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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES.

PERMANENT EDITION.

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# JUDGES

OF THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

### FIRST CIRCUIT.

Hon. HORACE GRAY, Circuit Justice....................Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge....................Bristol, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge....................Portland, Me.
Hon. NATHAN WEBB, District Judge, Maine....................Portland, Me.
Hon. EDGAR ALDRICH, District Judge, New Hampshire....................Littleton, N. H.
Hon. FRANCIS C. LOWELL, District Judge, Massachusetts....................Boston, Mass.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island....................Providence, R. I.

### SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice....................Washington, D. C.
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Hon. E. HENRY LACOMBE, Circuit Judge....................New York, N. Y.
Hon. NATHANIEL SHIPMAN, Circuit Judge....................Hartford, Conn.
Hon. WILLIAM K. TOWNSEND, District Judge, Connecticut....................New Haven, Conn.
Hon. ALFRED C. COXE, District Judge, N. D. New York....................Utica, N. Y.
Hon. ADDISON BROWN, District Judge, S. D. New York....................New York, N. Y.
Hon. EDWARD B. THOMAS, District Judge, E. D. New York....29 Liberty St., New York.
Hon. HOYT H. WHEELER, District Judge, Vermont....................Brattleboro, Vt
Hon. JOHN R. HAZEL, District Judge, W. D. New York....................Buffalo, N. Y.

### THIRD CIRCUIT.

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Hon. MARCUS W. ACHESON, Circuit Judge....................Pittsburgh, Pa.
Hon. GEORGE M. DALLAS, Circuit Judge....................Philadelphia, Pa.
Hon. GEORGE GRAY, Circuit Judge....................Wilmington, Del.
Hon. EDWARD G. BRADFORD, District Judge, Delaware....................Wilmington, Del.
Hon. ANDREW KIRKPATRICK, District Judge, New Jersey....................Newark, N. J.
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Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania..........Pittsburgh, Pa.

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Hon. CHARLES H. SIMONTON, Circuit Judge....................Charleston, S. C.
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Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.. ........Greensboro, N. C.
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Hon. JOHN J. JACKSON, District Judge, West Virginia.............Parkersburg, W. Va.

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Hon. HORACE H. LURTON, Circuit Judge..................................Nashville, Tenn.
Hon. WILLIAM R. DAY, Circuit Judge.........................................Canton, Ohio.
Hon. WALTER EVANS, District Judge, Kentucky. .........................Louisville, Ky.
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Hon. WILLIAM A. WOODS, Circuit Judge.................................Indianapolis, Ind.
Hon. JAMES G. JENKINS, Circuit Judge....................................Milwaukee, Wis.
Hon. PETER S. GROSSCUP, Circuit Judge .....................................Chicago, Ill.
Hon. CHRISTIAN C. KOHLSAAT, District Judge, N. D. Illinois.....................Chicago
Hon. WILLIAM J. ALLEN, District Judge, S. D. Illinois [2]..............Springfield, Ill.
Hon. JOHN H. BAKER, District Judge, Indiana..........................Indianapolis, Ind.
Hon. WILLIAM H. SEAMAN, District Judge, E. D. Wisconsin.............Sheboygan, Wis.
Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin.....................Madison, Wis.

[1] Appointment made January 23, 1901, under act approved December 19, 1900.
[2] Died January 26, 1901.

## EIGHTH CIRCUIT.

Hon. DAVID J. BREWER, Circuit Justice....Washington, D. C.
Hon. HENRY C. CALDWELL, Circuit Judge....Little Rock, Ark.
Hon. WALTER H. SANBORN, Circuit Judge....St. Paul, Minn.
Hon. AMOS M. THAYER, Circuit Judge....St. Louis, Mo.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas....Little Rock, Ark.
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas....Ft. Smith, Ark.
Hon. MOSES HALLETT, District Judge, Colorado....Denver, Colo.
Hon. OLIVER P. SHIRAS, District Judge, N. D. Iowa....Dubuque, Iowa.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa....Red Oak, Iowa.
Hon. WILLIAM C. HOOK, District Judge, Kansas....Leavenworth, Kan.
Hon. WM. LOCHREN, District Judge, Minnesota....Minneapolis, Minn.
Hon. ELMER B. ADAMS, District Judge, E. D. Missouri....St. Louis, Mo.
Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri....Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska....Omaha, Neb.
Hon. CHARLES F. AMIDON, District Judge, North Dakota....Fargo, N. D.
Hon. JOHN E. CARLAND, District Judge, South Dakota....Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming....Cheyenne, Wyo.

## NINTH CIRCUIT.

Hon. JOSEPH McKENNA, Circuit Justice....Washington, D. C.
Hon. WM. W. MORROW, Circuit Judge....San Francisco, Cal.
Hon. WILLIAM B. GILBERT, Circuit Judge....Portland, Or.
Hon. ERSKINE M. ROSS, Circuit Judge....Los Angeles, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California....San Francisco, Cal.
Hon. OLIN WELLBORN, District Judge, S. D. California....Los Angeles, Cal.
Hon. HIRAM KNOWLES, District Judge, Montana....Helena, Mont.
Hon. CORNELIUS H. HANFORD, District Judge, Washington....Seattle, Wash.
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Hon. ARTHUR H. NOYES, District Judge, Alaska, Second Division....St. Michaels.
Hon. JAMES WICKERSHAM, District Judge, Alaska, Third Division....Eagle City.

# CASES REPORTED.

# CASES

## ARGUED AND DETERMINED

IN THE

# UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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## PIKES PEAK POWER CO. v. CITY OF COLORADO SPRINGS.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1900.)

No. 1,413.

1. CIRCUIT COURTS OF APPEALS—JURISDICTION OF CONSTITUTIONAL QUESTIONS OPTIONAL.

In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States the circuit courts of appeals may either (1) decline to take jurisdiction, or (2), where other questions are involved, take jurisdiction, and certify the constitutional question to the supreme court, or (3) take jurisdiction, and decide the whole case in the first instance. 26 Stat. 826, c. 517; Carter v. Roberts, 20 Sup. Ct. 713, 177 U. S. 500, 44 L. Ed. 861.

2. SAME.

Where a dismissal of an appeal would cause a delay of years in the decision of a case of considerable importance which involves a constitutional question, the circuit court of appeals takes jurisdiction, and decides the whole case in the first instance.

3. MUNICIPALITY—USE OF WATER SYSTEM AND STREETS BY PRIVATE PARTIES—TRANSMISSION OF ELECTRICITY.

In September, 1898, a city passed an ordinance granting to J. and his assigns the right for a term of 25 years to use the water and water system of the city to produce power to generate electricity, and the right to lay conduits, to erect poles, to string wires, and to maintain and operate them in its streets during this term, on condition that the grantees would return the water to the system undiminished in flow, and without pollution; that they would do nothing to impair the efficiency of the water system; that they would complete the driving of a tunnel through a spur of a mountain for the city for the purpose of enlarging its water system and its supply of water; that they would carry its telegraph and telephone wires in their conduits and on their poles, and would furnish the city with a certain amount of electric power and certain electric lights free of cost, and with others at a fixed price during the term of the grant, and that at the end of the term they would vest in the city the ownership of a certain pipe line and any electrical plant they had then constructed to supply the electric lights. *Held*, that under the general power to manage and control the property of the city, to light its streets and public places, to manage its water system, and to control and regulate the use of its streets, the city council of the city had lawful authority to pass this ordinance.

4. SAME—ACCEPTANCE OF ORDINANCE—REPEAL.
After the ordinance of September, 1898, had been accepted, and after the grantees had proceeded in the performance of their part of the contract for five months, the city council, in February, 1899, passed an ordinance which, by its terms, repealed the ordinance of September, 1898. *Held*, the repealing ordinance violated section 10, art. 1, of the constitution, which prohibits the passage of a law impairing the obligation of contracts, and the fourteenth amendment to the constitution, which forbids the taking of property without due process of law.

5. SAME—CONSTITUTIONAL LAW.
An ordinance of a city passed under the legislative authority of a state is a law of that state, within the meaning of that term in the constitution and statutes of the United States.

6. SAME—GRANT FOR PRIVATE USE.
A grant by a city of rights and privileges in its streets, parks, public grounds, or water system for private use,—that is to say, a grant from which neither the city, its citizens, nor the public receive any consideration or derive any benefit,—is beyond the powers of the municipality, and void.

7. SAME—GRANT FOR PUBLIC PURPOSES.
A city has authority, under its general powers, to grant to private parties for public purposes reasonable rights and privileges in its water system, its streets, its public grounds, and its other public utilities, provided that such grant and its exercise do not materially impair the usefulness of these utilities for the public purposes for which they were acquired or dedicated.

8. SAME.
The ordinance of September, 1898, was not for purely private use, but for the public purposes of procuring an enlargement of the water system of the city, of obtaining the use of electric lights for the municipality, and of securing conduits and poles to carry its wires.

9. SAME—PRIVATE ELECTRIC LIGHT PLANTS.
The Colorado statute (3 Mills' Ann. St. p. 1144) which provides that the city councils of cities in that state shall have power to erect waterworks, gas works, or electric light works, or to authorize their erection by others, only when such works shall be erected or authorized pursuant to a favorable vote of the taxpayers of the cities, applies only to works erected by the cities themselves or by others under contracts with or for the cities. It has no application to such works erected by private parties for their own use.

10. SAME—POWERS.
A city has two classes of powers, the one legislative, public, governmental, in the exercise of which it acts as a sovereign and governs its people, the other proprietary, quasi private, business, conferred upon it for the private advantage of its inhabitants and itself.

11. SAME—EXERCISE OF ITS BUSINESS POWERS.
In contracting for the enlargement of its water system, for electric lights for municipal use, and for the use of conduits and poles to carry its wires, a municipality is exercising its proprietary or business powers, is subject to the same rules of law that govern the agreements of private corporations, and its contracts bind its successive sets of officers.

12. SAME—CONTROL OF PUBLIC UTILITIES.
The water system and the other public utilities of a city are held by the municipality and its officers in trust for the public purposes for which they were acquired and dedicated. The city and its officers may not renounce this trust, disable themselves from discharging it, or so divert or impair the public utilities that they become inadequate to accomplish the public purposes for which they were created.

13. SAME—UTILITIES CREATED FOR PUBLIC PURPOSES.
A city and its officers have the authority, and it is their duty, to apply the surplus power and use of public utilities for the benefit of the munic-

ipality and its citizens, provided such application does not materially impair their usefulness for the public purposes for which they were created.

14. SAME.

A city council has authority, under its general powers, to lease to private parties the use of the water flowing through its water system to enable them to generate power to create electricity, where such lease does not impair the usefulness of the water or the system for the municipal purposes for which they were obtained by the city.

15. CONTRACTS — DELAY IN PERFORMANCE — FORFEITURE — ENFORCEMENT IN EQUITY.

A court of equity will not enforce a forfeiture of the rights and privileges of the grantees in a contract for their failure to complete their performance of it in time, where the party seeking the forfeiture was guilty of the first breach of the agreement, and failed to pay installments due under it while the work was in progress until compelled to do so by judgments of the courts, and had persistently endeavored to revoke and annul the grant, while the grantees were vigorously prosecuting their part of the work under it, which they had, within the time limited by the agreement, substantially performed, although they had not completely finished it.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

Guy Le R. Stevick and Charles J. Hughes, Jr. (Henry M. Blackmer and Henry McAllister, Jr., on the brief), for appellant.

W. S. Morris and R. E. Lewis (J. W. Ady, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree dismissing the bill of the Pikes Peak Power Company, a corporation, upon the merits at the final hearing. The suit which culminated in that decree arose in this way: For many years the city of Colorado Springs, the appellee, has derived its supply of water from watersheds on the slopes of Pikes Peak some 19 miles from the city, and more than 6,000 feet above the level of the sea. The city owns more than 4,000 acres of land on these slopes, and it collects the water from rains and melting snows into reservoirs in the mountains, and by open flumes and iron pipes conducts it thence to the city, where it is distributed for the usual municipal purposes. The population and business of the city had so increased in 1895 that the supply of water which it had theretofore drawn from the eastern slopes of Pikes Peak was inadequate, and the city concluded to increase it by deriving an additional store from the western slopes of the mountain. The means devised to accomplish this purpose consisted of a reservoir on West Beaver creek for the collection of the water on the western slopes, and a tunnel at an elevation of about 11,500 feet above the level of the sea, about 6,400 feet in length, through one of the spurs of the mountain, to conduct the water to Middle Beaver creek on the easterly side of the peak, whence it would flow into the flumes and water pipes of the city. Thereupon, on December 27, 1895, Wilson & Jackson, a partnership composed of Charles H. Wilson and George W. Jackson, made a contract with the city to bore this tunnel on or before September 27, 1897. They entered upon the undertaking, but it proved to be far more difficult and expensive than any of

the parties had anticipated. A slide of loose rock, or a cave-in, was encountered on the line of the tunnel, which proved an insuperable obstacle to its construction on that line, and compelled the contractors to drive the tunnel on a detour more than 350 feet in length, while the distance on the line of the tunnel from the point of departure from it to that of the return to it was only about 130 feet. The high altitude at which the tunnel was located, the difficulty of transporting fuel, tools, and materials to that height, and developing power to drive and complete it, made its cost several times its contract price. As these obstacles developed, the city aided the contractors by a gift of $11,500, and by extending the time for the completion of the work until September 27, 1898. George W. Jackson became the successor of Wilson & Jackson, borrowed money, and apparently prosecuted the work of driving the tunnel to the best of his ability; but the undertaking became so expensive, and the amount of his indebtedness so great, that he was financially unable to carry it on without further assistance, and in the early days of September, 1898, it was evident that he could not complete it in the time or on the terms specified in the original contract, and its extension, and that he could not complete it in any way unless he could acquire some rights or privileges upon which he could get credit and borrow money to continue the work. While the contract price of the tunnel was only about $90,000, it had then cost more than twice that amount, and, if he had then abandoned it, it would have cost the city more than $100,000 to complete it. In driving the tunnel, Jackson had used electrical power, which he had created on the side of the mountain at an electrical plant of 200 horse power by the use of the water flowing down the mountain side which was subsequently led into the water system of the city of Colorado Springs, and distributed to its inhabitants. In this way he had learned that it was practicable to use this water for the development of electrical power without wasting or polluting it. In this state of the case, the city of Colorado Springs, by the passage of an ordinance on September 8, 1898, which was accepted by Jackson on September 10, 1898, made a grant to and an agreement with him which provided that the respective parties thereto should derive the following considerations or benefits therefrom: The city granted to Jackson, his associates or assigns, for the term of 25 years from September 8, 1898: (1) The right and privilege of laying, maintaining, and operating such conduits, cables, and wires in the streets and alleys within the fire limits of the city, and of erecting, maintaining, and operating such poles and wires in the streets and alleys of the city outside its fire limits as should be necessary for the transmission and sale to the city and its inhabitants of electricity for the development of electrical power, and the right and privilege of renting space in the conduits. (2) The right and privilege of constructing, maintaining, and operating at suitable places on the lands of the city and through the lands, rights of way, streams, reservoirs, flumes, ditches, pipe lines, and conduits of the water system of the city, dams, reservoirs, pipe lines, conduits, power houses, plants, poles, wires, and cables for the transfer and transmission of electrical power, together with the right to

use from such lands such earth, stones, and dead timber as might be needed to construct such power houses, reservoirs, plants, and dams. (3) The right to divert and use for the generation of electrical power all the water of any streams, ditches, flumes, pipe lines, conduits, and reservoirs of the city on condition that all water so diverted should be returned to the water system of the city unimpaired; that the use thereof under the contract should not diminish the flow of nor pollute the water; that the city should determine what constituted waste and pollution; that Jackson, his associates and assigns, should do nothing which would interfere with the successful operation of the city's system of waterworks; that the work under the contract in the city should be done under the supervision of the city, and that the city reserved its right to exercise its police power over the conduits, poles, and wires provided for by the contract. The consideration or the benefits which Jackson, his associates or assigns, agreed by this contract to bestow upon the city in return for this grant were: (1) The completion of the tunnel on or before December 8, 1899, on the terms specified in the original contract of 1895. (2) The necessary space in all the conduits they should lay, and on all the poles they should erect, for the telegraph and telephone wires of the city, and freedom of access and facilities for placing and removing them equal to those which Jackson and his associates or assigns should enjoy. (3) During the time between one year after the completion of the tunnel and September 9, 1923, such electric lights as should be necessary for lighting the public buildings of the city, not exceeding 5 arc lights of 2,000 candle power and 200 incandescent lights of 16 candle power; and such electrical power as should be necessary for municipal purposes, not exceeding 50 horse power, free of cost; and such arc lights of 2,000 candle power as should be necessary for lighting the streets, alleys, and public grounds of the city for $5.50 per light per month. (4) On September 9, 1923, any electrical plant to furnish these lights and this power and any transforming station, wires, cables, and other improvements which Jackson, his associates or assigns, shall have then constructed, strung, or made for the purpose of transforming and delivering the electricity necessary to furnish these lights and this power, and a 20-inch water pipe line from Lake Moraine to some point in the town of Manitou. On the faith and credit of this contract Jackson borrowed of various parties more than $80,000, pledged his rights and privileges under the ordinance to secure his debts for this amount, and proceeded with the construction of the tunnel. He organized the Pikes Peak Power Company, the appellant, and on January 16, 1899, assigned to it all his rights and privileges under his contract for stock in that corporation, which he pledged to secure the money he had borrowed. In this state of the facts, after Jackson had borrowed this money, and proceeded on the faith of the contract with the work of driving the tunnel through the mountain, and on February 23, 1899, the city passed an ordinance, which, by its terms, repealed the ordinance of September 8, 1898. Thereupon, on May 3, 1899, the Pikes Peak Power Company exhibited its bill in the circuit court, in which, and in an amendment to it, which it subsequently made, it set forth the

foregoing facts, and prayed that the repealing ordinance might be adjudged void as violative of the constitution of the United States, and that the city might be enjoined from interfering with the exercise by the power company of the rights and privileges granted to Jackson and his assigns by the ordinance of September 8, 1898. The city answered the amended bill. Its answer was that no rights and privileges were granted to Jackson, his associates and assigns, for various reasons, the chief of which was that the city of Colorado Springs had no power to make the contract, or to vest in any one the rights and privileges bestowed by the ordinance of September 8, 1898. On this ground the circuit court dismissed the bill at the final hearing, and this appeal challenges that ruling.

At the opening of the investigation of this case we are confronted with the claim of counsel for the appellee that this court is without jurisdiction to review the decree below, because this is a case in which the law of a state is claimed to be in contravention of the constitution of the United States. The foundation of the suit is that the city of Colorado Springs passed an ordinance which, by its terms, repealed an earlier ordinance, and thereby annulled a contract between it and the appellant, and took away the property rights of the latter without due process of law, in violation of section 10, art. 1, of, and of the fourteenth amendment to, the constitution of the United States. The answer of the city to this claim was that, while there was a contract in form, there never was any agreement in law, because the city had no power to make the contract which it assumed to effect. This defense was sustained by the court below. The appellant now insists that that court was in error because it did not hold that the city of Colorado Springs had lawful authority to make the contract, and because it did not also hold that its repealing ordinance was violative of the constitution. In this way it may be seen that this case is one in which a law of a state (for an ordinance of a city passed under the legislative authority of a state is such a law within the meaning of the federal constitution and statutes,—City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341) is claimed to be in contravention of the constitution of the United States, and that the suit involves the question whether or not this repealing ordinance is so violative of the constitution, together with other questions which must be considered and determined before the whole case can be decided. Section 5 of the act of March 3, 1891 (26 Stat. 826, c. 517), declares that appeals may be taken to the supreme court "(6) in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States." Section 6 provides that in cases other than those named in section 5 the circuit courts of appeals may exercise appellate jurisdiction unless otherwise provided by law. These provisions of the organic law of this court have seemed plain to us, and we have accordingly frequently held that the supreme court had exclusive jurisdiction, and that this court had no jurisdiction to review a judgment or decree in any case which was controlled by the question whether or not the constitution or law of a state was in contravention of the constitution of the United States. Merritt v. Barge Co.,

75 Fed. 813, 815, 21 C. C. A. 525, 526, 40 U. S. App. 127, 129; Hastings v. Ames, 68 Fed. 726, 728, 15 C. C. A. 628, 630, 32 U. S. App. 485, 488; Railway Co. v. Evans, 58 Fed. 433, 434, 7 C. C. A. 290, 292, 19 U. S. App. 233, 235; Pauley Jail Bldg. & Mfg. Co. v. Crawford Co., 84 Fed. 843, 942, 28 C. C. A. 579, 580, 56 U. S. App. 53, 55; Wrightman v. Boone Co., 88 Fed. 435, 437, 31 C. C. A. 570, 573, 60 U. S. App. 100, 104. We are, however, advised by two late decisions of the supreme court that our jurisdiction to review the class of cases described in the sixth subdivision of section 5 of the act of March 3, 1891, is optional with ourselves, and that we may take or decline to take jurisdiction thereof as to us seems just and proper. That court says:

"When cases arise which are controlled by the construction or application of the constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance." Carter v. Roberts, 177 U. S. 496, 500, 20 Sup. Ct. 713, 44 L. Ed. 861, 863; Railroad Co. v. Thiebaud, 177 U. S. 615, 620, 20 Sup. Ct. 822, 44 L. Ed. 911.

The case before us has been fully argued upon its merits. It is of much public importance. It involves the management of the water system and the lighting system of the city of Colorado Springs. The interests of the city and its inhabitants, as well as those of the power company, demand its early decision, and a dismissal of this appeal would almost inevitably lead to a delay of years in its determination. In view of these facts, we have concluded not to decline to take jurisdiction, and to proceed to "decide the whole case in the first instance."

It was not claimed in the argument of counsel for the appellee in this court, and it is not asserted in their brief, that the repealing ordinance of February 23, 1899, was not violative of the constitution of the United States if the contract evidenced by the ordinance of September 8, 1898, and its acceptance were valid, and binding upon the city. The repealing ordinance is so clearly a violation of section 10, art. 1, of that instrument, which prohibits the passage of a law impairing the obligation of contracts, and of the fourteenth amendment to the constitution, which forbids the taking of property without due process of law, that no argument to the contrary would be worthy of a moment's consideration, and no contention of that character is made. The position upon which the counsel for the city chiefly rely is that the grant of the rights and privileges found in the ordinance of September 8, 1898, was beyond the powers of the municipality, and void, so that no contract resulted from the acceptance of its terms, and no rights vested under it. In support of this contention they present numerous arguments, to which our attention will now be directed. They say that a grant by a municipality of rights and privileges in its streets, alleys, parks, and public grounds for private use is invalid; that this ordinance was a grant for such a use, and that it is, therefore, void. The major premise of this syllogism, when properly understood, and limited in its meaning, may be conceded to be sound; but the minor premise is unfounded in

fact. The grant evidenced by the ordinance of September, 1898, was not made for a purely private use. A grant for a private use is one from which neither the city nor its citizens derive any consideration or benefit. Such a grant cannot be sustained. This proposition is well illustrated by State v. Murphy, 134 Mo. 548, 565, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, upon which, and upon other cases of a similar character, which are cited in their brief, counsel for the city seem to rely. In that case the city of St. Louis had granted to a private corporation, for the exclusive use of the latter, the right to lay and maintain in the streets of that city conduits for carrying wires and cables, and had reserved no consideration or benefit to the city or the public from the grant of the right or from its exercise. It was held that such a grant for a purely private use was beyond the powers of the municipality. That decision rested, however, on the express ground that the grantee was placed under no obligation to use the rights and privileges granted to it in any way or to any extent for the benefit of the public, and that no duty whatever to the public, the city, or the citizens was imposed upon it. The supreme court of Missouri nevertheless expressly declared in its opinion that:

"Under its general power to regulate the use of streets the city has authority to authorize corporations and persons, for the purpose of serving the public, to string telegraph, telephone, or electric light wires upon poles above the surface or through conduits beneath the surface of the streets provided such structures and mechanical appliances do not materially interfere with the ordinary uses of the streets and public travel thereon." Pages 562, 565, 566, 134 Mo., pages 786–788, 31 S. W., and pages 374, 375, 34 L. R. A.

The grant now before us falls under the rule stated in this quotation. It was not a grant for a purely private use, for the use of the grantees alone. It was not a grant which imposed no duty to the city and to the public upon Jackson, his associates and assigns. It was not a grant for which the city exacted no consideration, and from which it derived no benefit. On the other hand, the ordinance and its acceptance secured to the city and to the public the completion of the tunnel, the use of all conduits and poles of the grantees for its telegraph and telephone wires until September 8, 1923, the use of such electric lights as should be necessary to light its public buildings, not exceeding 5 arc lights of 2,000 candle power and 200 incandescent lights of 16 candle power, and of such electrical power as should be necessary for municipal purposes, not exceeding 50 horse power, free of cost, until September 8, 1923, and on that day any electrical plant which the grantees shall have then constructed to light the streets and public buildings of the city and a 20-inch water pipe line from Lake Moraine to Manitou. Here were grave duties to the public and onerous public service imposed upon the grantees in this ordinance, and ample consideration secured to the city to sustain the contract.

The arguments in which counsel have indulged to minimize and expunge the public benefits and service which the city secured by this contract have not been overlooked, but they have failed to convince. They say that Jackson was bound, under his original con-

tract of 1895, to complete the tunnel, so that his agreement to do so, evidenced by his acceptance of the ordinance of September 8, 1898, added nothing to the benefits which were already secured to the city before that acceptance was made; that the only other public service imposed by the ordinance was furnishing the city with electric lights and the erection and maintenance of a plant for that purpose, and that the ordinance was inoperative in that respect because a majority of the voters of the city who were taxpayers did not cast their ballots in favor of authorizing the erection of this plant under a clause of the statutes of Colorado found on page 1144, 3 Mills' Ann. St., which reads:

> "They [city councils] shall have power to purchase or erect waterworks or electric light works; or to authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town who are taxpayers under the law voting on the question at a general or special election, by vote approve the same."

But the difference to the promisee between the agreement of a man who is financially unable to perform his contract to expend $100,000 in completing it, and the agreement of the same man to do the same thing when he is financially willing and able to do it, and actually proceeds to do it, is wide and substantial, and this was the important public benefit and consideration which the city secured in the construction of the tunnel by the contract of September 8, 1898. When the ordinance of that date was passed, Jackson had exhausted his means and his credit in his attempt to drive the tunnel through the mountain under his contract of 1895, and there still was required the expenditure of about $100,000 to complete it. The contract evidenced by the ordinance gave him rights and privileges upon which he was able to borrow the money, strengthened his credit, and enabled him to substantially complete the performance of his contract. This was no slight or immaterial consideration, and it cannot be whistled down the wind, or concealed from view, by harping on the fact that the promise of one who is unable to expend anything is as binding and forceful as the agreement of one who is able and willing to perform his contract. There was another material consideration secured to the city under this agreement. That was the use, during the term of the grant, of all the conduits which the grantees should lay, and of all the poles which they should erect to carry the telegraph and telephone wires of the city, and, at the end of the term, the pipe line from Lake Moraine to Manitou. Moreover, the statute of Colorado, which has been quoted, does not, in our opinion, avoid or render inoperative that portion of the ordinance and contract which secured to the city the use of the electric lights and power, and that for several reasons. In the first place, the ordinance does not purport to grant to Jackson, his associates or assigns, the authority to erect electric light works, and therefore a vote of the taxpayers was not required by the statute to authorize its passage. The authority granted by the ordinance is limited to the construction of proper plants for generating electricity by water power, and of conduits, wires, and poles for the transmission of the electric fluid. In the second place,

the statute has no application to electric light plants erected by private parties for their own business purposes. It applies only to waterworks, gas works, and electric light works purchased or erected by cities, or built for cities, under contracts with them, by other parties. It was not—it could not have been—the intention of the legislature to require the approving vote of the majority of the taxpayers of a city every time its council issued a license to a corporation, partnership, or person to erect or install a gas plant or an electric light plant upon its premises for domestic or business uses. Again, there is nothing in the ordinance which requires the grantees to erect or maintain any electric light plant whatever. It does impose upon them the duty, and they have assumed the obligation, to furnish to the city electric lights and electric power; but the contract leaves it optional with them to produce and supply this light and power themselves, or to persuade others to do so for them. The result is that the grant contained in the ordinance of September 8, 1898, was made for well-recognized public purposes, for the enlargement of the water system and the induction of the electric lighting system of the city of Colorado Springs, and it secured to the city ample consideration to sustain it. Under the statutes of Colorado this city was empowered to regulate the use of its streets, to provide for the lighting of the same, to pass all ordinances and to make all rules and regulations proper or necessary to exercise these powers. 2 Mills' Ann. St. § 4403, par. 66. Under these powers it had ample authority to grant the rights and privileges of constructing power houses to generate electricity in suitable places on its public grounds, of laying conduits, and of erecting poles on its streets, and of stringing wires in the conduits and on the poles to transmit the electrical power in such a way that these conduits, poles, and wires would not materially interfere with the ordinary uses of the streets and grounds by the public, and subject to the police power of the city as provided by the ordinance of September 8, 1898. 2 Dill. Mun. Corp. (3d Ed.) §§ 692, 697; Chicago Municipal Gaslight & Fuel Co. v. Town of Lake, 130 Ill. 42, 54, 22 N. E. 616; Gregsten v. City of Chicago, 145 Ill. 451, 461, 34 N. E. 426; City of St. Louis v. Western Union Tel. Co., 149 U. S. 465, 469, 13 Sup. Ct. 990, 37 L. Ed. 810; State v. Murphy, 134 Mo. 548, 561, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369.

Another position urged by counsel for the appellee is that the system of waterworks of this city, its streets, parks, and public grounds, are held by the municipality in its political or governmental, and not in its proprietary or business, capacity; that, consequently, they cannot be diverted from municipal uses, and a city council cannot make any agreement or contract relative to them which a succeeding council may not freely annul. The proposition is not novel. It has received the careful consideration of this court, and, so far as the question it presents is material to the issues in this case, it is no longer open to debate here. In Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 282, 22 C. C. A. 171, 181, 40 U. S. App. 257, 276, 34 L. R. A. 518, 525, this court announced its conclusion in these words:

"A city has two classes of powers,—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. Dill. Mun. Corp. (3d Ed.) § 66, and cases cited in the note; Safety Insulated Wire & Cable Co. v. City of Baltimore, 13 C. C. A. 375, 377, 378, 66 Fed. 140, 143, 144; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453, 468, 469; Com. v. City of Philadelphia, 132 Pa. St. 288, 19 Atl. 136; New Orleans Gaslight Co. v. City of New Orleans, 42 La. Ann. 188, 192, 7 South. 559, 560; Tacoma Hotel Co. v. Tacoma Light & Water Co., 3 Wash. St. 316, 325, 28 Pac. 516, 519, 14 L. R. A. 669; Wagner v. City of Rock Island, 146 Ill. 139, 154, 155, 34 N. E. 545, 548, 549, 21 L. R. A. 519; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 126, 31 N. E. 573, 577, 16 L. R. A. 485; City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396, 403; Read v. Atlantic City, 49 N. J. Law, 558, 562, 9 Atl. 759. In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Corp. § 27; City of Cincinnati v. Cameron, 33 Ohio St. 336, 367; Safety Insulated Wire & Cable Co. v. City of Baltimore, supra, and cases cited under it."

The purpose of the city in making the contract of September 8, 1898, was to enlarge its waterworks, to increase its supply of water, and to furnish itself and its inhabitants with electric light. In contracting for these purposes the city was exercising its proprietary or business powers. It is controlled by the same rules that govern a private corporation, and its contract bound its successive sets of officers.

The next proposition which counsel for the city seek to maintain is that the water system of the city and the water which flows through it are held in trust by the municipality for the suppression of fires, for the domestic use of its inhabitants, and for other customary municipal purposes; and that the city council has no power to divert them to the generation of electricity for private use, or to any such purposes. Before entering upon the consideration of this position, let us see what the power of the city is in regard to the establishment and management of its water system, and what, under the facts of this case, this contention really is. The statutes of Colorado provide that the city councils of cities in that state shall have power to manage and control all their property (2 Mills' Ann. St. § 4492); to erect waterworks on a favorable vote of their electors (2 Mills' Ann. St. § 4403, par. 67); "to construct or authorize the construction of such waterworks, without their limits, and for the purpose of maintaining and protecting the same from injury and the water from pollution, their jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, trenches, pipes and drains, used in and

necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken, for five miles above the point from which it is taken; and to enact all ordinances and regulations necessary to carry the power herein conferred into effect" (Id. par. 68); to construct reservoirs in public places in the city or beyond the limits thereof for the purpose of supplying the same with water; to provide proper conducting pipes to regulate the distribution of water for irrigation and other purposes (Id. par. 72). From these provisions of the statutes it will be seen that the city council of the appellee had plenary authority to manage and control the water system and all the property of the city, and to distribute and apply its water not only to ordinary municipal uses, but to "irrigation and other purposes." These were the powers of the council in this regard. Now, what was the state of facts when the ordinance of September, 1898, was passed? The city was not then engaged in initiating and constructing a system of waterworks. That had already been done. A system extending from watersheds on Pikes Peak, 19 miles distant, and 6,000 feet above the level of the sea, had been constructed and operated for years. The city had outgrown this system, and a contract had been made three years before for the construction of a tunnel to enlarge it, and to increase its supply of water. The contractors had exhausted their means and their credit, and the tunnel still lacked an expenditure of $100,000 to complete it. This was the state of the facts. No one questions the power of the council of this city to contract for this tunnel, and to agree to pay for it in the money of the city. No one questions its power to procure electric lights, conduits, and poles to carry its telegraph and telephone wires, and to pay for them with the funds of the city. Its authority to do these things is so plain and full that it cannot be denied. Now, what did the city do, and what is the actual contention of its counsel here? The price agreed upon by the contract of 1895 for the completion of the tunnel was not compensatory. It would not pay for the work necessary to be done. The contractors could not complete it without other compensation. Thereupon the city did this: It procured the completion of the tunnel, the right to use the conduits and poles of Jackson, his associates and assigns, to carry its wires, electric lights for its public buildings, and electric power to the extent of 50 horse power, without the payment of an additional dollar of the city's money, in consideration of a permit or license which it gave to the grantees in the September ordinance of the right to use the idle water power that existed and was running to waste in its water system. Now, what is the real contention of the counsel for the city here? It is that, while the city council might lawfully have contracted for these public utilities, and have taxed its constituents, and have paid out their money to obtain them, it had no authority to procure them for and to pay for them with the idle water power that existed in the water system of the city, without the expenditure of a dollar of the money of the citizens. It is, in fact, that municipal corporations hold all that part of public utilities which they cannot apply to customary

municipal uses in trust to waste to the loss of their cestuis que trustent, and not in trust to use for their benefit. This proposition, when reduced to its last analysis, finds no support in reason or authority. It is true, as counsel for the city assert, that the water, the water system, and the other public utilities of a municipality are held by it and by its officers in trust for its citizens, and for the public; that neither the city nor its officers can renounce this trust, disable themselves from performing their public duties, or so divert or impair these utilities that they are rendered inadequate to the complete performance of the trust under which they are held. Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 51 Fed. 309, 317, 2 C. C. A. 174, 231, 10 U. S. App. 98, 175, and cases there cited. But it is equally true that municipalities and their officers have the power, and it is their duty, to apply the surplus power and use of all public utilties under their control for the benefit of their cities and citizens, provided, always, that such application does not materially impair the usefulness of these facilities for the purposes for which they were primarily created. Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 51 Fed. 309, 321, 2 C. C. A. 174, 234, 10 U. S. App. 98, 180; City of St. Louis v. The Maggie P. (C. C.) 25 Fed. 202; State v. City of Eau Claire, 40 Wis. 533; Green Bay & M. Canal Co. v. Kaukauna Water-Power Co., 70 Wis. 635, 35 N. W. 529, 36 N. W. 828; Bell v. City of Platteville, 71 Wis. 139, 36 N. W. 831; French v. Inhabitants of Quincy, 3 Allen, 9; Worden v. City of New Bedford, 131 Mass. 23; Camden v. Camden Village Corp., 77 Me. 530, 537, 1 Atl. 689; Brown v. Winnisimmet Co., 11 Allen, 326, 334; Midland Ry. Co. v. Great Western Ry. Co., 8 Ch. App. 841, 851; Simpson v. Hotel Co., 8 H. L. Cas. 712; Hendee v. Pinkerton, 96 Mass. 381, 386. This question was presented to this court and exhaustively argued by able counsel in Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., supra. In that case the Union Pacific Railway Company had leased to another company for 999 years the joint use of its bridge across the Missouri river and of its terminal facilities at Omaha, together with about seven miles of its track, and it was contended that this lease was beyond the powers of the corporation, and void, because it was a diversion of the use of its railroad facilities from the public purposes for which the railroad corporation held them. The contract was, however, sustained, because it appeared that the use leased was a surplus use remaining after the Union Pacific Railway Company had retained for itself sufficient facilities to perform all its public functions and to discharge all its public duties. This court held, after careful consideration, and its decision was subsequently affirmed by the supreme court (Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265), that, if a corporation necessarily acquires for the conduct of its corporate business facilities whose entire capacity is not needed for its corporate use, it is not required to hold them in idleness; but it has the power, and it is its duty, alike to its stockholders and the public, to lease or otherwise apply the surplus use for their benefit. In State v. City of Eau Claire, 40 Wis. 533, and Green

Bay & M. Canal Co. v. Kaukauna Water-Power Co., 70 Wis. 635, 35 N. W. 529, 36 N. W. 828, the supreme court of Wisconsin held that, where a city had legislative authority to erect a dam for the purpose of waterworks for the city, it might lawfully lease for private purposes any excess of water not required for its waterworks. This is a just and reasonable rule. It is a rule inconsistent with no principle of law or of equity, and in accord with that common sense and common business practice which recognize as a public good the growth of two blades of grass where but one grew before, and the conversion of waste to use. The case in hand falls far within the rule. By the contract of September, 1898, the city renounced no trust that had been imposed upon it. It disabled itself from the discharge of no duty. It in no way impaired the usefulness of the water or of the water system of the city for the public purposes for which it was constructed and maintained. On the other hand, that contract expressly provided that the water diverted by the grantees under it should be returned to the water system of the city unimpaired, without pollution or diminution of its flow, and that the grantees should do nothing under it which should interfere in any way with the successful operation of the waterworks of the city. Every use of those waterworks and of the water requisite to the discharge of the trust under which they were held for the usual municipal purposes was retained by the city unimpaired, while the idle power therein which was running to waste was wisely utilized, not for private use, but for the public purpose of enlarging the waterworks of the city, of increasing its supply of water, of procuring conduits and poles to carry its wires, and of obtaining electric light and power for its public buildings and its streets. The ordinance and the contract, therefore, were not void on the ground that the water system and the water were held by the city in trust to extinguish fires, to distribute to its inhabitants for domestic uses, and for other municipal purposes, and on the ground that the municipality had no power to divert them to generate electricity for private use, because every use of the water and of the waterworks for which they were held in trust was expressly retained by the city unimpaired, because the grant in the ordinance was made for public purposes, and not for private use, and because that grant wisely utilized an idle water power for the benefit of the city and its inhabitants, without impairing the uses for which the water system was constructed and maintained.

Another argument of counsel for the appellee was that the portion of the ordinance which grants rights and privileges outside the limits of the city is void, because the city council has no power over that portion of the water system which is not specially given by legislative enactment. But, if the premise of this argument is sound, the conclusion does not follow, because the statutes which we have already quoted give ample power to the city council to grant the rights and privileges in that portion of the waterworks and of the water beyond the limits of the city which were conveyed by the ordinance. 2 Mills' Ann. St. §§ 4492, 4403, par. 68.

This concludes the discussion of all the arguments presented by counsel for the city in support of their contention that the contract of September 8, 1898, was beyond the powers of the city and of its council. For the reasons which have been stated, these arguments have not proved convincing or persuasive. In the answer of the city some other reasons were stated for the contention which the city here maintains, but they are either unfounded in law or not established by the evidence, and, as counsel for the city have deemed them unworthy of argument, they will not be discussed. Our conclusion is that the city council of Colorado Springs had the power to pass the ordinance and to make the contract of September, 1898, and that its subsequent attempt to repeal the former and to annul the latter, after the rights and privileges granted had become vested, was a violation of the constitution of the United States, and ineffectual for any purpose.

Finally, it is insisted that, if the contract was valid, the decree was right, because all rights and privileges under the ordinance were forfeited by the failure of Jackson to complete the tunnel within the time limited by the agreement. There is a provision in the contract that all the rights and privileges under it shall be forfeited by a failure to complete the tunnel by December 8, 1899. But another provision of the agreement is that if, for any cause for which the city is responsible, the work is materially delayed, then the time for the completion of the work shall be extended for a time equal to the aggregate length of the time of such stoppage or delays. Jackson drove the tunnel through the mountain within the time prescribed for its completion, and prosecuted his work vigorously and in good faith, but he did not reduce the tunnel to grade, or line it or finish it according to the specifications, within the time named in the contract. On the other hand, the city had repeatedly refused to pay him moneys that were due him for work which he performed in 1898, until he enforced payment by judgments of the courts. The city passed the repealing ordinance of February, 1899, answered this bill that its grant of 1898 was void, and so earnestly insisted upon its contention that it persuaded the court below to so hold. There is evidence that these wrongful acts of the city caused delay in Jackson's work, and that, in their absence, he would have completed the tunnel in time. This is the claim of the appellant. In our view, it is unnecessary to determine in this case whether or not that claim is well founded. This is not an action at law to enforce the forfeiture of this contract. This is a suit in equity to avoid the unlawful act of the city in attempting to annul its agreement. The claim of the city that the rights granted by it have been forfeited by delay in the performance of the agreement is presented by a supplemental answer. Whatever else may be the fact, this is certainly true: the great burden of the work of driving the tunnel had been borne, and that work had been substantially done, when the limit of the time for its completion was reached. The substantial benefits of the contract, the essential consideration which induced the city to make it, either has accrued to it, or surely will accrue to it. The tunnel has been driven. The city now asks

this court of equity to relieve it of the burdens of this contract while it retains this great and substantial benefit. That prayer does not appeal with much force to the conscience of a chancellor, and it cannot be granted here. Neither Jackson nor his assignee, the appellant, has committed any wrong, or violated any rule of law or of equity, in their dealings, and the case presents no equitable ground for depriving them of the rights and privileges which were granted to them under the contract, and which they have fairly earned by the substantial completion of the great work they undertook. "A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction." Boone v. Chiles, 10 Pet. 177, 210, 9 L. Ed. 388; Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 293, 22 C. C. A. 171, 193, 40 U. S. App. 257, 294, 34 L. R. A. 518; U. S. v. Winona & St. P. R. Co., 67 Fed. 948, 960, 15 C. C. A. 96, 108, 32 U. S. App. 272, 291; U. S. v. Northern Pac. R. Co., 95 Fed. 864, 880, 37 C. C. A. 290, 306.

The decree below is reversed, and the case is remanded to the circuit court, with instructions to enter a decree for the appellant for the relief prayed in its bill.

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## VANSICKLE v. WELLS, FARGO & CO.

(Circuit Court, D. Nevada. November 14, 1900.)

No. 599.

1. FRAUDULENT CONVEYANCES—EVIDENCE OF FRAUDULENT INTENT.
The fact that land was assessed in the name of a husband for several years after he had conveyed it to his wife and the deed had been recorded does not tend to show that the conveyance was made for the purpose of defrauding the husband's creditors, where it was not so listed at the instance of either husband or wife, but through the custom of the assessing officers to copy from previous assessment rolls.

2. SAME—DEED FROM HUSBAND TO WIFE.
A deed of property from a husband to his wife in payment of an indebtedness cannot be impeached by another creditor of the husband on the ground that the accounts between the husband and wife had not been so kept that the wife could have legally enforced her claim, or that such claim, or a portion of it, was barred by limitations.

3. SAME—EVIDENCE—FRAUDULENT INTENT.
The fact that a portion of an indebtedness from a husband to his wife, in payment of which he conveyed property to her, was barred by limitations, is admissible in evidence in support of a claim that the conveyance was fraudulent, to be considered on the question of good faith.

4. SAME—HUSBAND AND WIFE.
The failure of a wife to file an inventory of her separate property as required by Cutting's Comp. Ann. Laws Nev. §§ 512–514, does not affect her rights as against a creditor of her husband seeking to impeach the conveyance of such property to her as fraudulent.

5. HUSBAND AND WIFE—CONVEYANCE BETWEEN—NEVADA STATUTES.
Under the statutes of Nevada defining the rights of husband and wife (Cutting's Comp. Ann. Laws Nev. §§ 524, 528), which provide that, when a husband permits his wife to appropriate to her own use her earnings, the same, with the issues and profits thereof, shall be her separate property, and which permit a husband and wife to contract with each other

respecting property as if unmarried, an agreement between a husband and wife that the wife shall have as her own the proceeds of butter, eggs, and poultry which she raised and sold is valid; and where she from time to time loaned sums therefrom to her husband, or permitted him to use the same, on his agreement to repay, the indebtedness thereby created constituted a valuable consideration for the conveyance of property to her in payment.

6. SAME—PREFERENCE OF WIFE—INTENT.

In the absence of a statutory provision forbidding preferences, a conveyance of property by a husband to his wife in payment of a valid indebtedness is not fraudulent as to his other creditors, although he is insolvent, unless made with a fraudulent intent, and accepted with knowledge of such intent; and the relationship between the parties, while it is entitled to be considered upon the question of intent, is not in itself a badge of fraud.

In Equity. Suit to enjoin the sale of property on execution.

From the evidence in this suit it appears that the complainant came to Nevada in 1856, when she was 16 years of age, and then became acquainted with P. W. Vansickle; that they were married in 1857; that they both worked as laborers for a brother of P. W. Vansickle; that the property in controversy was then uncultivated government land in the possession of the brother, from whom P. W. Vansickle acquired it, and he and his wife, since the spring of 1858, have lived upon the land, cultivated and improved it. When they went upon the premises there was a small house, consisting of four rooms,—two bed rooms, a sitting room, and a kitchen,—in which they lived and reared a family of five children. In addition to the cultivation of the land and raising crops thereon, they acquired cows, horses, and chickens. Mrs. Vansickle, in addition to her other household duties, made butter; and the butter, chickens, and eggs were sold, among other things, for the support of the family. Within one year after their marriage there was an agreement made between the husband and the wife that she should have all the money realized from the sale of the butter, chickens, and eggs, as her own. In pursuance of this agreement she sold the butter, chickens, and eggs on her own account at Virginia City and elsewhere. There were no accounts kept of these sales for several years,—in fact, not until 1872, when the eldest daughter commenced keeping a memorandum of the sales and receipts from these sources, and of the accounts between her father and mother, and continued keeping such accounts until 1894. The husband often sold the butter, etc., for his wife. Sometimes he paid the money received therefor over to her, and at other times only rendered an account thereof, as he had spent the money. At different times he asked his wife for money, and she gave it to him, for the purpose of paying his debts. The proofs offered with reference to these transactions show an indebtedness from the husband to the wife equal to, if not exceeding, the value of the property at the time it was deeded to her by her husband. With reference to the execution of the deed in 1886 the testimony shows that the wife had at various times stated to her husband that he was largely indebted to her, and that he ought to give her a deed of the property, so that she could take care of herself and family. About the time of the execution of the deed he was taken sick, and the family thought he was seriously ill. On this account she repeated her previous requests, and again urged him to make the deed. The deed was executed and recorded without her knowledge, but he within two months thereafter told her of its execution, and then delivered the deed to her. Prior to the execution and delivery of the deed her husband managed and controlled the property, and directed the work done thereon. Thereafter he had nothing to do with it. The wife and eldest son performed those duties. The husband, however, lived with the family on the premises, received his board, and, after he quit the butchering business, conducted and carried on the purchase and sale of chickens and eggs on his own account. The husband was engaged as a butcher and conducted a butcher shop at Genoa for several years before the deed was executed, and thereafter carried on the butchering business, feeding his cattle up to 1894 upon the farm included in the deed,

and peddled out the meat at different places, wherever he could find a market therefor. At the time of the execution of the deed the husband was indebted to Mr. W. W. Lapham in the sum of $1,500, for which a note had been previously given by him, and owed a few hundred dollars besides,—in all, about $2,000. At that time he owned about 35 head of horses, of the value of $150 each, and about 200 head of cattle, of the value of $5,000. After the execution of the deed the wife was anxious to repair the house where the family lived. The question as to whether the house should be simply repaired or enlarged was discussed by all members of the family. The younger members were decidedly in favor of having it enlarged. The wife requested her husband to engage a carpenter for her, which he did, and the carpenter was consulted about the changes to be made and expense that would be incurred. W. W. Lapham, a man of means, who had boarded with the family for about 20 years,—and, according to the testimony, they had "never taken a cent from him,"—offered to furnish the money. He said: "Mrs. Van, you deserve a better house. You have worked hard, very hard. * * * I will give you one thousand dollars, and fix your house in good shape. * * * I will not charge you any interest." She said: "I don't care about taking it. I do not like to go in debt. I like to see my way clear." After the carpenters commenced work, and the old dining room had been torn down, Lapham said: "Mrs. Van, I think it would be cheaper for you to move the old building back, * * * and build a new front altogether." She replied by saying: "I don't like to go into debt too much. * * * If you think it will not cost over one thousand dollars, I will try it." Lapham paid the bills, and the improvements cost nearly $1,500. After the work was finished, Lapham wanted her to sign two duebills. When she examined them she noticed the words "Vansickle ranch," and thought he was trying to include her husband and the ranch; that the property was hers, the debt was hers, and that her husband had nothing to do with it. She testified that she said to Mr. Lapham: "What do you mean by 'Vansickle ranch'? Do you include Peter with it?"—and told him: "I will never sign that. You could come to-morrow and sue me, and that is the thing I cannot stand. You promised to wait and have patience until I paid you; and if I paid you it was all right, and if I did not it was all right. Is that not the bargain?" Other words passed between them, and the duebills were not signed. This indebtedness, together with the note of $1,500, was afterwards, by some transaction between Lapham and P. W. Vansickle, included in the note of $4,000 executed by P. W. Vansickle in favor of W. W. Lapham on the 29th day of March, 1887; the same being the note assigned by Lapham to Wells, Fargo & Co., before maturity, and upon which the judgment in its suit against P. W. Vansickle was obtained. On the day that this note was signed P. W. Vansickle made, executed, and delivered to said Lapham a chattel mortgage upon certain personal property, to wit, 200 head of cattle and 20 head of horses, as security for the payment of the note. Vansickle was then engaged in business as a butcher, and, after the note was executed, permission was given to him by the holder of the note and chattel mortgage to kill the cattle and dispose of the other property. He did so, and made many payments on the note at different times. He always claimed that he had paid the note in full to Lapham. The taxes were always assessed against the land in the name of P. W. Vansickle, after the deed was executed, as before, until about 1899, when it was assessed to Mrs. Lillies M. Vansickle. Mrs. Vansickle testified that she never paid any attention to it; that the assessor never came to her for a statement; that her husband paid the taxes while he was in the butcher business, for the feed of his cattle on her farm. It further appears that the assessors were in the habit of copying the statements from the previous assessment roll; that they made no examination or inquiry into the title, and made no changes in the name of the party to whom the land was assessed, unless objections were made thereto, or the party in whose name it was assessed had died; that this was true generally of all property assessed in Douglas county by them. On November 20, 1866, the husband and wife joined in the execution of a declaration of homestead embracing the property in controversy, and this declaration thereafter, on December 4, 1866, was duly filed and recorded in Douglas county, where the land is situate. On June 11, 1895, they again joined in the execution of a second declaration of

homestead upon the same property, which was duly filed and recorded as above.

W. E. F. Deal, for complainant.
M. A. Murphy, for defendant.

HAWLEY, District Judge (after stating the facts). This is a suit in equity to enjoin the defendant from selling certain lands situate in Douglas county, Nev., under an execution issued May 21, 1895, upon a judgment obtained in this court December 12, 1894, by the defendant against P. W. Vansickle for $4,000, with interest and costs. Complainant claims to be the sole owner of the property under and by virtue of a deed executed and delivered to her by her husband, P. W. Vansickle, in 1886. It is alleged in the answer that P. W. Vansickle, being indebted to a number of persons, with full knowledge of his insolvency, "and for the purpose and with the intent to hinder, delay, and defraud his said creditors, including this defendant, made a pretended sale of the lands and premises described and set forth in the complainant's bill to the complainant, Lillies M. Vansickle, who then was, and for a long time prior thereto had been, and now is, the wife of the said Peter W. Vansickle; that no consideration ever passed or was paid by the said Lillies M. Vansickle to the said Peter W. Vansickle or any other person; * * * that at the time of the pretended transfer of said lands and premises by the said Peter W. Vansickle to the said Lillies M. Vansickle, his wife, she received and accepted said deed of conveyance well knowing the embarrassed financial condition of her said husband, Peter W. Vansickle, and the said deed was made and some time thereafter recorded, and at a still later date delivered by the said Peter W. Vansickle to, and accepted by, the said Lillies M. Vansickle, his wife, with the intent and for the purpose of delaying, hindering, and defrauding the creditors of the said Peter W. Vansickle." This averment raises the only issues involved in this suit: (1) Was any contract or agreement ever made between husband and wife under which the husband became indebted to the wife? (2) Was the deed which was afterwards executed by the husband made with the intent on the part of the husband and the wife to hinder, delay, or defraud the creditors of the husband?

There were several preliminary objections made which are purely technical, and but few that require special notice. For instance, an objection was made to the admission of the deed from the husband to the wife because it purports to have been made April 30, 1886, and to have been acknowledged and recorded April 26, 1886, and was not delivered until several weeks thereafter. It is evident that the insertion of the "30th day of April" as the day of its execution was a clerical mistake, which does not in any manner affect the validity of the deed. The fact that the deed was not delivered until after it was filed is wholly immaterial. The fact the property was assessed to P. W. Vansickle after the deed was executed and delivered, the same as it had been for years before, does not, in the light of the circumstances disclosed by the testimony of the officers and others concerning the manner in which assessments of real estate were made in

Douglas county, tend to show that the complainant was guilty of any fraud in regard thereto. The fact that the husband often paid the taxes is, I think, satisfactorily explained in the testimony, and need not be repeated.

It was urged upon the oral argument that there was no valid agreement existing between the husband and wife that could have been enforced in an action at law between them, and upon this point divers objections were made as to the manner in which the accounts were kept between the husband and wife, and as to the methods of all the transactions between them. It would be useless to mention these objections in detail. It is enough to say that they were not relevant to the issues involved herein. The defendant is not in a position to object to the manner and method of these transactions. If a contract or agreement existed between the parties whereby an indebtedness became due to the wife at the time of the execution of the deed, it does not lie in the mouth of another creditor of the husband to say that the husband might have defeated the transaction by legal technicalities that might have been urged because the accounts between them were not kept in "due and regular form," etc. In line with these objections is found the answer to the objection that the debts incurred were barred by the statute of limitations. That was a matter solely between the husband and wife. The privilege given by the statute could be waived. There is no law which prevents a party from paying an honest debt simply because he might have availed himself of the provisions of the statute. No stranger to the transaction could raise the question. Blair v. Silver Peak Mines (C. C.) 84 Fed. 737, 738; Hanchett v. Blair, 41 C. C. A. 76, 100 Fed. 817, 825, and authorities there cited. But the fact that some of the items relied upon to constitute the consideration might have been barred by the statute was admissible, because, if it were shown that no efforts had ever been made to collect or enforce the claim, it would furnish a circumstance to be considered on the question of good faith. Schuberth v. Schillo, 177 Ill. 346, 350, 52 N. E. 319. It was, of course, the duty of the court to be liberal in the admission of testimony as to the various transactions, and consider all the evidence in regard thereto, in so far as it has any bearing upon the question of the good faith of the parties, or as to whether or not the deed was made for the sole purpose of hindering, delaying, or defrauding creditors. It would serve no useful purpose to refer to any of the other objections urged to the admission of the testimony.

There is no substantial ground urged against the validity of the homestead claims upon the property. The contention is over the question whether the defendant has the right, under its execution, to sell the property and take the proceeds in excess of the amount allowed as exempt under the homestead claim. But the filing of the second declaration of homestead after the execution and delivery of the deed is claimed to be a circumstance to be considered by the court, as tending to show some fraudulent design on the part of the parties; and in this connection counsel asks, if the previous transactions were bona fide, "why did Mrs. Vansickle, years after she had the deed, join with her husband in the declaration of a homestead?" The evidence

shows that she was advised to do so by an attorney. This advice may have been given as a matter of precaution, to save any question that might ever be raised as to the effect of the proviso contained in section 1 of the "act to exempt the homestead and other property from forced sale in certain cases, approved March 6, 1865," as amended in 1879, which reads "that if the property declared upon as a homestead be the separate property of either spouse, both must join in the execution and acknowledgment of the declaration." Laws Nev. 1879, c. 131, § 1. But, whatever the object or purpose may have been, it certainly cannot be considered as a circumstance which tends to establish any fraudulent intent upon the part of either in the execution and delivery of the deed. The fact that the wife, after as well as before the execution of the deed, often gave the husband money to pay his debts; that he lived upon the premises; and that she never charged him for his board, because, as she testified, "he is my husband, and he shall always have a home,"—is not of itself a circumstance from which fraud could be inferred. As was said by the court in Ravisies v. Alston, 5 Ala. 297, 303, in referring to similar facts, "If the sale was fair and the purchase bona fide, the facts supposed, instead of being a badge of fraud, entitle the parties to commendation."

Replying to the contention of the defendant that as the wife did not file an inventory of the property conveyed by the deed, as required by the statute, the court should hold that it is community property and liable for the debts of her husband, it is sufficient to say that the property which the wife acquired under the agreement did not, after the execution of the deed, belong to the community property of husband and wife, but was her own individual, separate property, and that the provisions of sections 3 and 4 of the "act defining the rights of husband and wife," requiring the wife to file a full and complete inventory of her separate estate, do not, in my opinion, have any bearing whatever upon any issue involved in this suit. Section 5 of the act, which provides the only penalty for such failure, relates exclusively to controversies "between the wife and purchasers in good faith and for a valuable consideration from the husband." Cutting's Comp. Ann. Laws Nev. §§ 512–514. The defendant stands in no such relation, and is not in a position to claim any right in the premises on account of the failure of the wife to file an inventory of her separate property. It certainly cannot be claimed that her failure to file such an inventory constitutes in the slightest degree any indicia of an intent on her part to hinder, delay, or defraud any creditor of her husband.

It is unnecessary to examine or review the numerous authorities cited by defendant based upon the rules which prevailed at common law. At common law contracts between husband and wife were held void, for the want of the wife's power to consent. The civil existence of the wife was considered, for many purposes, as being merged in that of her husband, and her services belonged absolutely to him. Nevertheless it will be observed that the courts of equity in England protected, as far as they could, the separate estate, savings, and earnings of married women; and many cases can be found where contracts and agreements between husband and wife of a

similar character to the one proven by the testimony in this suit were upheld and maintained under the strictness and rigidity of the common-law rules. In the early case of Slanning v. Style, 3 P. Wms. 334, 337, decided in 1734, where it was insisted on behalf of the defendant that the testator allowed his wife—

"To dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from the said farm (over and besides what was used in the family), for her own separate use, calling it her 'pin money'; * * * and it was proved in the cause that her husband, whenever any person came to buy any fowls, pigs, etc., would say he had nothing to do with those things, which were his wife's, and that he also confessed that having been making a purchase of about £1,000 value, and wanting some money, he had been obliged to borrow £100 of his wife to make up the purchase money. Therefore now the widow claimed to be paid this £100."

The lord chancellor, in decreeing that the widow was entitled to this £100, said:

"That the courts of equity have taken notice of and allowed feme coverts to have separate interests by their husbands' agreement; and this £100 being the wife's savings, and here being evidence that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality, and such agreement would be of little avail, were it to determine by the husband's death. That it was the strongest proof of the husband's consent that the wife should have a separate property in the money arising by these savings, in that he had applied to her, and prevailed with her to lend him this sum, in which case he did not lay claim to it as his own, but submitted to borrow it as her money."

In Peterson v. Mulford, 36 N. J. Law, 481, 486, the court said:

"There can be no question but that a husband is entitled to the services of his wife, if he claims them, and also to the proceeds of her labor, unless he permits her to labor for her own account, or, after she has earned or received the proceeds, gives them to her, or allows her to appropriate them to her own use."

But, without reference to the rules of the common law, this suit must be considered and decided under the provisions of the statutes of this state and general principles of the law applicable to the facts which the evidence herein establishes. Section 15 of the "act defining the rights of husband and wife, approved March 10, 1873," provides as follows:

"When the husband has allowed the wife to appropriate to her own use her earnings, the same, with the issues and profits thereof, is deemed a gift from him to her, and is, with such issues and profits, her separate property."

Section 19 of the same act reads as follows:

"Either husband or wife may enter into any contract, engagement, or transaction with the other, or with any other person, respecting property, which either might enter into if unmarried, subject in any contract, engagement, or transaction between themselves, to the general rules which control the actions of persons occupying relations of confidence and trust towards each other."

Cutting's Comp. Ann. Laws, pp. 121, 122, §§ 524, 528.

Under these provisions of the statute, independent of any authority upon the subject, it seems to my mind clear that the parties had the unquestioned right to make the agreement that the wife, in consideration of her extra services, might and should have the money realized from the sale of the butter, chickens, and eggs, and that the moneys appropriated by the husband out of this fund belonged to the

wife, as well as the money which she had realized from these sources and loaned to her husband, and created between them an indebtedness which constituted a valuable consideration for the execution and delivery of the deed. In Peterson v. Mulford, supra, Roche v. Trust Co. (Ind. Sup.) 52 N. E. 612, 616, 617, and Nuding v. Urich, 169 Pa. St. 289, 292–294, 32 Atl. 409, there is an able and exhaustive discussion of the relative rights of the husband and wife upon this subject, and many authorities are there cited. It is enough to say, without quoting therefrom, that they are directly applicable to the facts of this case, and that the conclusions therein reached fully support the views I have expressed. The authorities cited by the defendant are based upon facts which are entirely dissimilar to the facts in this suit, and many of them are based exclusively upon the ground that no agreement was ever made that the wife should have any recompense for the extra services she had rendered.

Was the transfer of the property made to hinder, delay, or defraud the creditors of P. W. Vansickle? Under the provisions of the statute of this state, all conveyances made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, debts, or demands are, as against such persons, utterly null and void. Cutting's Comp. Ann. Laws, § 2708. It is well settled that fraud may be shown, in conveyances of property made to hinder, delay, or defraud creditors, by the conduct and appearance of the parties, the details of the transaction, and the surrounding circumstances, and may be inferred when the facts and circumstances are such as to lead a reasonable man to believe that the property of a debtor has been attempted to be withdrawn from the reach of his creditors. Thomson v. Crane (C. C.) 73 Fed. 327, 329, and authorities there cited. The statutes of this state (Cutting's Comp. Ann. Laws, § 2711) provide that:

"The question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact, and not of law; nor shall any conveyance or charge be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration."

With reference to the facts established by the evidence, it is proper to say that all the testimony was taken in open court; that the court had the opportunity of observing the manner and appearance of the respective witnesses, and thus is better enabled to decide as to the weight and credence that should be given to their testimony. The fact is that there was no substantial conflict in the evidence. The difference in the statements of the respective witnesses concerning the various transactions, and the slight discrepancies as to the language used by the parties to the transaction, upon which much stress is laid by counsel, are readily accounted for by the lapse of time, and the differences that would naturally occur in the memory of the witnesses. To my mind, the fact that the transactions were differently stated from their recollection, instead of being given with a parrot-like sameness, strengthens, instead of weakens, the force of their evidence as to the bona fides of these transactions. The power of the husband to deed his property to his wife is unquestioned. The mere fact that the husband was at the time of the execution of the

deed indebted to other parties does not of itself raise any presumption of fraud, or constitute any ground for the impeachment of his acts. The rule is well settled that a conveyance giving such preference is not fraudulent, though the debtor be insolvent, and the creditor be aware at the time that it would have the effect of defeating the collection of other debts. Wheaton v. Neville, 19 Cal. 42, 46; Ross v. Sedgwick, 69 Cal. 247, 250, 10 Pac. 400; Lucas v. Claffin, 76 Va. 269, 277; 14 Am. & Eng. Enc. Law (2d Ed.) 224, and authorities there cited. The validity of the conveyance is to be determined, not by its effect, but by the intention with which it was made. In the absence of any statutory provision forbidding preferences, a debtor has the right to convey his property to any one or more of his creditors. The fact that the preference is given to his wife, or to any other relative, between whom and himself there subsists the relation of debtor and creditor, does not prohibit him from preferring such creditor in the payment of his debts. 14 Am. & Eng. Enc. Law (2d Ed.) 232, and authorities there cited. It is, of course, the duty of the court in all such cases, as in all cases where fraud is alleged, carefully to scrutinize the testimony of the witnesses, and keep in mind the family relations of the parties; but the determination of the case must, at last, as was said by the court in Shauer v. Alterton, 151 U. S. 607, 626, 14 Sup. Ct. 448, 38 L. Ed. 292, "depend upon the inquiry whether the transaction was honest and bona fide." This is the crucial test in all cases. It may be that fraudulent dispositions of a man's property to his wife or to members of his family are more frequently made than to others not so intimately connected; but where the transaction is manifestly honest and bona fide, and not made to hinder, delay, or defraud other creditors, too much stress ought not to be given to the fact of their intimate relationship. For, as before stated, the mere fact that the deed of the property was made to a relative is not of itself a badge of fraud. The books are full of cases where this general principle has been announced. Moreover, if the conveyance was not fraudulent in its inception, it will not be made so by any subsequent conduct of the parties. 14 Am. & Eng. Enc. Law (2d Ed.) 269, and authorities there cited. The weight of the testimony, taken in its entirety, establishes the fact that the conveyance to the wife was made bona fide, for a good and valuable consideration, without any intent on the part of the parties thereto to hinder, delay, or defraud any creditor of the husband. So far as the wife is concerned, there is no pretense that she was guilty of any fraud, though perhaps mistaken in some of the facts concerning Lapham's $1,500 note. She was honestly of the opinion that the note had been paid, and there is no circumstance or testimony of any kind to indicate that she accepted the deed for the purpose or with the intent of hindering, delaying, or defrauding any creditor of her husband. To make a conveyance fraudulent, fraud or fraudulent intent must be shown on the part of the grantee as well as on the part of the grantor. Cohen v. Knox, 90 Cal. 266, 273, 27 Pac. 215, 13 L. R. A. 711; Priest v. Brown, 100 Cal. 626, 634, 35 Pac. 323; Newman v. Cordell, 43 Barb. 449, 457; Meyer v. Sulzbacher, 76 Ala. 120, 128; Jenkins v. Einstein, 3 Biss. 128, Fed. Cas. No. 7,265; Magniac v.

Thompson, 7 Pet. 348, 393, 8 L. Ed. 709; 14 Am. & Eng. Enc. Law (2d Ed.) 270, and authorities there cited. In Prewit v. Wilson, 103 U. S. 22, 24, 26 L. Ed. 363, Mr. Justice Field, in delivering the opinion of the court, said:

"When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor."

In Garr, Scott & Co. v. Klein, 93 Iowa, 313, 315, 61 N. W. 919, which was a suit in equity to set aside a conveyance of real estate between husband and wife, and to subject the property conveyed to the payment of a judgment owned by the plaintiff, the lower court found in favor of the defendant, and the judgment was affirmed. The language of the court fits like a glove to the facts of this case, and is as near on "all fours" with it, as any cases ever get. The court said:

"We are satisfied that the conveyance was made in pursuance of a valid agreement between the husband and wife, entered into in good faith, for a lawful purpose. The plaintiff relies in part upon alleged statements of the husband made about the time the judgment against him was rendered, and also before that time, to the effect that the claim of the plaintiff was not just, that the plaintiff could not recover anything of him, and that his property was beyond its reach, and upon the relationship of the parties to the conveyance, as showing that it was fraudulent. But, if such statements were made by the husband, they would not be sufficient to taint the title of the wife with fraud. She denies that she knew of the indebtedness to the plaintiff at the time the deed was made, and her testimony to that effect is not shown to be incorrect. Since the consideration for the deed was ample, and was paid some time before the delivery of the deed, the fact that it was not delivered to her personally until after the judgment was rendered is immaterial. We have read the record and argument for the appellant with care, and although there are some facts which, if unexplained, would be deemed badges of fraud, yet, when all relevant facts are considered, we do not find any ground upon which the judgment of the district court can be disturbed."

The views we have expressed, and the conclusions we have reached, are not, as defendant claims, "throwing temptation in the path of integrity and truth," but, on the contrary, are calculated to preserve the ends of justice, and uphold the rights of parties to make agreements, and protect them therein, when made in good faith and for a valuable consideration, without any fraudulent intent. Let a decree be entered in accordance with the prayer of complainant's complaint.

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## VANSICKLE v. WELLS, FARGO & CO.

(Circuit Court, D. Nevada. November 14, 1900.)

(No. 600.)

1. FRAUDULENT CONVEYANCES—CONSIDERATION—PARENT AND CHILD.
   An agreement by a father to pay his son wages after his majority, when made before the services are rendered, will support a conveyance of property in payment of such wages after they have been earned, as against other creditors of the father.

2. SAME—LEGALITY OF PREFERENCE.
   Unless prohibited by statute, a debtor may give a preference to a member of his family to whom he is justly indebted, by conveying property to

him, although he is insolvent, and suits by other creditors are pending against him, of which the grantee has knowledge.

In Equity. Suit to enjoin the sale of property on execution.

W. E. F. Deal, for complainant.
M. A. Murphy, for defendant.

HAWLEY, District Judge (orally). This suit is of the same general character as Vansickle v. Wells, Fargo & Co. (C. C.) 105 Fed. 16, just decided. It depends upon the same general principles that were there elaborately discussed, and need not be repeated. By stipulation of the parties and consent of the court, all the testimony taken in that case which was material and relevant to this case is to be considered in evidence in this suit. From the testimony in this suit it appears that P. W. Vansickle made, executed, and delivered to his son James, the complainant herein, three deeds of certain real estate, situate in Douglas county, Nev.,—one on May 7, 1886, the second on October 17, 1893, and the other on October 24, 1893,—which are claimed by the defendant in this suit to have been made by the grantor and accepted by the grantee with intent on their part to hinder, delay, and defraud it, as a creditor of P. W. Vansickle. The testimony shows: That the son commenced to labor on the ranch of his father when he was 17 years of age. That after arriving at the age of 21, in 1883, there was a general conversation between himself and his father and mother, in the presence of the other members of the family, as to his future. The mother, especially, seemed anxious that he should remain at home; and all agreed that if he did some specified compensation should be agreed upon, to remunerate him for his services. As a result of this conversation the father then and there agreed to pay him wages better than he could get elsewhere. The language used by the father, as given by the witnesses, is not identical as to the amount, but all except the father testified that the sum was to be $500 per year. All agreed that he was to be paid wages. There is no controversy on this point, and no testimony was given in denial of or in conflict with the testimony that it was to be $500 per year. It is true, as claimed by defendant, that services rendered by children of the grantor after they become of age, who are members of his household, will not support a conveyance from him to them unless there was an agreement for compensation at the time the services were rendered. Such services are ordinarily presumed to have been gratuitously performed, and, in order to create a debt from the father to the son for such services, it may be admitted that it must affirmatively appear either that an express contract for remuneration existed, or that the circumstances under which the services were rendered were such as clearly exhibit a reasonable and probable expectation that there would be a reasonable and fair compensation. In this case it is satisfactorily shown that there was an express agreement between the father and son that compensation should be paid. The law is well settled that when a valuable consideration exists between the parties a fraudulent intent must be distinctly proved. It is only in cases of voluntary

conveyances, where there is no agreement between the parties, that the absence of a valuable consideration tends of itself to establish a fraudulent intent. The weight of the testimony in this suit clearly establishes the fact that the first deed was made, executed, and delivered for a valuable consideration, without any intent to hinder, delay, or defraud any of the other creditors of the father. This, to my mind, is too clear and plain to require comment or discussion.

The consideration for the other deeds arose out of transactions which occurred between the father and son as to the sale of cattle, and money loaned by the son to the father, the details of which it is deemed unnecessary to mention. After the suit of Wells, Fargo & Co. had been commenced against his father, the son requested payment of the amount due him. The father proposed to deed the son the property, saying it was the best he could do, and the son replied, "If it is the best you can do, I will take it." The testimony of the complainant with reference to the various agreements and business transactions between himself and his father which resulted in the execution of these deeds is corroborated not only by the testimony of other members of the family, but by all the surrounding circumstances which tend to shed any light upon the transactions. The only difference between this case and the one just decided lies in the fact that two of the deeds were executed and delivered to the son after the suit was brought against the father by Wells, Fargo & Co. But, under the authorities applicable to the particular facts of this case, that fact does not of itself establish any fraudulent intent on the part of the parties to hinder, delay, or defraud any creditors of the father. The right of the father to give a preference to members of his own family to whom he is justly indebted, over other creditors, is perhaps sufficiently shown in the opinion in the other case. But the principles announced in Bump, Fraud. Conv. (1st Ed.) 217, 220, are so directly in point, and so well supported by numerous authorities there cited, as to justify a quotation therefrom. The author, speaking of preferences not fraudulent, says:

"By virtue of his absolute dominion over his property, a debtor, however, may either give or allow a preference. It is no part of the policy of the statute to prohibit its application to the payment of one debt rather than another. The maxim, 'Vigilantibus non dormientibus leges subserviunt,' applies. Hence it is that a creditor who can secure a sufficiency, according to law, to satisfy his claim, is entitled to hold it against other creditors. This right, moreover, is not affected by the debtor's insolvency, or the preferred creditor's knowledge of such insolvency. The fact that a suit is pending, or that the transfer includes all the debtor's property, or that other creditors lose their debts by reason of the debtor's inability to meet all the demands against him, does not necessarily affect the validity of the preference. There is a distinction to be observed between the effect of a transfer by a debtor in failing circumstances, made to pay one or more of his debts, and that intent to hinder, delay, or defraud his other creditors against which the statute is aimed. The effect of the preference may be to delay or even to prevent them from obtaining payment at all, but, if the motive is to pay the preferred debt, the transaction is not invalidated. The statute is aimed only at intended fraud, but the payment of a debt to one creditor is no fraud upon other creditors,—no legal injury to them."

And again, in relation to an intent to defeat an execution, it is said:

"A preference may be given and received for the express purpose of defeating an execution, for the mere intent to defeat an execution does not of itself constitute fraud. The payment of a just debt is what the law admits to be rightful, and is not, therefore, fraudulent, either in law or in fact. The preferred creditor cannot be affected injuriously with notice of the debtor's intent to prefer, and thereby defeat an execution, because the purpose is honest, and such as the law sanctions. This is not delaying or hindering, within the meaning of the statute. It does not deprive other creditors of any legal right, for they have no right to a priority."

See, also, Sipe v. Earman, 26 Grat. 563, 569, where it was expressly held that the execution of a deed to one creditor pending a suit against the grantor by another creditor a short time before the term at which it was probable a judgment would be rendered against him did not render the deed fraudulent or void. Let a decree be entered in favor of the complainant, in accordance with the views herein expressed.

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## SCRUGGS v. SCRUGGS.

(Circuit Court, W. D. Missouri, W. D. November 19, 1900.)

No. 2,391.

1. ADMINISTRATORS—TITLE TO PERSONALTY—ACTION BY HEIR FOR CONVERSION.
It is a fundamental rule that the real estate of an intestate descends directly to the heirs at law, and that both the title and right of possession to the personal property vest exclusively in the administrator. Until an order of distribution has been made by the probate court having jurisdiction of the estate, an heir has no interest in the personal estate which will support an action, and, even after such an order has been made declaring the respective interests of the distributees, an heir has no title to any specific property, and cannot maintain an action for its conversion against the administrator, but his remedy is by action on the administrator's bond.

2. SAME—INEFFECTUAL ORDER OF DISTRIBUTION—CONTINUED JURISDICTION OF PROBATE COURT.
Where an order of distribution made by a probate court on final settlement by the administrator is ineffectual to bind the heirs by reason of a failure to give proper notice, the administrator is not thereby discharged, and the jurisdiction of the probate court over the property and the administrator continues, and is exclusive.

3. SAME—ACTION TO DETERMINE RIGHTS OF HEIR—JURISDICTION.
An administrator appointed by a court of one state is not subject to an action in a court of another state or jurisdiction by an heir to establish his right to a distributive share in the estate; jurisdiction to determine such right being exclusively in the courts of the state of the administration, and primarily in the court of probate.

On Demurrer to Petition.

A. N. Gossett, for plaintiff.
Judge R. H. Field, for defendant.

PHILIPS, District Judge. It is conceded by plaintiff's counsel that this is, in legal effect, an action for conversion. It is a fundamental and quite universal rule that the real estate of an intestate descends directly to the heirs at law, and that the personal estate does not descend directly to the heirs, but goes exclusively to the administrator,—both the title and the right of possession. Smith

v. Denny, 37 Mo. 20; Becraft v. Lewis, 41 Mo. App. 552; State v. Moore, 18 Mo. App. 411; Naylor's Adm'r v. Moffatt, 29 Mo. 126. By the statute of Kansas (section 1927, Gen. St. 1899) original jurisdiction is conferred upon the probate courts of Kansas as follows:

"Sec. 1927. The probate courts shall be courts of record, and, within their respective counties, shall have original jurisdiction: First, to take the proof of last wills and testaments, and admit them to probate, and to admit to record authenticated copies of last wills and testaments executed, proved and admitted to probate in the courts of any other state, territory or country; second, to grant and revoke letters testamentary and of administration; third, to direct and control the official acts of executors and administrators, settle their accounts, and order the distribution of estates; fourth, to appoint and remove guardians for minors, persons of unsound mind, and habitual drunkards, and make all necessary orders relating to their estates, to direct and control their official acts, and to settle their accounts; fifth, to bind apprentices, and exercise such control and make such orders respecting them and their masters as the law prescribes; sixth, to hear and determine cases of habeas corpus; seventh, to have and exercise the jurisdiction and authority provided by law respecting executors and administrators, and the settlement of the estates of deceased persons."

And the whole matter of the custody of personal property, the payment of debts, and the distribution of the assets among the creditors, legatees, and distributees is conferred upon the probate court. As said in McMillan v. Wacker, 57 Mo. App. 222:

"On the death of a party the personal property passes to the administrator, and he alone has a right to the possession thereof, unless, indeed, the probate court shall, by order, dispense with any administration, as provided by statute. It is only 'after making such order such widow or minor children shall be authorized to collect, sue for, and retain the property belonging to such estate.' The probate court is the only tribunal having original jurisdiction to determine the question as to whether or not an administration is necessary."

Under the Kansas statute, the widow, who is the administratrix in this case, was entitled to one-half of the personal estate; and only after settlement with the court, and on an order of distribution, do the heirs become entitled to receive their ascertained interests. There is no tenancy in common between the administrator and the heir in the personal property. The right of possession in the administrator is exclusive, and the heir can never maintain an action against the administrator for his distributive share until the probate court, of original and exclusive jurisdiction, has determined who the distributees are, and made an order of distribution. As said in Griswold v. Mattix, 21 Mo. App. 286: "It must be ascertained by a competent tribunal. The probate court is that tribunal. Its jurisdiction is original and exclusive." Until such order of distribution, and an ascertainment by the probate court of what the distributive share of the heir is, how can the heir maintain an action for conversion? It is a fundamental principle governing the action for conversion that "the plaintiff must show a legal title. He must have the property, general or special, or the actual possession or right to immediate possession, at the time of the conversion." Cooley, Torts (2d Ed.) 517. In law, as defined in Black's Law Dictionary, it is "the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. A construct-

ive conversion takes place when a person does such acts in reference to the goods of another as amount in law to the appropriation of the property to himself." The exclusive right of possession being in the administrator until the order of distribution is made, how can it be said that the administrator is wrongfully exercising a right of ownership over the goods or personal chattels belonging to another? The heir has no right of possession to the property in kind; and, as applied to the facts of this case, this heir would be entitled to one-third of the distributive share of the estate going to the heirs after the payment of the debts and giving to the widow one-half interest in the moneys, bonds, and securities. After the order of distribution, and failure to comply therewith by the administrator, the heir would have a remedy in an action on the bond of the administrator. The petition shows that the final settlement was made by the defendant in the probate court in Kansas after due notice by publication; and the petition further discloses the fact that at that settlement the probate court proceeded to make an order of distribution of the remaining assets between the widow and the two children born in lawful wedlock. The sole contention of plaintiff is that that order of distribution made on the final settlement was not binding on this plaintiff for the reason that no notice was given by the administratrix to the plaintiff of the application for such order of distribution, as provided by section 2857 of the Kansas statutes. It is contended by defendant's counsel that this section has reference only to the preceding section, providing for the sale of personal property ascertained by the court not to be susceptible of division in kind. It does not appear that this question has ever been directly passed upon by the supreme court of that state. It would seem from the language of the court in Proctor v. Dicklow, 57 Kan. 124, 45 Pac. 86, that it has been the practice in the probate court in that state to make the order of distribution at the time of making final settlement, and that the distributee would be concluded thereby if he does not appeal to that court for relief, and to the appellate court from the adverse action of that court. But, without determining this question, the fact in law still remains true that, if that order of distribution made by the probate court was not effectual for want of notice, then the administratrix was not discharged therefrom, and the jurisdiction of the probate court in Kansas continues in force over the administratrix, and is exclusive. As said by Sherwood, J., in Lenox v. Harrison, 88 Mo. 495: "Obviously, if, as alleged, there was no notice given as required by statute, then the final settlement was null, and the administration of the estate was still open." The court cites the case of Garton v. Botts, 73 Mo. 274, which expressly decides that until there is a final settlement of a ward's estate, a curator is not liable to an action by the ward for money had and received. The curator's bond constitutes the measure and limit of his liability, and he must have recourse to that. This, it seems to the court, is conclusive against this action. The petition discloses on its face that this defendant is a resident of Kansas, and in the jurisdiction of the probate court of that state, where this estate was administered; and this plaintiff, I presume, has found the defend-

ant over in Kansas City, Mo., possibly shopping, and sued her in the jurisdiction of Missouri in an action of trover or conversion; and this court is asked to take jurisdiction, in effect, over the administration of that estate, and ascertain for the first time that this plaintiff is an heir at law of the intestate, and determine what his interest in the estate is under the statute of descents and distributions of Kansas. This is the sole prerogative of the probate court of that state, which has original and exclusive jurisdiction in such cases. Bauer v. Gray, 18 Mo. App. 175. While these are Missouri decisions, and founded on the Missouri probate statute, it stands to universal law, excluding the jurisdiction of the courts of other states and other jurisdictions from assuming jurisdiction over the matter of administration and distribution of estates under a probate system like that which obtains in the state of Kansas. As said by the supreme court in Lawrence v. Nelson, 143 U. S. 222, 12 Sup. Ct. 442, 36 L. Ed. 134, it is "the general rule that an administrator's power to act, as well as his duty to account, is limited to the state from whose courts he derives his authority, and that, therefore, he cannot sue or be sued in another state in which he has not been appointed administrator." In Reynolds v. Stockton, 140 U. S. 272, 11 Sup. Ct. 778, 35 L. Ed. 470, the supreme court say that:

"Where an administrator or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the state. * * * Whatever may be the rule if jurisdiction is acquired by a court before administration proceedings are commenced, the moment they are commenced, and the estate is taken possession of by a tribunal of a state, that moment the party whose estate is thus taken possession of ceases to have power to bind the estate in a court of another state, either voluntarily or by submitting himself to the jurisdiction of the latter court."

The demurrer is sustained.

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## WILLIAMSON v. LIVERPOOL, L. & G. INS. CO.

(Circuit Court, W. D. Missouri, W. D. November 26, 1900.)

No. 2,495.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—STATUTE ALLOWING DAMAGES AND ATTORNEY'S FEES AGAINST INSURANCE COMPANIES.

Rev. St. Mo. 1899, § 8012, providing that "in any action against any insurance company to recover the amount of any loss under a policy," if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may allow the plaintiff damages, not exceeding 10 per cent. on the amount of the loss, and a reasonable attorney's fee, is in violation of the fourteenth constitutional amendment, as denying to insurance companies the equal protection of the laws by subjecting them to penalties which are not imposed on their adversaries or upon other litigants. The business of insurance is not of such character as to render insurance contracts, or actions thereon, proper subjects for discriminative legislation, under the police powers of the state; nor is the fact that payment must have been "vexatiously refused," to subject the defendant to the penalty, material, since no corresponding penalty is incurred by the plaintiff in case the suit is vexatiously brought.

At Law. On motion to strike out parts of the petition.

L. C. Boyle, for plaintiff.
M. A. Fyke, for defendant.

PHILIPS, District Judge. This an action, containing several counts, to recover losses based on certain fire insurance policies issued by defendant to plaintiff. On the first count, in addition to the judgment asked for to cover the loss, plaintiff asks for 10 per cent. damages, amounting to $466.66⅔, and a reasonable attorney's fee of $600; on the second count, in addition to the loss sustained on the property, plaintiff prays judgment for 10 per cent. damages, amounting to $533.33⅓, and a reasonable attorney's fee of $700; on the third count, additional damages of 10 per cent. on the sum of the loss, amounting to $1,000, and a reasonable attorney's fee of $1,000; and on the fourth count, the sum of $2,000 as damages, and a reasonable attorney's fee of $2,300, are prayed for in addition to the amount of the loss. The defendant has filed a motion to strike out those parts of the petition praying judgment for said damages and attorney's fees, on the ground that the statute authorizing the same is unconstitutional and void, being in conflict with the provisions of both the state and federal constitutions.

The statute in question is found in section 8012, Rev. St. Mo. 1899, as follows:

"In any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding ten per cent. on the amount of the loss, and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict."

The supreme court in Railway Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, held that an act of the legislature of Texas, which provides, in effect, that any person in that state having a valid bona fide claim for personal services or labor, or for damages, or for overcharges on freight, or claims for stock killed or injured by any railroad company, provided such claim for stock killed or injured shall be presented to the agent of the company near by, etc., and if, at the expiration of 30 days after such presentation, such claim has not been paid or satisfied, he may institute suit therefor, and, if he prevail, "he shall be entitled to recover the amount of such claim, and all costs of suit, and in addition thereto all reasonable attorney's fees, not to exceed $10, to be assessed and awarded by the court or jury trying the issue," is a violation of the fourteenth amendment of the federal constitution, as it deprives a railroad company of property without due process of law, and denies it the equal protection of the law, in that it singles out railroad companies among all its citizens, requiring them to pay, in certain cases, attorney's fees to the successful party suing them, while it gives to them no like corresponding benefit. The court said:

"It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them, when for like delinquencies it punishes no others. They are not treated

as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fee of the successful plaintiff; if it terminates in their favor, they recover no attorney's fee. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

The supreme court of this state, in Paddock v. Railway Co. (just reported) 56 S. W. 453, has followed this decision, and held that the statute of the state of Missouri which permits an attorney's fee to be taxed in favor of the plaintiff, on recovering judgment against a railroad company for injury to stock resulting from the negligence of the company, is void, as in conflict with the constitution.

The supreme court of Colorado, in the recent case of Davidson v. Jennings, 60 Pac. 354, has applied the same ruling to a statute of that state providing for the taxation of attorney's fees in mechanics' lien foreclosure suits, which is not allowed in other like proceedings.

A like ruling has been made by the supreme court of Michigan in Wilder v. Railway Co., 70 Mich. 382, 38 N. W. 289, in which the court says:

"This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist."

The supreme court of California, in the recent case of Johnson v. Mining Co., 59 Pac. 304, 47 L. R. A. 338, has declared an act of the legislature void and unconstitutional giving a lien for wages on all the property of the corporation in preference to all other liens, except duly recorded mortgages and deeds of trust, in case of failure of the corporation to pay its employés monthly, and an attorney's fee in case of an action to enforce the lien. The discussion of this and kindred statutes, in the latter case, is most elaborate and instructive. It asserts the doctrine, laid down in Wally's Heirs v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511, that:

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporations would be governed by one law, the mass of the community and those who made the law by another, whereas a like general law affecting the whole community equally could not have been passed."

And as quite germane to the Missouri statute under consideration, the court observed:

"It is said that corporations being the creatures of the state, and deriving their powers from their charters, the same power that created them may alter or amend their charters, or deprive them of rights originally given them. This is true as to certain purposes, but the legislature cannot, after creating

a corporation, and while it exists, deprive it of the rights guarantied to it by the federal constitution, nor deprive it of its right to resort to the courts of law, nor take its property without due process of law, nor subject it to unequal and oppressive burdens, nor deprive it of the equal protection of the laws. But the act in question applies, not only to the corporations existing under the laws of this state, but to all other corporations doing business in this state, and in no wise indebted to the state for their charters. Surely, the legislature of this state could not alter, amend, or repeal the charter of a corporation existing under the laws of another state."

Why these rulings are not applicable to the statute in question respecting insurance companies, which is applied to no other suitors except as to an attorney's fee in the instance referred to of suits against railroad companies, is not apparent upon principles of equal right in the courts of all litigants and all citizens. The learned counsel for plaintiff undertakes to differentiate the case of an insurance company from all the other legislative acts imposing like penalties, declared by the courts to be unconstitutional, on the ground that in modern commerce and trade insurance on life and property has become almost essential; that contracts between parties are largely dependent upon insurance; and, therefore, as the prompt payment of losses may be essential in the liquidation of these contractual liabilities, it touches the public policy of the state that the payment of losses should be coerced by this character of legislation. Under this idea, the legislature might undertake to declare that a citizen should not enter into certain classes of contracts, unless he holds a policy of insurance on his life or property, and giving the other party a lien on the policy as security. With much greater reason, it seems to me, if insurance has become so largely inseparable from commercial transactions as to be promotive of contracts by furnishing valuable credit and security, it should rather be a sound, rational policy of the state to burden and impede the issuance of such policies, with fewer discriminating penalties than other business or trading associations. The same specious arguments with which the astute counsel has pressed this consideration in respect of the discrimination against insurance companies would apply with equal, if not greater, force to suits against railroad companies. For what associations of capital are more indispensable to the prosperity and development of commerce and trade, in every industrial department, touching every hamlet and corner of the extended continent, than our railroads? And, getting back of these to the moving forces, we find that steam is indispensable to railroads for locomotion; and why not then declare by legislation that any association furnishing fuel for the railroads, failing to keep its contract, shall, in case of suit against it for a breach of contract, in addition to the damage caused the railroad, be liable to 10 per cent. and a reasonable attorney's fee? So of electricity. The movement of the street cars of our great metropolitan cities, and the lighting of business houses and the homes of the people, in our modern civilization, have rendered plants generating electricity quite indispensable. Why not, therefore, carry the idea to the reductio ad absurdum, and say that, as the running of railroad trains is dependent upon the fidelity of the conductor in charge, the engineer at the throttle, and

the fireman at the shovel, and the miner, who, with his powder and pick, digs the coal, is indispensable to the creation of steam which gives motion to the cars, and the engineer who runs the dynamo-electric machine furnishing the electricity that propels the street cars and lights this public building, the business houses, and our homes, if any one of these should break his contract the employé, in addition to the recovery of consequential damages, shall be liable, in case of suit against him, to 10 per cent. additional and a reasonable attorney's fee? The allotted work of the constituent elements and actors, producing the result of accomplishing the object of the association, is as much allied to the public policy and police power of the state as the composite association. And the statute that should undertake to subject either of these classes of material men or laborers to such penalties, in contradistinction to other classes of material men and laborers, would certainly be pronounced bad, as flying in the very teeth both of the letter and spirit of the state and federal constitutions.

Turning this argument over, presenting, in effect, a like side, in a supplemental brief, counsel for plaintiff argues that every fire policy of insurance is clothed with a public interest, and affects the public welfare, and therefore it comes within the police power of the state to impose penalties for failure of the company to make prompt liquidation. This proposition is enforced by the illustration of the burning of the Kansas City Convention Hall, in which it is assumed that the only valid defense the insurance companies could have interposed would have been an act of incendiarism. And it is suggested that, if the insurance companies had delayed payment without reasonable excuse, the effect would have been injurious to the whole community, as it could not have rebuilt the hall in time to have entertained the Democratic National Convention. Without stopping to discuss the exact relation of that convention to the public welfare, let us carry to its logical conclusion this illustration of the doctrine advanced. If the contractors had failed to keep and perform their contracts, and the material men had failed to deliver timely the ironwork and bricks, the building would not have been completed in time to accommodate the convention. Would that failure clothe such contracts with such public character as to involve the public welfare, and bring their regulation within the police power of the state? The popular conception touching such transactions has been that they are essentially subjects-matter of private contract, and the only penalties assessable for such defaults are such as are prescribed by the specifications of the contract. A railroad company has a contract with a contractor to build and deliver to it a given number of passenger and freight cars at a certain time and place. His failure to comply might occasion great loss to the road, as well as to shippers and travelers who expect to utilize this equipment. Would this breach of contract present a public question, in the sense that it comes within the police power of the state, independent of the terms of the contract, to regulate by the imposition of penalties under the guise of an exercise of the police power?

Having started upon this line of argument, counsel did not hesi-

tate to accept its logical results, by applying it to the situation of his client, whose house being centrally located in this city, he claims that the public has an interest in its speedy re-erection, so that, if he is unable to rebuild until the defendant company liquidates his loss, the delay concerns the public, and therefore the public welfare is involved, and such delinquency would fall under the police power of the state to punish. This argument would apply with equal reason and force to a private contract between A. and B. In a sense, the public welfare is concerned in every head of a family having a home, as the home is the nursery of the family, and the family is the nursery of the state. Therefore, if B. owes A. $5,000, with which A. expects to build a dwelling house in a desirable part of the city, would the default of B. so involve the public welfare as to bring such contract within the police power of the state? While there is a disposition in the judicial mind to stretch to tension the inherent police power of the state to conserve the public weal, and this power is constantly extended in its application to meet the exigencies of new conditions presented by the complexities of a widening civilization, yet, like every other power, it has its boundaries defined by judicial construction, following approximately defined rules. Like judicial discretion, there is more danger in giving it unbridled play than in hedging it about with fixed, impassable barriers.

The central definition of the police power of the state in general is "a system of precaution, either for the prevention of crimes or of calamities," and police regulations "are such provisions of the law as are designed to protect the lives, limbs, health, comfort, and quiet of citizens, and to secure them in the enjoyment of their property. And the police power can be invoked for an interference with one's dominion over his own property to prevent such use of it by him, or its continuance in such condition, as would be detrimental to the community, and on no other grounds." State v. Greer, 78 Mo. 188–195. As said by Judge Cooley: "Police regulations must have some reference to the comfort, safety, and welfare of society." They can never conflict with the constitutional rights of the citizen. How can it be said that an act of the legislature imposing a penalty on insurance companies for resisting or delaying the payment of an insurance loss touches the public policy of the state or pertains to its police power to regulate it? The business of insurance is not immoral. It spreads no contagious disease. It does not affect the public health. It does not obstruct the public policy of the state, nor threaten the community with any public calamity or danger. On the contrary, the argument of plaintiff's counsel is that the business of insurance has become inwoven with the very life of trade, promoting, rather than endangering, the public welfare, as much so as the existence and business of railroad and telegraph companies.

The case relied upon, principally, by plaintiff's counsel in support of this contention, is that of Railroad Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, which has carried the doctrine of the police power of the state, I take it, to its ultimate limit. In this case the court held to be valid an act of the legislature of the state of Kansas entitled "An act relating to the liability of railroad com-

panies for damages by fire," which provided that, in all actions commenced under this act, if the plaintiff shall recover there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment. This ruling was bottomed on the distinct proposition "that there is a peculiar danger of fire from the running of railroad trains. The locomotives, passing, as they do, at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken, and sometimes in spite of such care, scatter fire along the track. The danger to adjacent property is one which is especially felt in a prairie state like Kansas. * * * Fire catching in the dry grass runs for miles, destroying not merely crops, but houses and barns." And because of the widespread and far-reaching disaster to whole communities, integral parts of the state, incident to the escape of fire, endangering life and property, the public welfare was held to be directly involved in such calamity, and brought the instance within the police power of the state to regulate, as a preventive and protective remedy. The vigorous dissent of four out of nine justices gives assurance that the distinction almost metaphysically drawn by Mr. Justice Brewer between that ruling and the principles enunciated in the Ellis Case is not to be still further advanced. Indeed, as if apprehensive that the exceptional distinguishing features of the Matthews Case—the communicating of fire to farms when "caused by the operating" of the road—might be misunderstood and misapplied, he took the precaution, before closing the opinion, to observe that, while the courts should give considerate attention to the declared legislative policy of the state, "it is also true that the equal protection guarantied by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual or one corporation, and enact that, whenever he or it is sued, judgment shall be for double damages, or subject to an attorney's fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed." Soon after the decision in the Matthews Case, the courts of Kansas seized upon it to uphold such discriminating statute as the one under consideration here. This decision, and the one cited from Association v. Yoakum, 39 C. C. A. 56, 98 Fed. 251, do not commend themselves to my judgment.

The very terms of the Missouri statute under discussion show that its purpose was, not to protect the community from calamity by preventing the destruction of property by any recognized dangerous methods of operation, but its sole purpose is to coerce the payment of a private debt by deterring insurance companies from taking any chances of litigation, even though the defendant may honestly believe it has a meritorious defense. The penalty is imposed for refusing "to pay such loss."

The final contention of plaintiff is that this penalty is imposed only when the company "vexatiously" refuses to pay such loss. "Vexatious" is a vague term. In practice under this statute, it is little more than an epithet. The supreme court of this state holds that no direct proof of its existence is exacted of the plaintiff. Lockwood v. Insurance Co., 47 Mo. 50. It is to be left to the jury to determine from the general facts and incidents of the case. "Vexation" may mean, within a mere dictionary definition, trouble or annoying inconvenience to which the party is put in going to law. The defendant may honestly rely upon what it is advised by counsel to be a correct construction of some provision of the contract, or upon some hitherto undetermined proposition of law, or upon a belief in the existence of some fact susceptible of proof which ought to defeat a recovery. After the court has resolved the question of law in favor of the plaintiff, or after the defendant's witnesses to a controverted fact have been overborne by the weight of the plaintiff's evidence, the jury, occupying the vantage ground, may think the proposition of law was so plain, and the evidence for the plaintiff so strong, it could conclude that the defense was meritless, and therefore vexatious. The trial judge, conceiving that there was some atom or scintilla of evidence to support the jury's inference, would decline to interfere. And, in view of the known inclination of juries in such trials, the result, in general, would practically be the same as if this qualifying phrase were eliminated from the statute. Section 1107 of the Missouri Statutes, taxing a reasonable attorney's fee in suits against railroad companies, declared to be unconstitutional by the supreme court in the Paddock Case, supra, authorizes the imposition of this penalty only where the owner of stock killed "should be compelled to bring suit in court to recover the damages so sustained," and then only where the company had neglected to fence as required by the preceding section of the statute. The court attached no importance to the conduct of the company in refusing to pay and compelling suit. It is, however, a complete answer to this suggestion that this statute is leveled solely at insurance companies. If the assured has wantonly burned his own house, and the company refuses to pay, whereupon suit is brought against it, notwithstanding the defendant should clearly prove the act of incendiarism, and show that the suit was wholly vexatious, no damage or attorney's fee is taxable in its favor. If A. owes B. $1,000, evidenced by a note, to which he has not the shadow of a defense, and compels B. to hire a lawyer to enforce payment by suit, although A. defends solely to harass and delay his creditor, there is no statute of the state imposing upon such delinquent a like penalty.

The Code of Practice of the state (section 867) provides that:

"Upon the affirmance of any judgment or decision, or upon the dismissal of any case, the supreme court may award to the appellee or defendant in error, such damages, not exceeding ten per cent. on the amount of the judgment complained of, as may seem just."

It is observable that this punitive provision applies to all suitors, plaintiffs and defendants, natural persons as well as artificial concerns, alike. Had the legislature, however, declared that upon the

affirmance of any judgment, etc., against an insurance company, the supreme court may award against it damages, not exceeding 10 per cent. on the amount of the judgment complained of, as may seem just, with no like provision as to any other appellant or plaintiff in error, the statute would certainly fall under the inhibition of both the bill of rights of the state and the fourteenth amendment to the federal constitution. The motion is sustained.

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## PERSONS v. PERSONS.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1900.)

No. 1,363.

EVIDENCE—BILL OF SALE—IDENTIFICATION OF PROPERTY.

A bill of sale which describes certain notes and mortgages by naming the parties thereto, and giving their place of residence, and the county in which the mortgages are recorded, and which is in the possession of the grantee, is prima facie sufficient to identify the notes and mortgages, and to convey the title thereto, although it was not recorded until after the death of the grantor, and is admissible as evidence of the grantee's ownership.

In Error to the Circuit Court of the United States for the District of Minnesota.

Thomas Persons, now dead, was the father of the parties to this suit. Prior to his death he was the holder and owner of a note and mortgage for $1,800, executed by one Harvey E. Keene and wife. In 1892 he gave to his son Phineas P. Persons a general power of attorney to act for him concerning all the property and business he might have in the states of Minnesota and North Dakota. In 1897, Thomas, the father, assigned the mortgage in question by a written bill of sale to his son Simon E. Persons. The complaint alleges that after the assignment of the mortgage to Simon, and with full knowledge of that assignment, Phineas P., acting under cover of the authority conferred on him by the power of attorney executed by his father to him in 1892, collected the money due on the mortgage, and refused to account to Simon E. therefor. This action was brought at law to recover that money. The answer admits the execution of the Keene mortgage to Thomas Persons, and the assignment thereof by him to his son Simon, but alleges the assignment was made in trust for certain alleged purposes set out in the answer; and the answer also alleges that Thomas, the father, afterwards annulled and abrogated the assignment. Simon E., the defendant in error and plaintiff below, testified that the assignment of the mortgage to him by his father was absolute and unconditional, and made upon a valuable consideration, and imposed no trust on him whatever for any purpose, and that it was never annulled or revoked by his father. On the other hand, Phineas P., the plaintiff in error and defendant below, testified to the contrary, and that the assignment of the mortgage was made conditionally, and upon certain trusts, and, moreover, that it was afterwards annulled and revoked by the father. Under the charge of the court, to which no exception was taken, the jury found the issues in favor of the defendant in error, Simon E., and the defendant below removed the case into this court by writ of error.

Herman Winterer, Edward Winterer, W. E. Dodge, Rome G. Brown, and Charles S. Albert, for plaintiff in error.

J. N. Castle, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This case confirms the truth of Solomon's proverb, "A brother offended is harder to be won than a strong city, and their contentions are like the bars of a castle." But two errors are assigned, and only one of them requires any consideration, and that was an objection to the introduction of the bill of sale in evidence, and is in these words: "Objected to as incompetent, irrelevant, and immaterial, and for the reason that on its face it does not describe anything, and for the further reason that it appears that the same was not recorded until subsequent to the death of Thomas Persons, and, as a matter of fact, not delivered at any time." The specific grounds of the objection, which are all we can notice, are: (1) "That on its face it does not describe anything;" (2) "that it appears the same was not recorded until subsequent to the death of Thomas Persons, and, as a matter of fact, not delivered at any time." The description of the mortgage in the bill of sale is: "The following personal property, to wit, real-estate mortgage given by H. E. Keene and wife of Barnes Co., North Dakota; also one given by C. C. Smith and wife. All of said mortgages are recorded in the county of Barnes, town of Valley City, North Dakota." The bill of sale named accurately the parties to the mortgage, the county and state of their residence, and the county in which the instrument was recorded. Prima facie, this was a good and sufficient description. It was not claimed the grantor ever held a mortgage executed to him by Keene and wife, other than the one in dispute. If there had been a controversy as to what mortgage was meant, parol testimony would have been admissible to identify it. In such cases it is a maxim of the law that that is certain which can be made certain. The failure to record the bill of sale does not affect its validity between the parties to it, or affect the title of the property conveyed by it; nor does the death of the grantor before the bill of sale is recorded affect its validity or the title of the property conveyed by it. Upon the face of the bill of sale, the plaintiff was the person entitled to the possession of it, and he had it in his actual possession, and offered it in evidence. These facts afforded prima facie evidence of its delivery, and entitled the plaintiff to put it in evidence. If, in the language of the objection, "as a matter of fact" the instrument had never been delivered, the burden rested on the defendant to prove that fact. The bare assertion of the fact, without any offer to prove its truth, would not justify the court in excluding the bill of sale on that ground. The judgment of the circuit court is affirmed.

## UNITED STATES v. HOLMES et ux.

(Circuit Court, S. D. California. October 29, 1900.)

No. 842.

1. UNITED STATES—RIGHT TO CIVIL REMEDIES—ACTIONS.
   The government of the United States is entitled, for the protection of its property, and without express legislative authority, to all civil remedies given to individuals in its courts.
2. PUBLIC LANDS—RIGHTS OF SETTLER.
   Mere occupation and improvement of public lands with a view to the acquisition of title thereto under the land laws does not confer upon the settler any rights therein as against the United States, or impair in any respect the power of congress to dispose of the land in any way it may deem proper.
3. SAME—EXCEPTIONS FROM FOREST RESERVATION—LAND OCCUPIED BY SETTLERS.
   A provision in a proclamation by the president creating a forest reservation under Act March 3, 1891, § 24 (26 Stat. 1103), excepting from the effect of such proclamation all lands "upon which any valid settlement has been made pursuant to law," does not apply to land which, prior to the time it was settled upon, had been withdrawn from entry and settlement by the land department as within the limits of a railroad grant, and had not thereafter been restored to the public domain for settlement; and it is immaterial that the lands were not in fact within the grant, and their withdrawal was made through an error in its construction by the department.
4. SAME—ACT FOR BENEFIT OF SETTLERS ON RAILROAD LANDS—CONSTRUCTION.
   The provision of Act Jan. 13, 1881 (21 Stat. 315), giving all persons who had settled upon and improved any odd-numbered section of land within a railroad withdrawal with the permission of the railroad company, and the intention of purchasing the same, the right to purchase not exceeding 160 acres of the same from the United States if for any cause it should be restored to the public domain, does not apply to a tract of land which, although erroneously withdrawn from settlement, was not restored to the public domain, but was devoted by congress to another use.
5. SAME—PURCHASERS OF RAILROAD LANDS.
   A mere license given by a railroad company to settle upon a tract of land supposed to be within a grant made by congress to such company, where the company expressly declined to enter into a contract of sale, does not constitute the settler a purchaser, within the meaning of Act March 3, 1887, § 5 (24 Stat. 557), which gives to bona fide purchasers of such lands the right to purchase the same from the United States, where, for any reason, they are excepted from the operation of the grant.

Action of Ejectment.

The defendants Albert O. Holmes and Susan L. Holmes, his wife, have filed separate answers, each claiming the land in controversy. Both deny ouster and that the defendants were in possession wrongfully, etc. The defendant Albert O. Holmes avers: That he is a citizen of the United States, over the age of 21 years, not the proprietor of more than 160 acres of land in any state or territory of the United States, and that he has not heretofore had the benefit of the homestead laws of the United States. That in April, 1890, he settled upon the land in controversy in good faith to obtain a home for himself, and with the intention of claiming the same under the homestead laws of the United States. That said land is, and was at all the times herein mentioned, unsurveyed public land, and is still unsurveyed, and no plat of the township embracing the land is yet upon file, or has been received at the district land office of the district wherein the land is situated. That at the date of his said settlement said land was unappropriated public land, but had been withdrawn from entry by the United States land department as being within the limits of the grant made by the congress of the United States to the

Southern Pacific Railroad Company by the act of March 3, 1871, and parties seeking to acquire said lands were not permitted to file thereon under the provisions of the laws of the United States relating to public lands. That otherwise, and but for said withdrawal, the said land was at the date of said settlement subject to pre-emption under the laws of the United States. That within six months after his settlement he established his actual residence in a house upon said land, and has ever since resided thereon, and cultivated and farmed said land continuously, and made it the home of himself and his family. That he is now, and at all times since his said settlement has been, in the quiet and peaceable possession of said land; and that it is his intention, as soon as said land is surveyed, and an approved plat of the township embracing the same is received at the district land office of the United States, to file his homestead application for said land, and thereafter to perfect his original entry thereon under and in pursuance of the act entitled "An act for the relief of settlers on the public lands," approved May 14, 1880. The defendant Susan L. Holmes, in her separate answer, avers that she is the wife of the defendant Albert O. Holmes, and not divorced from nor deserted by her said husband; that in April, 1890, she settled and made valuable and permanent improvements on the land in controversy, with the permission and license of the Southern Pacific Railroad Company, in good faith, and with the expectation of purchasing of said company said land, and has since continuously resided thereon, and been in the quiet and peaceable possession thereof. She claims to be entitled to acquire said land under two separate acts of congress, hereinafter mentioned, to wit: (1) "An act for the relief of certain settlers on restored railroad lands," approved January 13, 1881 (21 Stat. 315); (2) "An act to provide for the adjustment of land grants made by congress to aid in the construction of railroads, and for the forfeiture of unearned land, and for other purposes," approved March 3, 1887 (24 Stat. 557). Among the material facts are these: The land sued for was, at the date of defendants' settlements, herein mentioned, public land of the United States, but had been withdrawn from entry by the land department as being within the limits of the grant made to the Southern Pacific Railroad Company by the act of congress of March 3, 1871 (16 Stat. 579), and was also within the overlapping limits of the grant made to the Atlantic & Pacific Railroad Company by the act of July 27, 1866 (14 Stat. 292). The Atlantic & Pacific Railroad Company built part of its road east of the Colorado river, but did not construct any line west of that river, or in California. In consequence of such failure, congress, by the act of July 6, 1886 (24 Stat. 123), forfeited and restored said lands to the public domain. Prior to said last-mentioned act, they had been withdrawn from entry upon the assumption that they were included in the subsequent grant made to the Southern Pacific Railroad Company of March 3, 1871, and said withdrawal was continued in force after the said forfeiting act of 1886. While the condition of affairs was such as above indicated, the defendant Susan L. Holmes made the application to purchase set forth in the opinion of the court. About the year 1892 suits were brought by the government of the United States against the Southern Pacific Railroad Company to determine the status of the lands within said overlapping limits, and the supreme court ultimately declared in favor of the government, as shown by the following extract from its opinion: "The supreme court of the United States distinctly declared that the lands within the overlapping limits became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain, without the Southern Pacific R. R. Co. having acquired any interest therein. * * * It is further declared that by the act of forfeiture of 1886 the title to the A. & P. R. R. Co. was retaken by the general government, and retaken for its benefit, and not that of the S. P. R. R. Co., and that the latter company has no title of any kind to these lands." Southern Pac. R. Co. v. U. S., 168 U. S. 66, 18 Sup. Ct. 18, 42 L. Ed. 355. The defendant Albert O. Holmes, in April, 1890, settled upon the land in controversy for the purpose of acquiring the same under the homestead laws of the United States. Within six months after said settlement he established, and has since continuously maintained, his residence on said land, making it the home of himself and his family. Defendants, during their occupancy of said lands, have made valuable and perma-

nent improvements thereon. Defendant Albert O. Holmes intends, as soon as the land is surveyed, to file a homestead application therefor in the land office. Mrs. Holmes has made application to the land department to purchase said lands under the act of congress approved March 3, 1887, hereinafter quoted from, which application is pending in the land office. Under the rules of said office, no filing or other application to acquire public lands under the act of January 13, 1881, will be received or considered until the lands have been surveyed, and because of that rule Mrs. Holmes has filed no application to purchase as a settler under said act. For a like reason defendant Albert O. Holmes has not filed his homestead application under the act of May 14, 1880. Both defendants, however, intend, respectively, as soon as they can do so, to make and prosecute the applications above indicated. The other material facts are stated in the opinion of the court.

Frank P. Flint, U. S. Atty., and J. R. Finlayson, Asst. U. S. Atty.
Sheldon Borden and D. M. McDonald, for defendants.

WELLBORN, District Judge (after stating the facts as above). An elaborate discussion of all the questions argued in the briefs of the respective parties is impracticable, and I shall undertake in this opinion but little more than an intelligible statement of my conclusions.

1. There seems to me no room for reasonable controversy but that the government of the United States, for the protection of its property, is entitled, without express legislative authority, to the civil remedies ordinarily administered in its courts. On this point the supreme court of the United States has said:

"It would present a strange anomoly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraints of the constitution upon their sovereign powers cannot affect their civil rights. Although, as a sovereign, the United States may not be sued, yet as a corporation, or body politic, they may bring suits to enforce their contracts and protect their property in the state courts, or in their own tribunals administering the same laws. As an owner of property in almost every state of the Union, they have the same right to have it protected by the local laws that other persons have. As was said by this court in Dugan v. U. S., 3 Wheat. 181, 4 L. Ed. 364, 'It would be strange to deny them a right which is secured to every citizen of the United States.' In U. S. v. Bank of Metropolis, 15 Pet. 392, 10 L. Ed. 774, it was declared that when the United States, by their authorized agents, become a party to negotiable paper, they have all the rights and incur all the responsibilities of other persons who are parties to such instruments. In U. S. v. Gear, 3 How. 120, 11 L. Ed. 523, the right of the United States to maintain an action of trespass for taking ore from their lead mines was not questioned." Cotton v. U. S., 11 How. 229, 13 L. Ed. 675.

To the same effect, I quote from the brief of the district attorney, filed in this case, the following citations:

"The opinion of Attorney General Wirt, of date May 27, 1821, holds as follows: 'Independent of positive legislative provisions, I apprehend that, in relation to all property, real or personal, which the United States are authorized by the constitution to hold, they have all the civil remedies, whether for the prevention or redress of injuries, which individuals possess. See 3 Wheat. 181, 4 L. Ed. 364. So the United States, being authorized to accept and to hold these lands for the common good, must have all the legal means of protecting the property thus confided to them that individuals enjoy in like cases. * * * They are, therefore, in my opinion, entitled to the injunction of waste by way of prevention, and to the action of trespass by way of punishment, in like manner as individuals similarly situated are entitled to them.' Attorney General Taney, afterwards chief justice of the United

States, in an opinion of 22d of August, 1833, cites this opinion of Mr. Wirt, and concurs in it."

No law of congress touching the disposition of the public lands by the government has been called to my attention, nor do I believe that any exists, which changes the rule declared in the citations above given, or abridges in any way the power of the courts to hear and determine actions brought by the government of the United States for the preservation and protection of the public domain. My conclusion on this branch of the case is that this court has jurisdiction of the pending cause.

2. "The United States, by pre-emption laws, do not enter into any contract with the settler, nor incur any obligation that the land occupied by him shall ever be put up for sale. They simply declare by those laws that, in case any of their lands are thrown open for sale, the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use." Third paragraph of the syllabus in Hutchings v. Low, 15 Wall. 77, 21 L. Ed. 82. In the body of the opinion of the case above cited the supreme court say:

"The question here presented was before this court, and was carefully considered, in the case of Frisbie v. Whitney, 9 Wall. 187, 19 L. Ed. 668, and it was there held that under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to pre-emption, do not confer upon the settler any right in the land occupied, as against the United States, or impair in any respect the power of congress to dispose of the land in any way it may deem proper; and that the power of regulation and disposition conferred upon congress by the constitution only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived. He is then entitled to a certificate of entry from the local land officers, and ultimately to a patent for the land from the United States. Until such payment and entry, the acts of congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States, by those acts, enter into no contract with the settler, and incur no obligation to any one, that the land occupied by him shall ever be put up for sale. They simply declare that, in case any of their lands are thrown open for sale, the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use."

See, also, Campbell v. Wade, 132 U. S. 34, 10 Sup. Ct. 9, 33 L. Ed. 240; Frisbie v. Whitney, 9 Wall. 189, 19 L. Ed. 668.

The next inquiry is, has congress devoted these lands to any use inconsistent with their acquisition by the defendants? Section 24 of the act of congress approved March 3, 1891, entitled "An act to repeal timber culture laws, and for other purposes" (26 Stat. 1103), provides:

"That the president of the United States may, from time to time, set apart and reserve, in any state or territory having public lands bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the president shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

Pursuant to the act of congress last cited, the president of the United States, on the 20th day of December, 1892, duly issued a public proclamation, wherein he "reserved from entry or settlement and set apart as a public reservation" a certain part of the public domain, specifically described, and which includes the lands in controversy in this suit, excepting, however, from the force and effect of said proclamation "all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired, and all mining claims duly located and held according to the laws of the United States and rules and regulations not in conflict therewith: provided, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made." 27 Stat. 1051. Do the defendants fall within any one of the classes mentioned in said exception? It is not claimed that there has been any legal entry or lawful filing, duly of record in the proper United States land office, but the defendant Albert O. Holmes contends that he is within the scope of that clause which protects valid settlements made pursuant to law. This contention, in my opinion, is vulnerable, for the reason that at the time said Holmes made his settlement the lands were withdrawn from entry and settlement. Maddox v. Burnham, 156 U. S. 544, 15 Sup. Ct. 448, 39 L. Ed. 527; Wood v. Beach, 156 U. S. 547, 15 Sup. Ct. 410, 39 L. Ed. 528. Nor does it in any way impair the soundness of this conclusion that the withdrawal of said lands was made under an erroneous impression that they were embraced within a valid grant to the Southern Pacific Railroad Company. In Wood v. Beach, supra, the court says (italics being mine):

"It was said in Wolsey v. Chapman, 101 U. S. 755, 768, 25 L. Ed. 915, 920: 'The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the state above the Raccoon Fork until the differences were settled, either by congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold the lands from private entry; and, as we held in Riley v. Welles, 19 L. Ed. 648, was sufficient to defeat a settlement for the purpose of preemption while the order was in force, *notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.*'"

The numerous cases cited in defendants' brief to the effect that a settler going on unsurveyed lands with the bona fide intention of acquiring the same goes by invitation of the government, etc., have no application to the case at bar. Surely, it cannot be successfully maintained that the government, at the time defendants entered

upon the land in controversy, invited them to do so, in the face of the conceded fact that such lands were then withdrawn from entry. From the foregoing it follows that the defendant Albert O. Holmes cannot hold the land in controversy against the government's demand for its possession.

I now pass to the consideration of the defenses set up by the defendant Susan L. Holmes. The first act of congress under which she claims a possessory right to the land is that of January 13, 1881, and is as follows:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that all persons who shall have settled and made valuable and permanent improvements upon any odd numbered section of land within any railroad withdrawal in good faith and with the permission or license of the railroad company for whose benefit the same shall have been made, and with the expectation of purchasing of such company the land so settled upon, which land so settled upon and improved may, for any cause, be restored to the public domain, and who, at the time of such restoration, may not be entitled to enter and acquire title to such land under the pre-emption, homestead, or timber-culture laws of the United States, shall be permitted, at any time within three months after such restoration, and under such rules and regulations as the commissioner of the general land office may prescribe, to purchase not to exceed one hundred and sixty acres in extent of the same by legal sub-divisions, at the price of two dollars and fifty cents per acre, and to receive patents therefor." 21 Stat. 315.

With reference to this defense it need only be said that the land in controversy has not been restored to the public domain, but, on the contrary, has been devoted to another use, which is seemingly permanent, so that the contingency on which Mrs. Holmes would be entitled to purchase the land, namely, its restoration to the public domain, will never arise. The possessory right claimed cannot be founded upon such an uncertain, not to say impossible, contingency.

The defendant Susan L. Holmes makes another defense, based upon section 5 of the act of congress of March 3, 1887, entitled "An act to provide for the adjustment of land grants made by congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," which section is as follows:

"Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: provided, that all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: provided further, that this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases." 24 Stat. 557.

It will be observed that the persons protected by said section are those to whom the railroad company has "sold" lands. Can it be said, under the evidence adduced by the defendant Mrs. Holmes, that the railroad company sold to her the land in controversy? It is true that the company consented to her occupancy of said land, but it is also true that the company declined to bind itself to a sale. The only negotiations had between said defendant and said company consisted of an application by the former to purchase and the acknowledgment of its receipt by the land agent of the company. The application is in the words and figures following, to wit:

"Application.

"Southern Pacific Railroad Co. Land Department.

"July 8th, 1891.

"I, S. L. Holmes, wish to purchase the land on which I reside, supposed to be S. E. quar. of section 7, township four (4) north, range nine (9) west, San Bernardino base and meridian, in Los Angeles county, California, containing one hundred sixty (160) acres. This application is made with the understanding that it confers no right or privilege; that if there be two or more applicants for the same tract of land, the actual settler who in equity is best entitled to purchase will be given the preference; that the S. P. R. R. Company reserves to itself the right, if it so elects, not to sell the above land in the shape designated, or by itself, but to sell it in conjunction with other of its lands; and that the determination of the questions mentioned herein—that is, of equity, awarding privilege of purchase to the applicant or applicants, and deciding whether or not the company will sell the above land in the shape applied for, or by itself, or in connection with other of its lands—shall be entirely left to and be within the judgment and discretion of the company's land agent; and his decision on such questions shall be final and conclusive.

"S. L. Holmes.

"Residence: Big Rock Creek.

"P. O. Address: Harold, Los Angeles Co., California.

"To Jerome Madden, Land Agent S. P. R. R. Co., San Francisco, Cal."

Indorsed:

"S. P. R. R. Application to purchase S. E. ¼ of Sec. 7, T. 4 N., R. 9 W., S. B. base and meridian, by S. L. Holmes. P. O. Address: Harold, Cal. July 8th, 1891.

"Land Dep't S. P. R. R. Co. Received Jul. 14, 1891. Answered July 16, 1891, by receipt to address hereon.

"U. S. A. vs. Holmes. Exhibit E."

The response to said application was as follows:

"Jerome Madden, Land Agent.

"Note. Be careful in writing about land to describe it particularly by section or parts of section, township, and range.

Land Department of the Southern Pacific Railroad Company. Fourth and Townsend Sts.

"Exhibit A.

"San Francisco, California, July 16th, 1891.

"Mrs. S. L. Holmes, Harold, Cal.—Sir: Your application for S. E. ¼ of Sec. 7, T. 4 N., R. 9 W., S. B. B. & M., dated July 8th, 1891, has been received and filed in this office. This receipt for the application above mentioned is given with the understanding that said application confers no right or privilege; that, if there be two or more applications for the same tract of land, the actual settler who in equity is best entitled to purchase will be given the preference; that the S. P. R. R. Co. reserves to itself the right, if it so elects, not to sell the above land in the shape designated, or by itself, but to sell it

in conjunction with other of its lands, and that the determination of the questions mentioned herein—that is, of equity, awarding privilege of purchase to the applicant or applicants, and deciding whether or not the company will sell the above land in the shape applied for, or by itself, or in connection with other of its lands—shall be entirely left to and be within the judgment and discretion of the company's land agent, whose decision on such question shall be final and conclusive.

"Respectfully, Jerome Madden, Land Agent S. P. R. R. Co.

"Owing to change of residence, persons often fail to get notice when land is for sale. If you change your P. O. address, return this certificate with the new address noted on it.

"P. O. address changed to ——."

From these communications it will be seen that the company, so far from selling the land to said defendant, expressly declined to enter at that time into any contract for the sale of said lands. I have examined carefully the precedents cited by defendant on this branch of the case (U. S. v. Winona & St. P. R. Co., 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789, and Same v. Southern Pac. R. Co. [C. C.] 88 Fed. 832), and I fail to find in either of them anything to support the contention that defendant is a "bona fide purchaser." On the contrary, both cases proceed upon the theory that, before there can be a bona fide purchaser, there must be a contract of sale binding upon the parties. In the former—U. S. v. Winona & St. P. R. Co., supra—the supreme court, in discussing section 4 of the act of congress now under consideration, says:

"It will be observed that the technical term 'bona fide purchaser' is not found in this section, and, while it is provided that a mortgage or pledge shall not be considered a sale so as to entitle the mortgagee or pledgee to the benefit of the act, it does secure to every one who in good faith has made an absolute purchase from a railroad company protection to his title irrespective of any errors or mistakes in the certification or patent."

Further on, and discussing section 5 of the same act,—the one upon which the defense is rested in the case at bar,—the court says:

"It is true, the term used here is 'bona fide purchaser,' but it is a bona fide purchaser from the company; and the description given of the lands, as not conveyed and 'for any reason excepted from the operation of the grant,' indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent. These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a bona fide purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a 'bona fide purchaser,' has nevertheless purchased in good faith from the railroad company."

The court then, on the page last quoted, summarizes its views as follows:

"Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims."

Thus it will be seen that, while the court holds that absence of notice is not essential to a bona fide purchaser, within the meaning of the act in question, yet nowhere in the opinion can there be found any intimation whatever that there can be a bona fide purchaser without a sale or purchase, while the contrary view—that there must be a sale or purchase, binding upon the parties, before there can be a bona fide purchaser—is kept prominent throughout the whole opinion. The contention of said defendant that she is a bona fide purchaser, within the meaning of said section, I think, is untenable.

Referring to subdivision 14 of defendants' opening brief, I would say that I am not unmindful of what are there called the "humanities of this case," and to which my attention is specially invited, namely, the hardships which defendants will suffer by reason of their ejectment from the lands sued for; but due consideration of the law of the case forces me to the conclusion that neither of them has a possessory right to said lands, and that the government has not, either through its legislative or executive department, done anything which bars a recovery in this action. Judgment will be entered for the plaintiff.

## WESTERN UNION TEL. CO. v MORRIS.

(Circuit Court of Appeals, Eighth Circuit. November 14, 1900.)

No. 1,406.

1. TRIAL—INSTRUCTIONS EMBODIED IN GENERAL CHARGE.
   It is not error for a trial court to refuse to give instructions to the jury in the language of counsel, where the substance of these instructions is embodied in its general charge to the jury.
2. SAME.
   Where a general charge correctly states the law of a case, but does not eliminate and set forth the crucial issues which the jury is to determine, or specifically apply the law to those issues, either party is entitled, upon request, to additional instructions from the court which clearly and tersely state to the jury the very issues which they must determine from the evidence, and the law specifically applicable to those issues.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

Clifford Histed and W. H. Rossington (George H. Fearons and Charles Blood Smith, on the brief), for plaintiff in error.

S. B. Isenhart, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The defendant in error, Daisy E. Morris, sued the plaintiff in error, the Western Union Telegraph Company, for damages caused by its negligence in transmitting a telegram, and recovered a verdict and judgment for $4,500 and costs, which are challenged by this writ of error.

The material facts on which this judgment rests are these: In

February and March, 1892, the defendant in error suffered from an attack of peritonitis. She recovered from this disease, and became so well that for many months before December, 1895, she performed the labor and discharged the duties of the wife of a farmer whose family consisted of himself, his wife, one or two children, and some hired men. Nevertheless, the attack of peritonitis from which she had suffered in 1892 had left her ovaries and fallopian tubes in such a diseased condition that there was greater liability to a recurrence of peritonitis than there had been before that attack. On December 4, 1895, she suffered from a severe pain in the head and shoulder, and her husband caused the operator of the plaintiff in error at Hoyt, in the state of Kansas, where she lived, to be informed that she was seriously ill, and to receive a telegram to be sent to Dr. Dawson at North Topeka, in the state of Kansas, summoning him to the bedside of the defendant in error on the first train on the morning of December 5, 1895. This telegram was delivered to the operator at about 7 o'clock in the evening of December 4th. It read: "Dr. Dosen: Come on the morning train, and not fail. Ans. I will meet you. Frank Morris, Hoyt, Kas." When this telegram was delivered to Dr. Dawson by the telegraph company at about 9 o'clock on that evening, it read: "Dr. A. Dawson, North Topeka, Kas.: Come on morning train without answer. Fronk." The result was that the doctor did not know that the telegram was from Frank Morris, and did not go to Hoyt until he received another telegram from Morris in the forenoon of the next day, so that his arrival at the residence of Mrs. Morris was in the afternoon of December 5th, and about nine hours later than it would have been if the first telegram had been correctly transmitted and delivered. Meanwhile the illness of Mrs. Morris had developed into general peritonitis, which caused her great pain, and resulted in suppuration and the formation of pus. Within an hour after his arrival, Dr. Dawson relieved her of the severe pain, and he testifies that, if he had arrived at the inception of the peritonitis, he could and would have relieved her at once, and have prevented the suppuration and formation of pus. During December 5th, and before Dr. Dawson arrived, another physician was in attendance upon Mrs. Morris. After receiving the treatment of Dr. Dawson, Mrs. Morris recovered from the attack of peritonitis to such an extent that she could sit up, and could walk a short distance, but she was not able to resume her work as a housewife, and on December 26, 27, and 28, 1895, her symptoms became so alarming that her physicians decided that a surgical operation was necessary to save her life. They performed this operation on December 29, 1895. They opened her abdomen, and found on one side a sack made up of the fallopian tube, the remnants of the ovary, and seven or eight ounces of pus; while on the other side the ovary was buried in adhesions, and the fallopian tube was diseased. This condition of the ovaries and of the fallopian tubes indicated that the abnormal adhesions in which they were involved were not the result of the attack of peritonitis in December, 1895, but that they must have been caused by the attack of 1892. The condition in which these parts were found showed that the fallopian tubes must

have been infected with germs of disease ever after that earlier attack, which, although they lay dormant from 1892 to 1895, were liable at any time to cause inflammation and peritonitis; and that after 1892 there was no other way than by means of a surgical operation whereby the defendant in error could be cured of this diseased condition. In this state of the facts there was a spirited contest at the trial over the question whether the attack of peritonitis in 1895 was the cause or the effect of the diseased condition of the ovaries and the fallopian tubes.

The part of the charge of the court which is material to the questions now to be considered reads in this way:

"On the part of the defendant it is claimed that the evidence shows that during the nine-hours delay between the time that Mr. Dawson might have arrived and the time that he did arrive Mrs. Morris was resting easily, and was asleep part of the time, due to the ministration of the local doctor, and that she suffered no more pain during that period than she would probably have suffered if Dr. Dawson had arrived on the morning of the 5th; that the suppuration or diseased condition which made it necessary to remove her ovaries and fallopian tubes was not the result of the peritonitis, but was the efficient cause thereof. In other words, it is contended by the plaintiff that the diseased condition of those organs of her body was the direct and proximate result of the peritonitis, while it is claimed by the defendant that the peritonitis was the direct and proximate result of the diseased condition of those organs; so that you will see that counsel are arguing from different standpoints, and have been during the entire progress of their arguments. * * * It is incumbent on the plaintiff to prove three things by a preponderance of the evidence: First. That the defendant was negligent in the transmission of the telegram. * * * Second. Had the message been correctly transmitted and delivered, would Dr. Dawson have gone on the first train to the bedside of Mrs. Morris? You have heard the evidence as to that. Third. Did his failure to go, caused by the incorrect transmission of the telegram, produce any injuries to the plaintiff which were the direct and proximate results of such delay? A proximate cause is one which, in a natural and continuous sequence, produces a condition or result complained of which would not exist were it not for that cause. In other words, as applied to this case, did the delay mentioned, if it were caused by the negligence of the defendant, naturally and probably cause the plaintiff any pain or injury which ought to have been foreseen in the light of the attendant circumstances? The plaintiff cannot recover for any pain or injury unless it be the proximate and natural result of the negligence of the defendant company. Anything that is reasonably ascribable to other causes than the negligence of the defendant will not afford plaintiff a cause of action. If you believe, from a fair preponderance of the evidence, that the defendant was negligent in transmitting the telegram for a physician, and that the defendant at the time was advised of the importance and urgent need of a physician; that the physician would reasonably have come in time had it been received by him, and that he was directly delayed in coming by reason of the defendant's error in transmitting it; and that the plaintiff directly and proximately, by such negligence and delay, and without contributory negligence on her part, suffered injury in the disease taking a more serious turn, requiring an operation to be performed on her, and causing her ill health; and that, if the physician had arrived at an earlier time in response to the telegram, had it been sent and delivered in reasonable time, and correctly so, such serious turn of the disease, the operation, and subsequent ill health of the plaintiff would have been prevented,—in such case the plaintiff would be entitled to recover of the defendant such sum as, in your best judgment and soundest discretion, will fairly and reasonably compensate her for such injuries as she may have alleged in her petition, and as the preponderance of the testimony fairly proves to have been brought about and produced directly through and because of the defendant's negligence in sending such telegram and the consequent delay in obtaining the physician."

The plaintiff in error requested the court to charge the jury that, even on the defendant in error's theory of the case, she was not entitled to recover any damages on account of the surgical operation if she became sick with peritonitis on December 4, 1895. The court refused this request, and gave no equivalent instruction. The testimony was full and undisputed that, if the physician failed to reach the patient within nine hours after the inception of the peritonitis, his arrival would have been too late to have prevented the suppuration which necessitated the surgical operation. Dr. Dawson, the expert of the defendant in error, himself testified that, so far as suppuration was concerned, it would make no material difference whether the physician was delayed nine hours or twice nine hours after the inception of the acute peritonitis, and there was no evidence to the contrary. It inevitably followed from the fact thus established that, if the commencement of the peritonitis was on December 4, 1895, the delay which caused the suppuration and the operation was the failure of the defendant in error to secure the attendance of a physician on that day, and not the failure of the telegraph company to correctly transmit the summons for a doctor to come on the morning of the next day. There was substantial testimony from which the jury might well have inferred that the inception of the peritonitis was on the 4th day of December, 1895. The husband of the defendant in error testified that on the evening before that day he told the telegraph operator that his wife was sick, and that he was thinking of sending for a doctor. The boy who was living with Mrs. Morris, and who took the message from her residence to the operator on the evening of December 4th, told the latter that she was very sick, and that they did not expect her to live. The sister of Mrs. Morris testified that she was at the latter's residence between 5 and 6, probably later, in the evening of December 4th, and that Mrs. Morris was in bed, and that she thinks they were putting hot applications upon her. In view of this testimony the instruction requested by the counsel for the telegraph company was a correct statement of the law applicable to the case, and there was ample evidence to warrant its submission.

The plaintiff in error also requested the court to charge the jury: (1) That if the condition of the organs of the defendant in error was such when the message was sent that their removal was necessary, and could not have been prevented if Dr. Dawson had arrived when he was summoned, the defendant in error was not entitled to recover any damages on account of the surgical operation; (2) that the defendant in error was entitled to recover for such aggravation of her physical pain and suffering as was caused by the delay of the doctor which resulted from the failure to properly transmit the telegram, but that she could not recover for the pain which she would have suffered if he had not been so delayed; and (3) that, if the defendant in error procured the services of another physician, who so attended her during the delay in the arrival of Dr. Dawson that she suffered no more at any time than she would have suffered, and was in no worse condition when Dr. Dawson arrived than she would have been if he had promptly responded to the first call, then the

plaintiff in error was entitled to their verdict. The court refused to give either of these instructions, and each of its refusals is assigned as error. These requests present correct statements of the law which were applicable to the evidence in the case. In support of the rulings of the court counsel for the defendant in error invoke the rule that it is not erroneous for the trial court to refuse to give instructions to the jury in the language of the attorneys when the substance of the instructions is embodied in the general charge of the court. The soundness of this rule is conceded, but its applicability to this case is not admitted. It may be that the substance of some of the requests can be deduced from the general charge of the court by a careful and painstaking process of reasoning. Thus it may be said that the court charged that the defendant in error could not recover for anything which she did not prove by a fair preponderance of evidence to be the natural and probable result of the negligence of the plaintiff in error in transmitting the telegram, but that if they believed, from a fair preponderance of the evidence, that the plaintiff in error "directly and proximately, by such negligence and delay, suffered injury in the disease taking a more serious turn, requiring an operation to be performed upon her," she could recover such damages as were directly and proximately caused by such negligence and delay; and that, in effect, this was to say that she could not recover damages on account of the surgical operation if her organs were so diseased when the message was sent that their removal could not have been prevented, and that she could not recover for any pain which she would have suffered if the message had been properly transmitted, because in such a state of facts the surgical operation and the pain would not be the natural and probable result of the failure to properly transmit the message. But this conclusion is a deduction from a careful study of the written charge and an extended process of reasoning. The jury had no opportunity to study this charge in this way. They did not read it at all, and heard it but once. It is plain that it did not as clearly present to those who heard it the real issues as did the requests for instructions which formulated them. A single delivery or reading of this general charge probably would not at once present to the minds of all who heard it the crucial questions in this case, while the submission of the instructions requested which clearly stated those issues and applied the law to them would have been sure to do so. Moreover, the argument that these issues are, in substance, presented in the general charge on the law of proximate cause, proves too much. It is equally cogent to present the proposition that a general statement that damages caused to a plaintiff by the negligence of a defendant may be recovered covers in substance all the legal questions which arise in an action for negligence. General charges of this character often fail to present to the minds of those who hear them but once, and have no opportunity to carefully read and study them, the actual issues which they are to decide. A plain statement of the actual issues left for the jury to decide at the conclusion of the evidence, and an application of the law to those very issues in the charge or the instructions of the court, is more helpful

to the jury, and far more conducive to the administration of justice, than an abstract statement of the legal propositions which govern the case.

The counsel for the plaintiff in error requested the court to give to the jury instructions which tersely and fairly presented the crucial questions in this case to the jury. The general charge did not so submit them, but left the jury to eliminate them from the mass of evidence and argument, to apply a general statement of the law of probable cause to them, and then to decide them. In this state of the case, we are not persuaded that the substance of the instructions requested by counsel for the plaintiff in error can fairly be said to be embodied in this general charge. There is no statement whatever in it that the defendant in error could not recover on account of the surgical operation, even on her theory of the case, if she became sick with peritonitis on December 4, 1895, and there is nothing in the charge equivalent to that statement. There is no plain instruction in the charge, either, that, if the condition of the organs of the defendant in error was such when the message was sent that their removal could not have been prevented if Dr. Dawson had arrived when he was summoned, she could not recover on account of the consequences of the operation, or that she could recover for the aggravation of pain caused by the delay of the doctor which resulted from the failure to transmit the telegram only, and that she could not recover for the pain which she would have suffered if he had not been delayed, or that, if she procured the services of another physician, who so attended her during the delay in the arrival of Dr. Dawson that she suffered no more at any time, and was in no worse condition when Dr. Dawson arrived, than she would have been if he had promptly responded to the first call, she was not entitled to a verdict. The instructions which embodied these statements present the real questions which it was the duty of the jury to decide in this case, and the plaintiff in error was entitled to have them tersely and clearly submitted to the jury by the court. A general charge which correctly states the law of a case, but does not eliminate and state the crucial issues in it which the jury is called upon to determine, may not be subject to exception. But, upon request, either party is entitled to additional instructions from the court which tersely and clearly state the crucial issues which the jury must determine from the evidence, together with the law applicable to those very issues. The instructions requested did this, and the charge did not do it. The requests for their submission to the jury should have been granted. The Encyclopædia of Pleading and Practice states the rule upon this subject in these words:

"Thus it is erroneous to refuse an instruction applying a principle of law to the facts in the case, even though the same principle be stated abstractly in other instructions. It is better practice to charge the law as applied to the respective theories contended for than to announce principles in the abstract. So it is erroneous to refuse a request where the charge given does not state the requested point in clear and unmistakable language, and where the language of the request will be more readily understood by the jury." 11 Enc. Pl. & Prac. 298, 299; Muldowney v. Railroad Co., 39 Iowa, 615, 619, 620; Parkhill v. Town of Brighton, 61 Iowa, 103, 108, 15 N. W. 853; Devitt v. Railroad Co.,

50 Mo. 302, 305; Aldrige v. State, 59 Miss. 250, 257; Lamar v. State, 64 Miss. 428, 430, 1 South. 354; Gerdine v. State, 64 Miss. 798, 801, 2 South. 313; Thompson v. Thompson, 77 Ga. 692, 698; Railway Co. v. Johnson, 90 Ga. 500, 16 S. E. 49.

In Railway Co. v. Johnson, supra, it was held that a specific charge, which was legal, and adjusted to a distinct matter in issue involving the right of the plaintiff to recover, and which might materially aid the jury, should have been given as requested, although in principle, and in more general and abstract terms, it might be covered by other instructions given by the court. In Thompson v. Thompson, supra, the supreme court of Georgia said:

"Where several distinct matters involving diligence are presented to the jury, while it is proper to charge a general principle applicable to them all, yet if a specific charge, which is legal, apt, and precisely adjusted to one of them, be requested, it is proper to give the latter also, if it would materially aid the jury in applying the general principle to this one of the several matters for their consideration. Now, law is not only to be submitted to the jury, but it is to be applied by them; and where its application is materially aided by a specific request, there seems as much reason to give that request as to give the principle; and, looking to the evidence in this case, we have no doubt that the request was a proper one. It was bringing the general principle down to this specific instance, and the jury would have been helped materially by having the very words of this request delivered to them as a part of the charge of the court."

And that court reversed the judgment below for the failure to give the specific instruction.

On account of the refusal of the circuit court to submit to the jury the requested instructions which have been discussed, the judgment below must be reversed, and the case must be remanded to that court, with instructions to grant a new trial. It is so ordered.

THAYER, Circuit Judge. I agree to the reversal of the judgment of the trial court, but not upon the grounds stated in the foregoing opinion, from which both Judge CALDWELL and myself dissent. After a careful perusal of the testimony as contained in the present record, I have reached the conclusion that there was no substantial evidence tending to show that the surgical operation of which the plaintiff below complained was occasioned by the defendant company's neglect to transmit the telegram of December 4, 1895, correctly. On the facts disclosed by this record there is no reasonable ground for the contention that the negligence complained of was the proximate or efficient cause of the operation. For that reason I am of opinion that the trial court should have instructed the jury, as it was requested to do, that the plaintiff was not entitled to recover "for any damages resulting from the surgical operation, or any consequences flowing therefrom"; and that the recovery should have been limited to compensation for such increased pain and suffering as the plaintiff below may have sustained by reason of not receiving proper surgical attention at the proper time, owing to the mistake made in transmitting the message. The charge by the learned judge of the trial court, in my judgment, sufficiently advised the jury that there could be no recovery on account of the surgical operation, if the condition of the plaintiff's organs was

such when the message was sent that their removal was necessary, and could not have been prevented if Dr. Dawson had arrived on the morning of December 5th, when he was summoned. It also clearly advised the jury that she could not recover for pain which she would have suffered even if Dr. Dawson had not been delayed by the mistake made in transmitting the message. I think that both of these propositions were clearly embraced in the charge in chief, and that no error was committed in refusing the special requests in which those propositions were embraced, and, in substance, reiterated. It is a well-settled doctrine in the federal courts that error cannot be successfully assigned because of the refusal to give special instructions the substance of which is embraced in the charge in chief. Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Railroad Co. v. Winter's Adm'r, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; Railroad Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; Ormsby v. Webb, 134 U. S. 47, 10 Sup. Ct. 478, 33 L. Ed. 805; Anthony v. Railroad Co., 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301. The rule in question tends to shorten litigation. It frequently avoids the necessity of giving a multitude of special instructions, which would confuse, rather than enlighten, a jury; and it should be upheld. I do not assent to the foregoing opinion, therefore, in so far as anything therein contained may tend to weaken or impair the force and effect of the doctrine in question. I am authorized to state that Judge CALDWELL concurs with me in the views last stated, and that he also concurs in the view first expressed, that the present record does not contain substantial evidence warranting the submission to the jury of the issue whether the mistake made in transmitting the telegram was the proximate cause of the operation.

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## In re WOODSIDE COAL CO.

(District Court, E. D. Pennsylvania. December 3, 1900.)

No. 591.

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—MINING CORPORATION.

A corporation whose sole business is the mining of coal and preparing and shipping the same to market is not engaged in trading or mercantile pursuits, within the meaning of Bankr. Act 1898, § 4, cl. "b," and cannot be adjudged a bankrupt.

In Bankruptcy. On motion by bankrupt to set aside adjudication and dismiss petition.

Conard & Middleton, for petitioning creditors.

R. H. Koch and D. W. Kaercher, for other creditors.

McPHERSON, District Judge. The bankrupt having moved to set aside the adjudication on the ground that a coal-mining company is not a corporation principally engaged in manufacturing, trading, or mercantile pursuits (section 4, cl. "b," Act 1898), the question was referred to the referee, who decided in favor of the motion. The

relevant facts are that the bankrupt is a Pennsylvania corporation, chartered for the purpose of "mining and quarrying coal and preparing and shipping the same to market," and that its sole business has been the carrying out of this purpose. Upon these facts I am of opinion that the decision of the referee was right, and that the petition must be dismissed.

That a mining company is not engaged in manufacturing, within the ordinary meaning of this word, has been several times decided, and I agree with the correctness of the ruling. Whether a mining company is not engaged in trading—using that word in a large sense—may, perhaps, admit of more doubt, and I am not sure how I might decide that question if the point arose now for the first time. But the question has already been decided in three cases that arose in other districts, and I am unable to reach a clear conviction that a different conclusion should have been reached. In view of the advisability of uniformity in decision, so far as uniformity may be attainable, I shall therefore follow my Brethren who have already considered this question and have decided that a mining company is not engaged in trading or mercantile pursuits. In re Elk Park Min. & Mill. Co. (D. C.) 101 Fed. 422; In re Rollins Gold & Silver Min. Co. (D. C.) 102 Fed. 982; In re Chicago-Joplin Lead & Zinc Co. (D. C.) 104 Fed. 67. See, also, the analogous cases In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co. (D. C.) 96 Fed. 756, and In re New York & W. Water Co. (D. C.) 98 Fed. 711. Contra, In re San Gabriel Sanatorium (D. C.) 95 Fed. 271.

It may, perhaps, be worth suggesting that, although mining companies are in some sense engaged in trade, nevertheless they belong so plainly to a distinct class of trading corporations that they are almost always specifically named in any statute that is intended to embrace them. Failure to name them, therefore, raises a presumption of some force that they were not in the legislative view.

The adjudication is set aside, and the petition in bankruptcy is dismissed.

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## In re MILLER.

(District Court, N. D. Iowa, W. D. December 3, 1900.)

BANKRUPTCY—CONTEMPT—DISOBEDIENCE OF ORDER OF REFEREE.

Under Bankr. Act 1898, a referee has authority to enter an order directing a bankrupt to surrender to his trustee any money or property which belongs to his estate, and which is found by the referee, after a hearing, to be in his possession or under his control; and on a failure or refusal to obey such order the referee may enter such fact on the record, and it is then his duty to certify the facts to the judge, who alone has authority, under section 41b, to adjudge the bankrupt in contempt, and impose the punishment therefor.

In Bankruptcy. On exceptions to order of referee directing payment of a certain sum to the trustee, and on certificate of referee.

E. C. Herrick and Wilber Owen, for trustee.

Sullivan & Griffith, for bankrupt.

SHIRAS, District Judge. Upon the evidence submitted in this matter the referee found and held that it appeared that the bankrupt had in his possession or under his control the sum of $15,000, which he had not accounted for or turned over to the trustee, and thereupon an order was entered by the referee requiring the bankrupt to forthwith pay the sum to the trustee, and adjudging him in contempt for a failure to make payment as ordered. Thereupon the attorneys for the bankrupt petitioned for a review of the ruling of the referee on the ground that the evidence did not justify the finding that the bankrupt had in his possession any money or property belonging to his estate, much less the sum of $15,000, and the orders of the referee were therefore without foundation, and improvidently made. In the case of In re Rosser, 41 C. C. A. 497, 101 Fed. 562, the court of appeals for this circuit held that:

"Under the general rules of law and under the specific provisions of the bankrupt act, a court of bankruptcy has power and jurisdiction to make an order requiring the bankrupt to pay or deliver to his trustee in bankruptcy money or other property in his possession or control, constituting a part of his estate in bankruptcy, and which he has not surrendered or accounted for, and to enforce his obedience to such order by commitment as for contempt."

Under the rule laid down in this case it is clear that the referee, upon whom is imposed the duty of collecting through the trustee the property of the estate, had the right to enter an order directing the bankrupt to surrender to the trustee any money or property which the referee found to be in possession or under the control of the bankrupt, opportunity having been given to the bankrupt to be heard upon the question; and upon the refusal or neglect of the bankrupt to obey the order thus made the referee had the right to enter upon the record the fact that the bankrupt had refused obedience, and therefore was in contempt of the court. Beyond this, however, the referee could not rightfully go, as the provisions of section 41 of the act require that the referee, in cases of disobedience to any lawful order, process, or writ, as well as in cases of misbehavior, shall certify the facts to the judge, who shall thereupon in a summary way hear the evidence, and deal with the case as though the question had originally arisen in the district court. The referee having certified the facts as required by section 41, the matter came properly before the court, and was set down for hearing, notice thereof being given to the attorneys of record representing the bankrupt and those representing the trustee. Upon this hearing the main contention was over the question whether the evidence justified the finding of the referee that the bankrupt had in his possession money or property which he had not surrendered to the trustee. I am satisfied that the evidence justified the finding that the bankrupt had in his possession money and property to a considerable amount which he had not delivered to the trustee. Whether the sum fixed by the referee, to wit, $15,000, is in excess of the amount wrongfully withheld by the bankrupt, is open to question, but there is evidence to sustain this finding. The bankrupt does not propose to turn over any sum whatever, nor does he, in person, attempt to explain the present situation of his estate. In fact, it is said that he has fled the country. Under these circum-

stances it will be held that the bankrupt is in contempt, in that he has failed to obey the order of the referee, or to show cause why the order should be rescinded in whole or be modified as to amount, and it is therefore ordered that, if the said bankrupt can be found within the jurisdiction of the court, he be at once taken into custody by the marshal, and be committed for safe-keeping until he yields obedience to the order of the court, or until he is otherwise lawfully released.

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## TUBBS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1900.)

No. 1,400.

1. INDICTMENT—DESCRIPTION OF OFFENSE—OMISSION OF OBSCENE MATTER.
An indictment for mailing an obscene, lewd, and lascivious letter is not defective because it fails to set out such letter, where it is alleged that its contents are too obscene to be spread upon the records of the court.
2. CRIMINAL LAW—SUFFICIENCY OF INDICTMENT TO SUPPORT JUDGMENT.
Where a defendant was convicted on a number of counts, but the sentence does not exceed that which might lawfully be imposed on any one of such counts, one good count is sufficient to sustain the judgment.
3. SAME—TRIAL—EVIDENCE.
That expert witnesses stated unqualifiedly that certain letters were in the handwriting of defendant, instead of stating that such was their opinion, is not prejudicial error.
4. SAME—REVIEW ON APPEAL—FAILURE TO OBSERVE RULES.
While the circuit court of appeals may waive a noncompliance with its rule requiring a plaintiff in error to set out the exceptions relied upon in his brief in a criminal case, as to matters going to the foundation of the prosecution, it will not do so as to exceptions to the admission of evidence which are technical, and do not go to the merits of the case.
5. SAME—ADMISSION OF INCOMPETENT EVIDENCE—EFFECT OF WITHDRAWAL.
The introduction in evidence by mistake in a criminal case of a letter which was inadmissible is not an error which cannot be cured by the court by striking it out on discovering the mistake, and directing the jury not to consider it, or any evidence relating to it.

In Error to the District Court of the United States for the District of South Dakota.

The defendant was indicted, under section 3893 of the Revised Statutes of the United States, for depositing in the post office, to be mailed and delivered, obscene, lewd, and lascivious letters, and letters giving information where, how, and of whom articles and things could be obtained for the procuring of an abortion. The first trial of the case was a mistrial. 94 Fed. 356. A second indictment was preferred against the defendant, which was consolidated with the second, fourth, and fifth counts of the first indictment; a demurrer to the other counts of that indictment having been sustained. On the second trial the defendant was convicted on the fifth count of the first indictment, and the first, second, third, and fourth counts of the second indictment, and sentenced to imprisonment at hard labor for two years on the conviction under each of the counts, the sentences to run concurrently. The defendant reserved exceptions at the trial, and has removed the case into this court by writ of error.

Frank R. Aikens (Harold E. Judge, on the brief), for plaintiff in error.

William G. Porter (James D. Elliott, on the brief), for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

On the trial objection was made to the introduction of any evidence by the government in support of the second, fourth, and fifth counts on the first indictment upon the ground "that they do not state facts sufficient to constitute a public offense or a violation of the statutes of the United States, and that they do not, nor does either of them, apprise the defendant, with a sufficient directness or certainty, of the nature of the charge against him." A like objection was made to the introduction of any evidence in support of the first, third, and fourth counts of the second indictment, "for the reason that it appears from each of them that neither of them contains matter giving information where, how, and of whom might be obtained an article or medicine designed and intended for the procuring of an abortion." The counts of the first indictment are alike, and, omitting the formal parts, charged that the defendant did "unlawfully, willfully, and knowingly deposit, and cause to be deposited, in a post office of the United States, to wit, the post office at Alcester, in the county of Union, state of South Dakota, for mailing and delivery by the post-office establishment of the United States, certain nonmailable matter, to wit, a letter inclosed in an envelope, and which said letter was obscene, lewd, and lascivious, and of an indecent character, and is offensive, and unfit to be set forth in this instrument, and to be spread at length upon the records of this honorable court, wherefore the grand jurors aforesaid do not set forth the same in this indictment, and which said envelope containing the letter aforesaid was then and there directed to and addressed as follows, that is to say, 'Miss Clara Saltness, Alcester, S. D.'; he, the said Richard A. Tubbs, then and there well knowing the contents of the said letter, and the character thereof, and well knowing the said letter to be obscene, lewd, lascivious, and of an indecent character."

One contention is that these counts do not charge a public offense, because the letters themselves alleged to be obscene, lewd, lascivious, and indecent are not set out, and because the description of the letters is not so definite and precise as to enable the defendant to avail himself of a plea of former conviction or acquittal. These objections are answered by repeated decisions of the supreme court. The rule is stated in Rosen v. U. S., 161 U. S. 29, 40, 16 Sup. Ct. 434, 438, 40 L. Ed. 606, 609. In that case Mr. Justice Harlan, delivering the judgment of the court, said:

"The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer, or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense; that this right is not infringed by the omission from the indictment of indecent and obscene matter

alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that, in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice."

Defendants in this class of cases commonly affect ignorance of what they are indicted for, and great apprehension lest they shall be indicted a second time for the very same offense, and be unable to prove by the record a former conviction or acquittal. No case of the kind has ever occurred, or is ever likely to occur, but the affected apprehension of each defendant that it may occur in his case is perennial. The supreme court has put a quietus on these stock objections by repeatedly pointing out that the defendant may apply for a bill of particulars (Rosen v. U. S., 161 U. S. 29, 34, 35, 39–41, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Durland v. U. S., 161 U. S. 306, 315, 16 Sup. Ct. 508, 40 L. Ed. 709), and that parol evidence is always admissible, and sometimes necessary, to establish the defense of prior conviction or acquittal (Dunbar v. U. S., 156 U. S. 185, 191, 15 Sup. Ct. 325, 39 L. Ed. 390; Durland v. U. S., 161 U. S. 306, 314, 315, 16 Sup. Ct. 508, 40 L. Ed. 709).

It is common learning that, where the matter is too obscene to be spread upon the records of a court of justice, it may be omitted from the indictment upon an allegation to that effect. Rosen v. U. S., 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Dunlop v. U. S., 165 U. S. 486, 497, 17 Sup. Ct. 375, 379, 41 L. Ed. 799, 802. In the case last cited the court say:

"Whether the matter was too obscene to be set forth in the record was a matter primarily to be considered by the district attorney in preparing the indictment, and, in any event, it was within the discretion of the court to say whether it was fit to be spread upon the records or not. We do not think that error will lie to the action of the court in this particular."

The objection that the counts in the second indictment do not purport to give information "where, how, and of whom might be obtained an article or medicine designed and intended for the procuring of an abortion" is unfounded in fact. The letters seem to have been written for the sole purpose of giving such information, and they do give it, or purport to give it. Quotations from the letters would demonstrate this fact, but the matter is too gross and immoral to be introduced into the reports of this court.

All the counts are good, but if one or more of them was bad the judgment would still be good. It is conceded the second count in the second indictment is good, and "one good count is sufficient to sustain the judgment" (Dunbar v. U. S., 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. Ed. 390), where, as in this case, the punishment imposed by the sentence of the court does not exceed that imposed upon the conviction under the good count (Haynes v. U. S., 42 C. C. A. 34, 101 Fed. 817; Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Id., 153 U. S. 608, 14 Sup. Ct. 939, 38 L. Ed. 839;

Claassen v. U. S., 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Peters v. U. S., 36 C. C. A. 105, 94 Fed. 127; 2 Bish. Cr. Proc. 841; Dunbar v. U. S., 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. Ed. 390). The only punishment imposed is imprisonment, and the sentence imposed the same term of imprisonment on the conviction under each count, the sentences to run concurrently, so that the defendant's punishment is precisely what it would have been if he had been convicted and sentenced on the confessedly good count alone.

Assignments 7 to 18, both inclusive, in the language of the brief of counsel for the plaintiff in error, "have reference to but one proposition," and that is that the expert witnesses called to prove the letters were in the handwriting of the defendant stated unqualifiedly that they were in his handwriting, when they should have been required to state that, in their "opinion," they were in his handwriting. The objection is not made that the witnesses were not qualified to testify as to the defendant's handwriting. They had seen him write frequently, and were, moreover, experts in handwriting. The point is too fine spun to require further notice.

Moreover, none of the exceptions to the evidence are set out in the brief of the plaintiff in error, as required by rule 24 of this court. City of Lincoln v. Sun Vapor Street-Light Co. of Canton, 19 U. S. App. 431, 8 C. C. A. 253, 59 Fed. 756; Western Assur. Co. of Toronto v. Polk (decided at the present term) 104 Fed. 649; Oswego Tp. v. Travelers' Ins. Co., 36 U. S. App. 13, 17 C. C. A. 77, 70 Fed. 225; Van Gunden v. Iron Co., 8 U. S. App. 229, 248, 3 C. C. A. 294, 296, 52 Fed. 838, 841; Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 24 U. S. App. 38, 45, 12 C. C. A. 350, 353, 63 Fed. 891, 894; Doe v. Mining Co., 44 U. S. App. 204, 214, 17 C. C. A. 190, 196, 70 Fed. 455, 461; Sovereign Camp Woodmen of the World v. Jackson, 38 C. C. A. 208, 97 Fed. 382. And, while we have waived the noncompliance with the rule as to the exceptions challenging the sufficiency of the indictment which went to the foundation of the prosecution, we feel constrained to enforce it so far as relates to objections to evidence not at all going to the merits of the case. We have gone over the record very carefully to see if there was "a plain error" in admitting or rejecting evidence material to the merits of the case, and find no such error, nor, indeed, any error whatever.

One other assignment, because much insisted on, will be considered. When introducing the letters in evidence, the government, by mistake, put one letter in evidence known as "Exhibit 2," which, because it had not been declared on or for some other reason, ought not to have been introduced. As soon as the mistake was discovered, the court promptly said to the jury:

"It seems counsel for the prosecution mistook the letter, and the letter that ought to have gone in has not gone in at all. The letter that ought not to have gone in was this Exhibit 2, together with the envelope. Make the record there that Exhibit 2, and all evidence in relation thereto, is struck out, and the jury directed to pay no attention to that."

It is insisted that nothing the court could say or do could nullify the mistake, or banish from the minds of the jury the effect of the mistake. This contention is put at rest by the decision of the su-

preme court in Pennsylvania Co. v. Roy, 102 U. S. 451, 459, 20 L. Ed. 141, 145, where the court say:

"To this position we cannot assent, although we are referred to some adjudged cases which seem to announce the broad proposition that an error in the submission of evidence cannot afterwards be corrected by instructions to the jury, so as to cancel the exception taken to its admission. But such a rule would be exceedingly inconvenient in practice, and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle, or by sound reason, and is against the great weight of authority. The charge from the court that the jury should not consider evidence which had been improperly admitted was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

Finding no error in the record prejudicial to the defendant, the judgment of the district court is affirmed.

## BRADFORD v. BELKNAP MOTOR CO.

(Circuit Court, D. Maine. November 12, 1900.)

No. 517.

1. PATENTS—CONSTRUCTION OF CLAIMS—PAPER PATENTS.
   While the fact that a patented device has not gone into practical use does not necessarily defeat the patent, yet, with reference to construing the claims, it necessitates caution to avoid going beyond what the actual invention clearly shows.
2. SAME—SUIT FOR INFRINGEMENT—ACCOUNTING.
   It seems that the court will not appoint a master in a patent cause in equity, where it is apparent that the damages will be trivial or disproportionate to the expense of taking the accounts.
3. SAME—INJUNCTION—LACHES.
   The defense of laches is not ordinarily effective to bar injunctions against infringers who have been seasonably notified of the patentee's rights, when it appears that the complainant was disabled from carrying on litigation by lack of financial means.
4. SAME—INFRINGEMENT—ELECTRICAL APPARATUS.
   The Bradford patent, No. 535,158, for a method of, and apparatus for, regulating electric circuits, construed, and *held* not infringed.

In Equity. Suit for infringement of a patent. On final hearing.

Clifton V. Edwards, for complainant.
Edward M. Rand and Seth L. Larabee, for respondent.

PUTNAM, Circuit Judge. This case relates to applied dynamic electricity with reference to some of its most complicated and delicate phases. A thorough understanding of the purposes which the inventor sought to accomplish, and of the principles applicable there-

to, in the absence of a thorough explanation by experts of both practical and scientific attainments in the art, requires a mastery of the particular science to which the patent in suit relates. Although the patent issued in March, 1895, the inventor's device never has gone into commercial use, and no practical machine illustrating it has ever been constructed. Neither has the court been assisted by any model, and the expert testimony on either side proceeds too much on the assumption that the court has a special knowledge which it would not be justified in making use of, even if it thought itself possessed of it. Packard v. Lacing-Stud Co., 16 C. C. A. 639, 70 Fed. 66, 67; Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co., 25 C. C. A. 420, 80 Fed. 287, 290; Parsons v. Seelye, 40 C. C. A. 484, 100 Fed. 452, 454.

At the hearing we gathered an apprehension of the conclusions which we must reach. Our subsequent investigations have not changed that apprehension; and, although it has increased our doubts with reference thereto, yet we are satisfied that they would not be removed by further consideration of the case, and that the interests of the parties will be better advanced by a disposition of the suit which will enable an appellate tribunal seasonably to review it, rather than by holding it longer under advisement.

Although the fact that the complainant's device has not gone into practical use does not necessarily defeat the patent, and although, on the authority of Packard v. Lacing-Stud Co., ubi supra, it probably passed the experimental stage, yet, applying the rules with reference to mere paper machines, stated in Ford v. Bancroft, decided in this circuit and reported in 85 Fed. 457, 461, and in the same case on appeal (39 C. C. A. 91, 98 Fed. 309, 312, 313), we must proceed with great caution, and avoid giving the complainant the benefit of anything beyond what his invention and patent clearly require. That the complainant has shown great ingenuity in certain directions is admitted; but to precisely what the ingenuity relates, and how far its results are limited by the prior art, are the main questions in the case.

The patent contains five claims, of which the first, second, fourth, and fifth are in issue. For the purpose of making clear the conclusions we have reached, it is necessary to repeat only claim 1, as follows:

"In an electric regulating apparatus, the combination of a current-varying device, an electro-magnet, with differential windings to govern the movements of said current-varying device, electric circuits, and a device responsive to variations in the current, to be regulated to control action of said magnet, and driving gear to move said current-varying device progressively."

The patent concerns the method and apparatus for regulating electric circuits. The elements admittedly common to the art prior to the patentee's invention were: First, at one terminus a "current-varying device," which operates by moving either the arm of the rheostat or the brushes which control the subcurrent shunted to the magnets of the electric dynamo; and, second, at the other terminus, a so-called "solenoid," or, in other words, a subsidiary helix, which is more or less magnetized according as the current to be regulated

is more or less weak. This helix, according as the main current varies, draws down or relaxes, through its varying increase or diminution of magnetic power, an arm which, directly or indirectly, operates to move the current-varying device. It is plain, however, that, while we use the expression "current-varying device" as limited to the mechanism which directly impinges on the arm of the rheostat, yet that expression may well be construed to cover the entire mechanism, including both termini which we have named. At various points throughout the claims and specification this expression is used in either sense indiscriminately. In claim 1 it is used in the narrower sense, but in claims 4 and 5 we find the words "current-varying apparatus"; and, on the whole, we are unable to discover anything in the varying use of the expression in question which will enable us to solve the problems which we have to dispose of.

The respondent's alleged infringement grows out of the construction of machines in accordance with the claims of patents to William H. Chapman, dated, respectively, August 31, 1897, March 1, 1898, and November 8, 1898. It is, however, now admitted that the machines constructed in accordance with the earliest of these patents do not infringe. This eliminates 13 from the case. Independently of this, there arises an important question whether, even if the bill were sustained, the complainant would be entitled to any relief beyond an injunction. The respondent urges laches as a reason why an account should not be decreed; but the complainant seasonably notified the respondent of his demand, and he testifies that he was unable to follow up his notice on account of lack of means to carry on patent litigation. That class of litigation, unfortunately, often involves so much expense that the courts are tender to patentees under such circumstances, and the complainant cannot be charged with laches. The difficulty is of a more complicated character.

The record raises in a formidable manner the proposition that the complainant's device was never put on the market because the cost of construction, according to his specification, would be disproportionately expensive. It may be that, even if Chapman can be charged with adapting complainant's underlying conception, he improved on it in the way of simplicity of construction to such an extent as involved invention, and so as to overcome the disproportionate cost of construction. Indeed, the case seems to fall within the late decisions of the supreme court to such an extent as to lay no basis for substantial damages. Coupe v. Royer, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263, and cases based thereon. So far as relates to an account of profits, how can equity require such an account where it appears that the complainant's device is altogether too costly to have any commercial value? And is not the case within Manufacturing Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103?

In Machine Co. v. Crossman (C. C.) 57 Fed. 1021, we declined to appoint a master on the ground that the accounting would be of a trivial character. Our conclusion was overruled by the circuit court of appeals in the same case (61 Fed. 888), but this without any discussion of the underlying principle which governed the circuit court. It is a well-settled rule that neither equity nor admiralty will pro-

ceed for nominal damages only. Little v. Kellam (C. C.) 100 Fed. 353, 355; Munson v. Steamship Co. (C. C. A.) 102 Fed. 926, 928; Curt. Pat. (4th Ed.) 434. Equity will maintain the right to give a value, but it will not, as will the common law, proceed to an assessment of damages which are vague, uncertain, or nominal in amount; so that it is not improbable that, in any event, the complainant could only be entitled to an injunction. Saxlehner v. Siegel-Cooper Co., 179 U. S. 42, 21 Sup. Ct. 16, 45 L. Ed. —, is directly in point.

It is admitted that the complainant's device is ingenious, and it is not denied that he is entitled to be regarded as an inventor. The question, therefore, is limited to one of infringement, and this, as we have already suggested, depends on the breadth of the complainant's invention and the construction of the patent. He claims to have started with the simple form of regulator which we have described, with a solenoid at one terminus and the arm of the rheostat at the other. The arm was ordinarily operated directly from the solenoid by what is called by some of the witnesses a "magnetic pull." The complainant claims to have introduced two elements into this simple device, namely, a relay, and what is described in the claim which we have quoted as a "differential winding." His theory is practically as follows: That it is obvious that the simple device which we have described, dependent for action on the development of a "fault," was defective in principle, and could only partially correct, and not prevent, serious variations in the current; that, to maintain a practically constant force, it was necessary to make use of an auxiliary power or relay; and that the use of an auxiliary power developed a new difficulty,—that is to say, the difficulty of controlling the auxiliary current so as to overcome its inertia, and prevent the excessive sparking which would normally attend its use. It is clear, and it is admitted, that all this was extremely useful in the art. The claims in issue are broad enough to cover these new elements, and the questions arise whether they were new with Bradford, and whether, if new, the patent, taken as a whole, is to be construed as broadly as the mere letter of the claims apparently requires. In view of the rules which we have stated as applicable to merely paper machines, it is evident that the complainant must establish his case clearly on both these points.

Bradford, in his specification, elaborates at great length the method in which he employs the relay current and the so-called "differential winding." The relay current is constant, ready whenever called on to operate the arm of the rheostat. The call on it is made by electrical contacts with the solenoid, the contacts alternating as the core of the solenoid is drawn in or pushed out; thus alternating the movement of the arm of the rheostat in one direction or the other, as the main current develops an excess or an insufficiency of force. The connection is made with the arm of the rheostat through a magnetic "clutch," which, with the aid of the relay current operating through the differential winding, instantly sets the arm in motion, without any obstacle from inertia, and without sparking. This "clutch," it will be noticed, is, in the device shown by Bradford in his specification, interposed between the solenoid, as known in the

original art, and the arm of the rheostat. The respondent, in accordance with the device of Mr. Chapman, makes use of no "clutch," but it applys the relay current and the differential winding directly to the solenoid shown in the original art. If Bradford first brought into the art the relay current and the differential winding, the respondent makes use of the substance of what he invented. In that view, the respondent has merely availed itself of the ingenuity of Chapman, who would be presumed to have begun with the invention of Bradford, and, by improvements, relieved it from the cumbersome mechanism of his electric "clutch," and thus to have materially simplified the device. This, however, even though it involved invention, would have been merely an improvement so far as Bradford was concerned, and therefore subject to the control of the court in his behalf. If, therefore, the claims in the complainant's patent are to be construed broadly according to their letter, and the complainant was the true inventor of all which they covered as thus construed, the respondent cannot escape the charge of infringement.

The testimony, however, in behalf of the respondent is positive that, at the time of the complainant's invention, the art of electric regulators was full, not only of direct-acting solenoids, but of mechanical relays of various types, and that differential winding for the purposes of the art was a well-known device some years before the complainant's application was filed in the patent office. The only contradictory evidence on the state of the art is the statement of the complainant that differential winding was not known to him prior to his invention, but he introduced no proof to show that this suggests anything more than a limited knowledge of this particular branch of the art on his own behalf.

There can be no invention in merely combining in this art a relay current with differential winding. Indeed, the case does not enable us to perceive that there could be differential winding without a relay current, or even that there could be any occasion for the former without the latter. The complainant does not suggest either, but, in connection with its explanation of the necessity of the differential winding, it apparently implies that it exists only as an incident to the relay. Therefore we must hold that both differential winding and the relay current, and the combination of the two, were within the prior art, as that expression is defined by the circuit court of appeals for this circuit in Parsons v. Seelye, 40 C. C. A. 484, 100 Fed. 452; so that, at the time of Bradford's application for his patent, there could be no invention in introducing the same, either separately or in combination.

The complainant's specification is in harmony with this view of the state of the art. It is devoted almost entirely to a description of the electric "clutch" to which we have referred. He immediately precedes his claims with the following sentences:

"To secure powerful and accurate action is the object of the invention described in the foregoing specification. The alternating current causes wheel 16 to be powerfully grasped and instantly released by turns, thereby allowing the apparatus to be driven at a comparatively high rate of speed without losing control of the regulating mechanism attached to said wheel."

The specification also contains the following very significant language:

"The apparatus described in the foregoing specification differs from other apparatus for the same purpose in the means employed to cause instantaneous connection and disconnection between the current-varying device and an auxiliary motor by which it is moved in response to incipient changes in the current to be regulated."

These expressions, in connection with the elaborate details of the electric "clutch" in the specification, may well be presumed to have induced the patent office to have understood that the broad language of the claims was limited to the "apparatus"; that is, to the particular class of machines thus described. However this may have been, the claims are necessarily limited by the prior art as proven in the case. It cannot be holden, therefore, that the complainant is entitled to cover every electric regulator which combines differential winding with a relay, or which includes either without the other; and it follows that the respondent cannot be holden to have infringed.

Let there be a decree under rule 21 dismissing the bill, with costs for the respondent.

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## GAST v. NEW YORK ASBESTOS MFG. CO. et al.

(Circuit Court, E. D. New York. November 21, 1900.)

PATENTS—INVENTION—STEAM-PIPE COVERING.

The Shearer patent, No. 456,661, for a steam-pipe covering, composed of alternate layers of plain and corrugated noncombustible material, the longitudinal air spaces formed by the corrugations being closed at the ends of the section by asbestus or similar material, embodies a combination of elements all of which were old in the art, and none of which perform new functions, either separately or in combination, and, in view of prior patents, is void for lack of invention.

In Equity. Suit for infringement of a patent. On final hearing.

Quincy Ward Boese, for complainant.

Henry Schreiter, for defendants.

THOMAS, District Judge. The complaint states an infringement by the defendants of a patent for steam-pipe covering, secured by letters patent issued to one Shearer, July 28, 1891. The claim is as follows:

"What I claim as my invention, and desire to secure by letters patent, is the following: A detachable pipe-covering section composed of alternate layers of corrugated and plain noncombustible material, whereby longitudinal air spaces are formed throughout the entire length of the section, the ends closed by asbestus or similar material, and having a canvas cover, with means, such as wires, beneath such cover for closing the joint when the section has been placed upon the pipe, all combined substantially as shown and described."

It is conceded that the claim is for a combination device, which admits that the several elements thereof are old, and, indeed, there is no contention to the contrary. The essential features of the covering are (1) a section of alternate layers of corrugated and plain noncombustible material; (2) longitudinal air spaces formed thereby;

(3) the ends of the section closed by asbestus or similar material; (4) an outer canvas cover, with means, such as wires, for closing the longitudinal joint.

The Bradley 1888 patent, improvement in nonconducting covering for steam pipes, boilers, etc., shows two corrugated sheets, with an intermediate wire fabric, corrugated, interposed between two plain sheets, each of which is doubled, with a corrugated wire fabric intervening. The specification states that:

"The coverings consist of a series of nonconducting plain or corrugated sheets, composed of paper, felt, asbestus, or other similar fibrous material, the sheets of the series being all of the same material, or made up of sheets one or more of which are of different material from the others composing the series. The objects of this invention are to increase the durability and materially strengthen such coverings, without destroying the requisite flexibility necessary to enable them to be readily bent and conformed to the surface to which they are to be applied; to stiffen the coverings to a degree sufficient to provide for staying and bracing the sheets of which the coverings are composed, when corrugations in the sheets are of such dimensions that they would otherwise break down, owing to the normal flexibility of the sheets; and to provide one or more layers of a flexible stiffening adapted to retain a variety of forms given to the layers individually or collectively, whereby corrugations may be conveniently made in, or the covering be bent to conform to, a particular configuration in, or locality of, the device to be covered."

The specification, referring to the figure, describes a number of plain sheets composed of paper, felt, asbestus, or other similar fibrous material, and similar sheets forming opposing sides of a covering having one or more intermediate corrugated sheets of similar material. The claims are as follows:

"(1) A covering the outer layers on both sides of which are composed of plain sheets of nonconducting fabric, and the inner layer of corrugated nonconducting fabric, adapted to support and hold in position the outer and plain sheets, substantially as described. (2) A covering the outer layers on both sides of which are composed of plain sheets, one or both of which is lined with wire fabric, and the intermediate layer or layers of one or more corrugated sheets, with or without a lining of wire fabric, substantially as described."

In connection with the specification, claim 1 shows a use of asbestus paper in alternate layers of corrugated and plain sheets, the former to support the latter. Bradley fully describes air spaces formed by alternating layers of corrugated and plain sheets, "possessing to a maximum degree nonconducting qualities and indestructible by fire or heat." There is no suggestion of retaining dead air within the spaces formed, nor any reference to closing the ends.

Riley, in 1889, patented a "nonconducting jacket." This device, in terms, describes "separated dead-air channels and spaces." The specification states that the invention is—

"To provide a nonconducting jacket wherein a series of parallel separated dead-air channels extend longitudinally within the jacket and are formed of corrugated paper; to provide a nonconducting jacket, wherein an inner set and an outer set of parallel separated dead-air channels extend longitudinally to largely increase the efficiency of the structure in preventing the radiation of heat, and prevent the burning or charring of the hair that may be used; to provide a novel external envelope of textile material for binding and retaining a sectional nonconducting jacket on a steam pipe or other radiating surface, which can be buttoned and unbuttoned; to provide a novel external binding envelope of textile fabric having continuously wired opposite edges

for keeping the latter stretched or distended, and producing a smooth surface when the parts are buttoned together," etc.

The specification further describes the figure illustrating the device as follows:

"The numeral, 1, indicates an internal layer or sheet of asbestus or other material prepared, preferably, as a fireproof paper, and adapted to rest directly in contact with a steam pipe, 2, or other radiating surface to be covered and protected. A layer or sheet of paper formed with parallel corrugations, 3, running lengthwise, is arranged around the internal layer or sheet, with the alternate corrugations resting thereupon, while the other alternate corrugations are cemented or otherwise secured to a sheet, 4, of paper, which constitutes a supporting back for the corrugated paper sheet. A course or layer, 5, composed of asbestus and hair felted together, of considerable bulk or thickness, is placed upon the inner corrugated paper sheet, and upon this felted course is an outer sheet, 6, of paper formed with parallel corrugations, 7, running lengthwise and alternately bearing upon the felted course, while the other alternate corrugations are cemented or otherwise secured to a supporting back, 8, composed of paper. The inner corrugated sheet, 3, and the outer corrugated sheet, 6, constitute within the jacket two sets of parallel separated dead-air channels or spaces, which extend longitudinally, the inner set being at the inside of the felted course or layer, 5, and the outer set at the outside of the said course or layer, whereby the jacket, in its capacity to prevent the radiation of heat, is rendered very efficient, desirable, and suitable for the purpose designed. The backing sheets, 4 and 8, serve to support and preserve the corrugated shape of the paper sheets, and prevent the corrugations from being crushed in when binding the jacket upon a steam pipe or other radiating surface. The several layers or sheets described are prepared of substantially equal dimensions to form a jacket section, and they are then bent around the steam pipe or other object, and brought into cylindrical form, in which position the jacket is secured by an external binding envelope, 9, of suitably prepared duck, canvas, cotton cloth, or other textile fabric, suitable for the conditions required."

Thereupon such covering is described. It is obvious, from this specification and the claim which it contains, that the pipe was to be covered by a plain sheet of noncombustible, nonconducting substance, and that the corrugated sheet was placed above it, and, aside from closing the ends, the device was quite similar to the complainant's covering. With the exception of closing the ends, the claims in the Riley patent fully describe the patent in suit, at least to the extent that any matter of difference would not constitute invention. The manner of fastening the outer covering is different, but such difference is quite unimportant. Although Riley refers in his specification to dead-air channels or spaces, there is no statement, in terms, that the ends shall be closed. But the construction of dead-air spaces in the manner described is the very purpose of the Riley patent, and carries the suggestion that each end must or may be suitably closed, either by fitting against some object at the end of the run, or by sealing or covering; and, if the end should be closed, the thought would be spontaneous that the closure should be effected by the use of material similar to that of which the jacket was composed.

The Kelly 1884 nonconducting covering provided for dead-air spaces by corrugating one layer between two plain layers of nonconducting paper. The manner of making the corrugations was quite different from that employed by the Shearer patent, and there

is no provision, in terms, for closing the ends, although it is inferable that the device for dead-air spaces would not permit of a circulation of air through such spaces.

The Watson 1887 patent, covering for steam pipes, aimed "to provide a covering which shall be fireproof, waterproof, and a nonconductor of heat; and to this end it consists, essentially, in a covering composed of an inner layer of fireproof deafening felt, a second layer of either plain or corrugated deafening felt, and an external layer or covering of waterproof or sized paper." The specification describes "the inner layer, composed of what is known in the trade as 'fireproof deafening felt,' consisting of paper or woolen fiber treated with fireproof compound or asbestus, suitably prepared in sheet form; * * * the second or intermediate layer consisting of what is generally known in the art as 'deafening felt,'—a thick felt composed of suitable fiber, having wool, asbestus, or similar material incorporated therein." It is further stated: "I propose to make use of this material either in the form of plain flat sheets, or in sheets which have been corrugated, the latter being preferred, for the reason that it produces internal spaces between the layers." And the claim is: "The herein-described boiler covering, consisting of the inner layer of fireproof felt, the outer layer of waterproof paper, and the intermediate layer of corrugated waterproof paper." Here is a fireproof noncombustible covering, longitudinal air spaces, and asbestus, specially mentioned as the proper substance with which to treat the layers of which the covering is composed. There is no provision for closing the ends, nor is there an outer envelope corresponding to that described in the Shearer letters.

The Pierce 1883 covering for steam pipes has for its object, as the specification states, to give the covering "a maximum power to resist the passage of heat through it by utilizing, in connection with the covering, confined air, a well-known and efficient nonconductor of heat, by providing the covering with cellular or dead-air spaces between two or more of its layers; and to this end my invention consists in indenting or corrugating the inner surface of one or more of the sheets forming a layer of the covering, as hereinafter more fully described, and shown in the accompanying drawings." This invention aims at space for noncirculating or dead air. The covering is composed of "layers of nonconducting material, one or more of said layers being provided with corrugations or indentations in its surface adjacent the next layer." There is no provision for closing the ends, and an outer covering, with means of attachment, is absent.

The Martin 1881 patent, covering for steam pipes, states: "I have found the most advantageous covering to consist in the use of loose fiber of asbestus, because with it I obtain absolute indestructibility by carbonization, with approximately the greatest amount of air space." The specification discusses the usefulness of confined air as a nonconductor of heat. The covering differs from others described, in that it consists of a "coil of alternate sheet and loose asbestus or similar material in fiber." The intention thereby is to create air spaces, and the air is contained in the

following manner: "The ends of the pipe, as well as the inner and outer ends of the coiled roll, may be securely closed by any suitable cement or adhesive material, such as silicate of soda."

The Suhr 1885 sectional nonconductive covering for tubes provides for a covering made in sections, and the claims are as follows:

"(1) A tube covering formed of two semicylinders of plaster of Paris, asbestus, and sawdust, covered on the outside with a layer of felt, which, in turn, is covered by a layer of thick paper, substantially as herein shown and described. (2) In a tube covering, the combination, with two semicylinders, A, composed of plaster of Paris, asbestus, and sawdust, of the felt, B, on the outside of the same, the paper, C, on the felt, and the piece of canvas, D, or other flexible material, to which the two semicylinders are secured, substantially as herein shown and described."

The specification states:

"To apply a section, the two semicylinders are swung from each other, and passed over the pipe or tube, and then closed and swung together, thereby surrounding the tube or pipe completely. The overlapping part of the canvas covering is then folded against and cemented to the outer surface of the complete covering, thus locking the covering, and holding it in place."

In the letters issued to him Shearer states:

"I am aware that pipe coverings or jackets made of layers of paper or some other nonconducting material having perforations, or short grooves, have been heretofore used, and I do not claim the same as my invention, but I am not aware that any pipe covering made of material which is at once noncombustible and nonconducting, and of alternating plain and fluted layers, whereby longitudinal air spaces are formed throughout the entire length of the section, the section also sealed at the ends and covered on the outside, has ever been known or used."

It is obvious, from an examination of the descriptions of former devices, that pipe coverings of noncombustible and nonconducting material, and of alternating plain and fluted layers, whereby longitudinal air spaces are formed throughout the entire length of the section, were old in the art, and, as we have seen in the Martin patent, the ends were closed, although the construction of the air cells in the Martin device was dissimilar. But in certain other letters patent, prior to that in suit, it is stated that continuous longitudinal dead-air spaces were to be formed. But dead-air spaces can only be formed by making dead-air cells, which necessarily carries or suggests the idea of closing the ends. Shearer provides for closing the ends by "asbestus or similar material." Martin provides for closing the ends by "any suitable cement or adhesive material, such as silicate of soda." Thus, every part of the Shearer device is old. Dead-air cells had been made in practically the same way, so far as concerns the manner of fashioning the same and the material used, but no definite provision has been made for retaining air in spaces by closing the ends, save in the Martin patent. If it was invention to add to a device for forming dead-air cells, substantially similar to those described by Shearer, a provision for closing the same by an application of some material like asbestus, then Shearer produced a patentable combination. But the Shearer device does not indicate invention, unless invention may be found in judicious selection of well-known parts, and the combination thereof, each part by itself, and all the parts in combination, performing old func-

tions. The vital thing is the retention of air in closed cells formed by alternating corrugated and plain layers of nonconducting and noncombustible material, and sealed at the end with similar material. In the Shearer patent the air is contained in cells, in form and manner of construction substantially similar to those shown in one or more previous patents; the material is practically similar; so is the outer covering. To aid the retention of the air, the ends are closed. The closing of ends of spaces intended to hold dead air is an apparent requisite. It does not involve invention, nor even considerable mechanical skill. Previous letters patent, save those of Martin, did not provide means for closing the ends, for the probable reason that the ends would come in contact with some objects at the end of the run, like joints or fittings, that would of themselves tend to close the end of the pipe, or, as the testimony shows, molded coverings were furnished, or the ends of the covering were tapered down with cement. In any case, Shearer's use of old forms has produced air cells substantially as they have been formed before, and he has closed up the ends with a nonconducting, noncombustible material, just as Martin did before him. The dead-air cells employed by Shearer may be better than those fashioned by Martin, and Shearer's method of closing the end may be preferred, but the attainment required very feeble inventive faculty. Every desirable, or even clever, mechanical arrangement does not reach the point of invention. What action or mode of action is there present in his device that was not present before? No part does something in a new way. The combination effects nothing that previous combinations had not effected, with perhaps a less degree of excellence. To ascribe invention to Shearer's efforts is to diminish unduly the products of the inventive faculty intended to be fostered by the statute. This conclusion is reached upon the theory that the claim of Shearer intends to close the ends of the run of pipe covering, and not to close the ends of each section of pipe covering, which last is the apparent reading of the claim. It is urged by the complainant that it was not the intention, and is not the practice, to close the ends of each section, and for the purposes of this decision that contention may be allowed. If the claim demands that the ends of each section shall be closed, then the evidence does not show infringement. But it is considered that the evidence does preponderatingly show infringement. It is conceded that the covering used by the defendants is identical with the complainant's covering, save that, as the defendants claim, they do not close the ends of the covering. In fact, the evidence is that the defendants have on occasions closed the ends of the run in such manner as would infringe the complainant's patent were the patent valid. But the foregoing views deny invention, and hence patentability, to the complainant's covering, from which it results that there must be a decree dismissing the complaint, with costs.

## SHOE MANUFACTURERS' SUPPLY CO. v. STACY et al.

(Circuit Court of Appeals, First Circuit. November 8, 1900.)

No. 352.

PATENTS—INVENTION—UPPERS FOR LACED SHOES.

The Benjamin patent, No. 552,506, for improvements in uppers for laced shoes, claim 3, which covers the placing of a strip or cushion piece under the projecting bases of the eyelets or hooks, so as to present a smooth surface to the wearer, is void for lack of invention.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Benjamin Phillips (Horace Van Everen, on the brief), for appellant.

Charles Allen Faber, for appellees

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. Only the third claim of the patent in suit is in issue. As to that, we agree that it covers no patentable invention, as explained in the opinion of the learned judge who tried the case in the circuit court (100 Fed. 652), and for that reason we adopt his conclusions. The decree of the circuit court is affirmed, and the appellees will recover the costs of appeal.

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## BIGLEY v. NEW YORK & P. R. S. S. CO. HUUS v. SAME. TORGESON v. HAY.

(District Court, S. D. New York. November 10, 1900.)

1. PILOTS—OBLIGATION TO TAKE—FOREIGN PORTS.

In Consol. Act N. Y. 1882, § 2119, which requires domestic vessels navigating under a coasting license from the United States to take a licensed pilot on entering or departing from the port of New York, only when such vessels are from a foreign port, whether the words "foreign port" mean a port within the sovereignty and dominion of a foreign nation, quære.

2. SHIPPING—LICENSE FOR COASTING TRADE—PORTO RICAN PORTS.

Section 9 of the Porto Rico act of April 12, 1900 (31 Stat. 79), which provides for the nationalization of all vessels owned by the inhabitants of Porto Rico, and for their admission to all the benefits of the coasting trade of the United States, and that "the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States," extends and makes applicable the privileges and restrictions of the coasting trade of the United States not only to trade, but also to navigation between the ports of Porto Rico and those of the United States; the words "coasting trade" having been used and construed as extending to the navigation by means of which such trade was carried on in the Alaskan act of 1868.

3. PILOTS—OBLIGATION TO TAKE—VESSELS FROM PORTO RICAN PORTS EXEMPTED.

Rev. St. § 4444, exempts all steam vessels sailing under license from the United States, and employed in the coastwise trade, from the pilotage laws of the states. Consol. Act N. Y. 1882, § 2119, requiring foreign vessels and vessels from a foreign port to take a licensed pilot on entering or departing from the harbor of New York, exempts from its provisions do-

mestic steam vessels licensed and engaged in the coasting trade. *Held* that, under the provisions of either statute, domestic steam vessels, licensed by the United States since the passage of the Porto Rico act of April 12, 1900, and entering the port of New York from Porto Rican ports, were exempted from the payment of pilotage charges imposed by the state statute.

In Admiralty. Suits to recover for pilotage services offered and refused.

Lindsay, Kremer, Kalish & Palmer, for libelants.

Curtis, Mallet-Prevost & Colt, for New York & P. R. S. S. Co.

Cowen, Wing, Putnam & Burlingham, for Hay and others.

BROWN, District Judge. In the above three libels pilotage dues are claimed for services offered and rejected as follows:

(1) June 2, 1900, from the steamship Ponce outward bound from New York to Porto Rico, $60.06.

(2) June 25, 1900, same steamer inward bound from Porto Rico to New York, $74.34.

(3) July 24, 1900, for the schooner O. F. Whittier inward bound from San Juan, Porto Rico, $37.54.

From the agreed statement of facts it appears that the vessels were all American vessels sailing under coasting licenses duly issued since the act of April 12, 1900 (31 Stat. 79, c. 191, § 9); and it is agreed that the libelants are entitled to the pilotage dues above specified, provided that the vessels at the above dates were bound to or from a "foreign port" and were not "engaged or employed in the coasting trade."

1. Pilotage fees, as regulations of commerce, are wholly subject to the constitution and laws of the United States. By section 4235 of the United States Revised Statutes, embodying the provisions of the act of August 7, 1789, it is enacted that "until further provision is made by congress all pilots * * * in the ports of the United States shall continue to be regulated in conformity with the law of the states."

By section 4401, it is enacted that every coastwise seagoing steam vessel of the United States shall, "when under way, excepting on the high seas, be under the control and direction of pilots licensed by the inspectors of steam boats."

By section 4443, the master or mate may also be licensed as a pilot; and by section 4444, the states are forbidden to require any other license in addition to those issued by the United States, or to impose any other regulation which shall impede such pilots from the performance of their duties. The same section also further provides:

"Nor shall any pilot charges be levied by any such (state) authority upon any steamer piloted as provided by this title. Nothing in this title shall be construed to annul or affect any regulation established by the laws of any state requiring vessels entering or leaving a port of any such state, other than coastwise steam vessels, to take a pilot duly licensed by the laws of such state."

The effect of the above acts of congress, is to exempt all steam vessels sailing under a license and employed in the coastwise trade from the pilotage laws of the states; while other vessels remain subject to the state laws.

By section 2119 of the New York consolidation act of 1882 relating to pilotage it is provided:

"No master of any vessel navigated under a coasting license and employed in the coasting trade by way of Sandy Hook shall be required to employ a licensed pilot when entering or departing from the harbor of New York. * * *

"All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under registry bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot. * * *

"This section shall not apply to vessels propelled wholly or in part by steam owned or belonging to citizens of the United States and licensed and engaged in the coasting trade."

Although the maintenance of a body of skillful pilots is regarded as a matter of public policy in the interests of commerce, and though the laws in regard thereto are to be construed liberally for their benefit (Ex parte McNiel, 13 Wall. 236, 20 L. Ed. 624; Gillespie v. Winberg, 4 Daly, 318, 325), still no suit can be maintained for such fees, except in accordance with the statutory provisions applicable to the specific case. As each of these vessels is a domestic vessel and was navigated under a coasting license of the United States no pilotage can be claimed under the provisions of section 2119 of the New York statute above quoted, if the vessel was in fact "employed in the coasting trade"; nor second, unless she was "from a foreign port."

2. The primary and ordinary meaning of the term "foreign" is, belonging to or relating to another sovereignty or dominion; as in the expressions "foreign law," "foreign commerce," "foreign ministers," "foreign territory." In the case of The Eliza, 2 Gall. 4, 7, Fed. Cas. No. 4,346, Story, J., says:

"It is clear to my mind that a foreign port or place under the statute means a port or place exclusively within the sovereignty of a foreign nation. Such has been the uniform construction," etc.

In U. S. v. Hayward, 2 Gall. 485, 500, Fed. Cas. No. 15,336, he says:

"By 'foreign ports,' as the terms are here used, may be understood a port within the dominion of a foreign sovereign and without the dominion of the United States."

See, also, The Lark, 1 Gall. 55; Fed. Cas. No. 8,090; The Sally, 1 Gall. 58, Fed. Cas. No. 12,257; The Adventure, 1 Brock. 235, Fed. Cas. No. 93; Taber v. U. S., 1 Story, 1, Fed. Cas. No. 13,722; Loughborough v. Blake, 5 Wheat. 317, 5 L. Ed. 98.

In this sense of the word, it is evident that Porto Rico, since the cession of the island by Spain to the United States, is not a foreign port, as it is subject solely to the sovereignty and dominion of this country.

By the treaty with Spain of April 11, 1899 (30 Stat. 1754, art. 2):

"Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones."

Article 9 of the same treaty provides:

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States, shall be determined by congress."

The term "foreign" is familiarly used also in a more restricted sense in our interstate law in such phrases as "foreign corporation,"

"foreign divorce," "foreign assignment," "foreign judgment," etc. But the word, even in this use of it, still retains its primary significance, and refers to the independent jurisdiction and authority of the several states over the subject-matter referred to. In the same sense vessels belonging to citizens of another state, are often termed "foreign vessels," and are treated as such in the federal courts in the application of the maritime law as respects maritime liens for work, materials and supplies; and conversely, supplies furnished a vessel in a different state from that of her owner's residence, i. e. not in the home port, are treated as supplied in a "foreign port." This designation of ports of other states as "foreign ports" as respects maritime liens, originated in colonial times, when the colonial governments were independent of each other; and the law has remained unchanged in that regard between the states since the Union under the constitution. But the words "a foreign port" in the New York pilotage statutes are evidently not used in this restricted sense, and do not embrace ports of any of the states. For interstate navigation is embraced in the "coasting trade," in which pilotage charges are expressly excluded.

When the New York statute was enacted, however, it evidently applied to vessels bound to or from Porto Rico and so continued, at least until its cession to us by Spain; and it is urged that until the laws applicable to Porto Rico were changed by congress, the liability to pay pilotage remained as before. No doubt where territory is acquired by conquest or by treaty, the laws existing among the people of the territory, in the absence of treaty stipulations, continue in force until altered by the new sovereign. Otherwise, until the new sovereign should act, the territory would be without any law at all. Strother v. Lucas, 12 Pet. 410, 436, 9 L. Ed. 1137; Railway Co. v. McGlinn, 114 U. S. 542, 546, 5 Sup. Ct. 1005, 29 L. Ed. 270. Most of our acquisitions by treaty have contained provisions securing certain rights to the people of the territory. By the treaty with Spain all these rights were expressly left to the action of congress. Until congress acted, therefore, and except as modified through the military power, the law of the internal relations at least of the people of Porto Rico remained as before; and it may be that their external relations as respects this country in matters of navigation and commerce also remained the same. See Goetze v. U. S. (C. C.) 103 Fed. 72, and cases there cited.

3. I do not find it necessary, however, to determine this question, since the act of congress of April 12, 1900 (31 Stat. 79, c. 191, § 9), in pursuance of the terms of the treaty, and acting under its constitutional power, shows so clear an intention to alter the previous conditions, and to assimilate trade and navigation between Porto Rico and the United States to the ordinary coasting trade between ports of the United States, that pilotage cannot now be claimed in the one case more than in the other. That act provides for a government of the island, not only in its internal relations, but also as respects trade and commerce. The whole machinery of a new government was provided for; officers executive and judicial were to be appointed, and oaths of fidelity to the United States to be exacted;

ports of entry were established and revenue for necessary expenses to be collected by customs duties; vessels of the Porto Ricans were allowed to become nationalized, and by necessary implications from the provisions of section 9, the rules and regulations of our domestic coasting trade were designed to be made applicable to trade and commerce between the United States and Porto Rico. The act is entitled: "An act temporarily to provide revenues and a civil government for Porto Rico and for other purposes."

Section 9, having special reference to trade and commerce with this country, provides as follows:

"Sec. 9. That the commissioner of navigation shall make such regulations, subject to the approval of the secretary of the treasury, as he may deem expedient for the nationalization of all vessels owned by the inhabitants of Porto Rico on the eleventh day of April, eighteen hundred and ninety-nine, and which continued to be so owned up to the date of such nationalization, and for the admission of the same to all the benefits of the coasting trade of the United States; and the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States."

The great coasting districts of the United States are established by section 4348 of the Revised Statutes. The first and second districts embrace the sea coast and navigable rivers from the eastern limit of the United States to the Rio Grande; and the evident intention of section 9, as it seems to me, is to extend and make applicable the privileges and the restrictions of the coasting trade of the United States to trade and navigation between the United States and Porto Rico, the same as if they formed contiguous territory.

It is objected that the phraseology of the statute covers only trade, and does not include navigation, or the laws applicable to navigation. In the construction of a statute of this general character, however, such a verbal distinction seems to me not well founded; and inasmuch as the "coasting trade between the United States and Porto Rico" can only be carried on by means of vessels and the navigation of vessels, "the provisions of law applicable to such trade," in the language of section 9, must include the laws applicable to the navigation by which alone such coasting trade can be carried on.

No doubt the words "coasting trade" as thus construed are extended beyond their original and primary significance, which meant trade along the contiguous line of coast of the United States. But the whole subject being within the power of congress, it is competent for congress to extend the privileges and restrictions of that trade as it shall see fit; and the only question is whether that extension was intended in this act. Upon the acquisition of Alaska, the same terms were used and in the same manner for the extension of the "coasting trade" between the United States and that territory far beyond any contiguous coast line of the United States (Act July 27, 1868; Rev. St. § 4358), and in the act of April 30, 1900, to provide a government for the territory of Hawaii (31 Stat. 141, 161, c. 339, § 98), there is also provision for the "coasting trade between the Hawaiian Islands and any other portion of the United States," in the same language that is employed in the last clause of section 9. This extended use of the words "coasting trade" was already familiar.

Numerous decisions of the commissioner of navigation as respects trade and navigation by American vessels between these territories and the United States have, moreover, held such trade to be a part of the coasting trade of the United States, entitling the vessels to sail under enrollments and licenses with the privileges and exemptions attaching thereto (Dec. 6,106, Jan. 8, 1884; also Decs. 5,618, 18,859, 19,364, 22,201, May 3, 1900); and the same has been ruled by the commissioner with regard to trade with Porto Rico since the act of April 12, 1900, by treasury decision 22,232, May 16, 1900. It was under these rulings that the registers of these vessels were surrendered and coasting licenses taken out.

The decisions of the commissioner of navigation under the direction of the secretary of the treasury are official decisions entitled to much weight, since he is an officer "specially charged with the decision of all questions relating to the issue of registers, enrollments and licenses of vessels." Act July 5, 1884 (1 Supp. Rev. St. p. 461).

His decisions on these points are the more important from the fact that by section 4337 of the Revised Statutes, it is enacted that "if any vessel enrolled or licensed shall proceed on a foreign voyage without first giving up her enrollment and license, * * * and being duly registered by the collector, such vessel and the merchandise so imported therein shall be liable to seizure and forfeiture."

The distinction, therefore, between foreign voyages, which can be made only by registering the vessel, and the coastwise trade in which vessels may be navigated under license, is vital. If the voyages between Porto Rico and New York which these vessels were making under license in accordance with the commissioner's decisions, were foreign voyages, the vessels and their cargoes were liable to seizure and forfeiture for sailing under license, instead of being registered.

It is urged that section 9 does not expressly state that trade between Porto Rico and the United States shall be deemed or treated as "coasting trade," and that the word "coasting" before the word "trade" in the last sentence of section 9 is not an appropriate word, nor sufficient to indicate that such was the intent of congress. It seems to me otherwise; and that the designation of such trade as "coasting trade" is as strong by necessary implication as a direct affirmance would be. For otherwise the whole provision, as far as I can see, would have no meaning. The clause is an indirect affirmance of a "coasting trade" to be established "between Porto Rico and the United States"; it is that trade between Porto Rico and the United States which is to be governed by the rules applicable to the great coasting districts of the United States; and any such trade that is possible "between Porto Rico and the United States" must necessarily include voyages like the present, which are therefore entitled to the same exemptions as the established great coasting districts of the United States. Such has been the established construction and the practice under a similar statute respecting "coasting trade" with Alaska for more than 30 years past. The identity of the phraseology on this subject in the acts as to Alaska and Porto Rico shows that congress in framing section 9, had in view the Alaskan statute, and must, therefore, have intended that

the same construction and effect should be given to section 9 which the practice and usage for 30 years under the Alaskan statute had already established.

For the above reasons, I think these vessels were not liable to pilotage charges, and the libels must be dismissed, with costs.

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HEWLETT et al. v. BURRELL et al.

(Circuit Court of Appeals, Second Circuit. November 14, 1900.)

No. 2.

SHIPPING—DELIVERY OF CARGO—CUSTOM AS TO PLACE OF DELIVERY.

A custom having been established to deliver cargoes of tea within a particular part of the water front in the port of New York, a vessel having a cargo consisting principally of tea is bound to make delivery there if required by the consignees, and it is no defense to a suit for damages for the refusal to discharge there that in one or two instances other vessels have also refused, nor is it material that other piers afforded better facilities for discharging.

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal from a decree in favor of libelants awarding damages for failure of respondents, owners of the steamer Strathallan, to deliver cargo laden on board said steamer at the usual and customary place in New York. The great bulk of the cargo was tea.

John M. Bowers, for appellants.

Edward L. Owen, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. In The Mascotte, 2 C. C. A. 400, 51 Fed. 606, this court held that, although the evidence was ample that the customary place of delivery in the port of New York for tea cargoes in bulk is within the certain specified part of the water front, no such usage applied where the tea was but a minor part of a general cargo. The evidence in the case at bar is sufficient to prove the usage, as it was in the former case. Respondents fail to show that the custom has been abandoned or has changed. The circumstance that ships with general cargo (tea a minor part) have in the past few years gone to Brooklyn to discharge is immaterial in view of the decision in The Mascotte Case. The fact that one or more ships with tea cargoes have also gone there, as this one did, against the objection and protest of the tea consignees, is unpersuasive. The district judge rightly excluded evidence tending to show the respective merits of the piers in the tea district and in Brooklyn (their size, lights, manner of construction, etc.). It was clearly immaterial.

Appellant further contends that the damages found are excessive in the amount of $9.42. It is sufficient to say that on that branch of the case we concur, as did the district judge, in the conclusions of the commissioner.

The decree of the district court is affirmed, with interest and costs.

## PARKINSON v. BARR et al.

(Circuit Court, D. Nevada. November 26, 1900.)

No. 703

1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—FORMAL OR FICTITIOUS PARTIES.
   On a question of a right of removal the court will consider only the citizenship and residence of the parties whose real names are disclosed in the pleadings. Defendants joined by fictitious names, their real names being alleged to be unknown, and their residence and citizenship being undisclosed, will be regarded as merely formal parties, whose presence on the record cannot affect the right of removal.
2. SAME—TIME FOR FILING PETITION.
   The validity of a removal is not affected by the fact that at the time the petition therefor was filed the summons had not been returned nor served on all the defendants.
3. SAME—MOTION TO REMAND—WAIVER.
   A plaintiff, by appearing in the federal court after the removal of the cause, and obtaining leave to file an amended complaint, does not thereby waive his right to move to remand.
4. SAME—DIVERSITY OF CITIZENSHIP.
   Where there is no separable controversy in a cause, it is not removable, under the judiciary act of 1887-88, on the ground of diversity of citizenship, unless all the defendants are nonresidents of the state in which it is brought, notwithstanding the plaintiff is a citizen of a different state from any of such defendants.[1]

On Motion to Remand to State Court.

N. Soderberg, for complainant.
M. A. Murphy, for defendants.

HAWLEY, District Judge (orally). This suit was removed into this court by an order of the state district court of Ormsby county, Nev., made October 3, 1900. The petition for removal upon which the order was made states, among other things:

"That on the 12th day of April, 1900, the above-named plaintiff filed a complaint in the district court of the First judicial district, state of Nevada, in and for the county of Ormsby, praying for a judgment against the defendants, for the cancellation and annulment of all deeds, incumbrances, mortgages, or other written instruments, and all other agreements, whether parol or in writing, made or had under or in pursuance of the said proceedings in the high court of justice, chancery division, at London, England; praying for a restraining order and the appointment of a receiver, and for a judgment against the said defendants, and each of them, in the sum of fifty thousand dollars damages; asking for an accounting of rents, issues, and profits, and for costs. That on the 13th day of July, 1900, a summons was issued out of, and under the seal of, this court. * * * That the time has not elapsed wherein your petitioners are allowed, under the practice and laws of the state of Nevada, and the rules of said court, to appear, plead, demur, or answer said complaint. That your petitioners dispute said claim, and deny all liability and the allegations as set out in the complaint herein. That the matter in dispute in this action exceeds the sum of two thousand dollars, exclusive of interest and costs. That the controversy in this action, and every issue of fact and law therein, is wholly between citizens of different states and foreign empires and kingdoms, and which can be fully determined

[1] Diverse citizenship as ground for federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249, and Mason v. Dullagham, 27 C. C. A. 298.

as between them. That is to say, the plaintiff, T. D. Parkinson, is now, and was at the time of the filing of the complaint in this action, a citizen and resident of Oakland, Alameda county, state of California; and the defendant James Mark Barr was then, and still is, a citizen and resident of the state of Pennsylvania; and the defendant R. L. Ritchie was at the date of filing the complaint in this action, and still is, a citizen and resident of Humboldt county, state of Nevada. That the defendants Richard Hammond, William F. Lees, John Annan, the Nevada Land & Cattle Company, Ltd. (a corporation), C. De Murrieta & Co., Ltd., John Doe, and Richard Roe are now, and were at the time of the filing of the complaint in this action, citizens and residents of Great Britain, kingdom of Great Britain and Ireland."

On the 5th day of November, 1900, the attorney for plaintiff appeared in this court, and obtained leave of the court to file an amended complaint herein within 30 days. Thereafter, on the same day, he filed his notice of motion to remand the cause to the state court upon the following grounds:

"(1) That said cause was prematurely removed, * * * particularly in this, to wit: that said cause was ordered removed by, and was removed from, said state court, and docketed in said United States circuit court, * * * before service of summons upon said defendants therein, except upon the defendant Ritchie, and before the return of said summons to said state court, and without the said court's having any evidence before it of said service; (2) That the said United States circuit court * * * has no jurisdiction of the subject-matter of said cause, or the parties therein, and particularly in this, to wit: that the alleged right of removal and the jurisdiction of said federal court depend wholly on diverse citizenship of the parties to said cause, and it does not appear from the record herein that said diverse citizenship exists. (3) That said defendants have not all united in the petition for removal. (4) That it does not appear from the said petition for removal, or otherwise, or at all, that said or any of the defendants are nonresidents of the state of Nevada, and, if so, who are such nonresidents."

The technical points presented by the motion may be briefly disposed of.

It must be apparent that as to the defendants John Doe and Richard Roe, whose real names are alleged in the complaint to be unknown to plaintiff, their residence and citizenship, not being mentioned therein, must be presumed to be unknown to the defendants whose real names are given. They should therefore be treated, for the purposes of this motion, as being merely formal parties, whose rights for the present should be ignored. It is certain that the mention of their fictitious names in the complaint and in the petition cannot be considered either in favor of or against the motion. It is the duty of the court to consider only the citizenship and residence of the parties whose real names are disclosed in the pleadings. 18 Enc. Pl. & Prac. 195, 196, and authorities there cited. In Dill. Rem. Causes (5th Ed.) § 18, the author said, "The joinder of mere nominal or formal parties can no more secure the right of removal than their presence on the record can defeat it."

With reference to the points made by plaintiff about the issuance of a summons, and of the nonservice thereof at the time the petition of removal was filed, it is enough to say that the parties defendant might appear without any service of process upon them, or either of them, and file their petition for removal. The plaintiff, by first appearing in this court and asking for time to file an amended com-

plaint, did not waive his right thereafter to move to remand the cause to the state court.

The merits arising upon the facts stated in the petition of removal are worthy of careful consideration. It will be noticed therefrom that, while it is alleged that the controversy is "between citizens of different states and foreign empires and kingdoms," yet it appears that one of the defendants, to wit, R. L. Ritchie, is a resident and citizen of the state of Nevada. The question to be discussed is, can the removal of this cause from the state court be sustained upon the ground that the parties are residents and citizens of different states, unless it clearly appears that all the defendants who join in the petition for removal are nonresidents of the state where the suit is brought? This question is important. It involves a construction of the provisions of the removal act of 1887–88 (24 Stat. 553; 25 Stat. 434). In construing the provisions of this act, it must constantly be kept in mind that it was passed for the express purpose of limiting the jurisdiction of the United States circuit courts as given by the removal act of 1875. In Smith v. Lyon, 133 U. S. 315, 320, 10 Sup. Ct. 303, 304, 33 L. Ed. 635, 637, the court said it was "a statute mainly designed for the purpose of restricting the jurisdiction of the circuit court of the United States." In Re Pennsylvania Co., 137 U. S. 451, 454, 11 Sup. Ct. 141, 142, 34 L. Ed. 738, 740, the court said, "The general object of the act is to contract the jurisdiction of the federal courts." In Fisk v. Henarie, 142 U. S. 459, 467, 12 Sup. Ct. 207, 210, 35 L. Ed. 1080, 1083, the court said, "The attempt was manifestly to restrain the volume of litigation pouring into the federal courts, and to return to the standard of the judiciary act." In Hanrick v. Hanrick, 153 U. S. 192, 197, 14 Sup. Ct. 835, 837, 38 L. Ed. 685, 687, the court said it "was intended * * * to contract the jurisdiction of the circuit court of the United States, whether original over suits brought therein, or by removal from the state courts."

The particular provisions of the act applicable to this case read as follows:

"Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

Under this statute it is clear that, in all cases where there is no separable controversy, the right of removal can be exercised only by nonresident defendants. Telegraph Co. v. Brown (C. C.) 32 Fed. 337; Anderson v. Appleton, Id. 855; Weller v. Tobacco Co., Id. 860; Schofield v. Demorest (C. C.) 40 Fed. 273; Smelting Co. v. Cowenhoven (C. C.) 41 Fed. 450; Mills v. Newell (C. C.) 41 Fed. 529; Frisbie v. Railway Co. (C. C.) 57 Fed. 1; Thurber v. Miller, 14 C. C. A. 432, 67 Fed. 371, 378; Bank v. Smith, 19 C. C. A. 42, 72 Fed. 568; Davis v. County

Court (C. C.) 88 Fed. 705; Fife v. Whittell (C. C.) 102 Fed. 537; Martin v. Snyder, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602; Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America, 151 U. S. 369, 386, 387, 14 Sup. Ct. 367, 38 L. Ed. 195; Bryan v. Richardson, 153 Mass. 157, 26 N. E. 435. From the general principles announced in these authorities it necessarily follows that in all cases where, as here, the suit is brought by a nonresident against residents and citizens of different states, and all the defendants join in the petition for removal, the complaint or petition for removal must affirmatively show that all of them are nonresidents. If one or more of them are residents and citizens of the state where the suit is brought, that fact is sufficient to defeat the removal from the state court. In Smelting Co. v. Cowenhoven, supra, the plaintiff, a corporation organized in Missouri, under the law being a resident and citizen of Missouri, brought suit in the state court of Colorado against two defendants residents and citizens of the state of Colorado, one defendant a resident and citizen of the state of Ohio, and one defendant a corporation organized in New York. The state court, upon petition of the defendants, ordered the cause removed to the United States circuit court. On the motion to remand, Hallett, J., said:

"Inasmuch as Margaret Cowenhoven and Elmer T. Butler, two of the defendants, are citizens and apparently residents of the state of Colorado, the cause is not removable into this court under the act of 1887."

The fact that some of the defendants who join in the petition are aliens and subjects of other kingdoms does not change the rule. The law is well settled that suits between citizens of a state and foreign states, citizens or subjects, can be removed only when the defendants are all nonresidents of the state where the suit is brought. Cudahy v. McGeoch (C. C.) 37 Fed. 1; Walker v. O'Neill (C. C.) 38 Fed. 374; Scott v. Cattle Co. (C. C.) 41 Fed. 225, 227; Purcell v. Mortgage Co. (C. C.) 42 Fed. 465; Tracy v. Morel (C. C.) 88 Fed. 801.

The facts set forth in the petition are wholly insufficient to maintain the jurisdiction of this court. Motion granted.

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## SOUTHERN PINE CO. v. HALL.

(Circuit Court of Appeals, Fifth Circuit. November 20, 1900.)

No. 815.

1. JURISDICTION OF FEDERAL COURTS—SUITS IN EQUITY—EQUITABLE REMEDY GIVEN BY STATE STATUTE.

A state statute which enlarges equitable rights will be enforced and administered in the United States courts in all cases where its enforcement and administration do not conflict with the constitutional right of a party to a jury trial; and such a court has jurisdiction of a suit to quiet title to land, although the complainant is not in possession, where such suit is authorized by a state statute, and it appears from the record that the defendant is not in possession, so that an action in ejectment would lie.

2. PUBLIC LANDS—DISPOSITION OF SWAMP LANDS BY STATE—CONSTRUCTION OF MISSISSIPPI STATUTE.

By Act April 8, 1871 (Acts Miss. 1871, pp. 482–487), the legislature of Mississippi chartered the Pearl River Improvement & Navigation Company, which was authorized to receive from the state patents for certain swamp lands on its filing in the office of the secretary of state, within 60

days, a bond in the sum of $50,000, "with two or more good securities, * * * to be approved by the governor." Such bond was to secure to the state a compliance by the company with the provisions of the act requiring it to expend the value of the lands in making improvements in the navigation of Pearl river, and the governor was empowered, in case the company failed to comply with such provisions, to "commence suit on bond of said company." A bond was filed, in all respects as required, signed by four obligors, but not signed by the company. Such bond was approved by the governor, and patents were issued to the company for the lands, which it disposed of to others, and they were thereafter taxed by the state. Two years later the legislature, by an act then passed, recognized that the lands had been patented to the company "in compliance with the act of incorporation." *Held* that, there being no express provision requiring the company to sign the bond, and such signature being unnecessary to bind it, and the bond filed having been recognized as sufficient by both the executive and legislative departments of the state, it must be held to have been a substantial compliance with the act, and to have authorized the conveyance to the company of the lands.

3. FEDERAL COURTS—CONSTRUCTION OF STATE STATUTE—FOLLOWING STATE DECISION.

A federal court will exercise an independent judgment as to the construction of a state statute in a case involving rights acquired thereunder before it had received a construction by the state courts, notwithstanding it has since been construed by such courts.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

This case was tried in the circuit court on the following agreement, signed and filed September 2, 1898:

"It is hereby agreed, as a matter of fact, upon the submission of this cause by the undersigned solicitors, respectively, for complainant and defendant and cross complainant and respondent, that all technical matters in respect to pleadings and proceedings shall be waived; that the matters alleged in the cross bill shall be deemed to be facts in issue without the necessity of a formal answer hereto; and that the affirmative matters alleged in the answer to the original bill shall be deemed as being put at issue without a replication. It is further agreed, as matter of fact, that the lands in controversy were donated to the state of Mississippi, as stated in the original bill and answer, as swamp and overflowed lands. It is further agreed that whatever title was acquired from the state of Mississippi by the corporation designated as the Pearl River Improvement & Navigation Company came by regular conveyances to the defendant herein to the original bill. It is further agreed that if the patent made by the governor and secretary of state to said corporation, together with the subsequent acts of the legislature and the other facts herein recited, was insufficient to pass the title, and that the title remained in the state, and that the state was not estopped to thereafter assert title, then that the complainant in the original bill has duly acquired said title through persons who purchased the same of the state, as alleged in the original bill. It is further agreed that the only bond attempted to be furnished by or on behalf of said corporation under an act of the legislature entitled 'An act to incorporate the Pearl River Improvement and Navigation Company and for other purposes' (Acts 1871, pp. 482–487), which became a law on the 8th day of April, A. D. 1871, is that set forth in the report of the case of Hardy v. Hartman, 65 Miss. 506, 4 South. 545, and that the said copy shall be deemed and treated as having been read in evidence as the original bond; that said bond was filed by the Pearl River Improvement & Navigation Company in the office of the secretary of state prior to May 12, 1871. It is further agreed that said bond was by the governor approved on May 12, 1871, as the bond required under said act, and thereupon a patent was issued under said act in the name of the state, as otherwise provided by said act, to said company, which said patent was issued under the great seal of the state, signed by the governor and countersigned by the secretary of state, upon the 7th day of June, 1871. It

is further agreed that after the patent was issued to the Pearl River Company as above stated, and on, to wit, the 20th day of November, 1872, the said company sold and conveyed said lands to M. S. Baldwin for a sufficient and valuable consideration in cash then paid by him; that said Baldwin had no actual notice of the nature or character of the bond filed, but bought the same upon the faith of the state's patent exhibited to him before and at the time of the purchase, and upon the advice of counsel learned in the law that said title was good, and that said patent vested same in said Pearl River Company; that thereafter, on, to wit, the 17th day of April, 1873, said Baldwin sold and conveyed said lands to Israel Hall, who on the 5th day of November, 1874, conveyed to defendant, his wife; that said Hall paid to said Baldwin for said lands a full and valuable consideration, to wit, the equivalent of $40,000 in cash; that said Hall had no actual notice of the nature or character of the bond filed by the Pearl River Company, but bought said lands upon the faith of the patent from the state to the Pearl River Company, and the deed from such company to Baldwin, which said patent and deed were exhibited to him before and at the time of said purchase, and upon the advice of counsel learned in the law that the said patent and deed vested the title in said Baldwin; that said lands shortly after said sale to the Pearl River Company were listed for state and county taxation, and that defendant and her grantors have paid the taxes thereon from time same were listed up to the institution of this suit; that said patent to Baldwin, and the deeds from Baldwin to Hall, and Hall to defendant, were all duly recorded in the proper office shortly after execution, and long before the issuance of the patents under which complainant in the original bill claims. It is further agreed that if the court shall hold, in the above state of facts, that defendant, Olivia B. Hall, by virtue of said patent and conveyances, and with the facts above recited, and by virtue of said act of April 8, 1871, and the other acts of the legislature of the state of Mississippi passed in relation to the subject-matter, became, was, or is vested with the title to said lands, then a decree shall be rendered by this honorable court dismissing the original bill and canceling the title of complainant therein. If, however, upon the record above made, and upon the several acts of the legislature in reference to the subject-matter in dispute, the court shall find that the said Olivia B. Hall has no title to said land, then a decree shall be entered in favor of complainant in the original bill, as prayed therein, leaving to be determined only the question of charging the lands in controversy with the payment of taxes paid out by defendant and cross complainant, which matter is to be submitted to a master after the determination of the other issues. It is further agreed that complainant is not to be prejudiced by describing the document copied into said report of case of Hardy v. Hartman as a bond; the purpose being to submit to the court the question whether or not, under all the facts above recited, and the law in reference thereto, said bond was the bond required by said act, whether title passed by the issuance of said patent, and, if not, whether the state was, by the facts recited, the approval of said bond, and various laws thereafter enacted, estopped to thereafter assert title to said lands. It is further agreed that the lands in controversy are of the value of ten thousand dollars and upward. It is further agreed that nothing was done by the Pearl River Improvement & Navigation Company in furtherance of the purpose of public improvement mentioned in the act of 1871, and that neither said company, nor any one on its behalf, ever returned the patents it received, and that no money was paid as provided for by the act of April 19, 1873, to the state by said company, nor by any other person. It is further agreed that, if the same can be of any avail, defendant and cross complainant shall be deemed and treated as having pleaded specially the said act of April 19, 1873. In case the court shall be of opinion that the act of 1873, as published, cut off the title of the state as to the lands conveyed by said company before that date, complainant [reserves] the right to show that in point of fact said act, as published, was never a law [of] the state.

"T. M. Miller & G. W. Ellis,
"Solt'rs for Compl't.
"E. J. Bowers,
"Solicitor for Def't and Cross Compl't."

The sections of the act of the legislature of Mississippi passed March 22, 1871, which relate to the bond to be given under the act, are as follows:

"Sec. 5. Be it further enacted, that said company shall expend in the improvement of said river and in the navigation thereof, ten per centum of the first year, of the value of the property referred to in the preceding section, and that the whole value of said property shall be expended for the purpose specified in this charter within five years from the passage of this act. That said company shall, within sixty days after the passage of this act, file in the office of the secretary of state a bond in the sum of fifty thousand dollars, with two or more good securities, who shall make oath that they are worth the penalty of the bond over and above all liabilities and exemptions, which securities shall reside in this state, to be approved by the governor, and upon the approval and filing of said bond, said secretary of state shall from time to time, as demanded by said company, make out a patent or patents for said land to said company, which patent or patents shall be signed by the governor and countersigned by the secretary of state, which patents shall vest the fee-simple of said lands in this company: provided, nothing in this section shall be construed as to require patents to issue for any land heretofore sold to legal purchasers: provided further, that no lands shall be disposed of or sold by said company for a less sum than twenty-five cents per acre."

"Sec. 8. Be it further enacted, that the governor may at any time require the president of said company to make report to him of the amount of money expended in the improvement of Pearl river, which reports shall be made under oath, and shall set forth all particulars relating to said improvement; and when it becomes apparent to the governor that said company has not complied with the conditions of this act, and that they are not appropriating money derived from the sale of the land, as hereinbefore provided, it shall become his duty to commence suit on bond of said company, in his own name, for the use of said Pearl River district."

The bond which was given under the act is as follows:

"Pearl River Improvement and Navigation Company.

"Know all men by these presents, that we, Walter P. Billings, Samuel A. Vose, A. Warner, O. C. French, are held and firmly bound unto the state of Mississippi in the sum of fifty thousand dollars, the payment of which, well and truly to be made, we bind ourselves, our heirs and executors, jointly and severally, by these presents. The condition of the above bond is such that whereas, by an act of the legislature of the state of Mississippi entitled 'An act to incorporate the Pearl River Improvement and Navigation Company, and for other purposes,' a company was incorporated, called the Pearl River Improvement and Navigation Company, which company is charged with certain duties and bound by certain conditions in said act specified: Now, if said company will well and truly perform, or cause to be performed, all the acts and things mentioned in said act of incorporation, and comply with all the terms and conditions in accordance with the tenor and meaning of said act, then this bond to be void, otherwise to remain in full force and effect.

"In witness whereof, said persons have hereunto set their hands and seals this 7th day of April, 1871. W. P. Billings. [Seal.]

"By S. A. Vose, His Attorney.

"S. A. Vose. [Seal.]

"A. Warner. [Seal.]

"O. C. French. [Seal.]

"Approved May 12th, 1871.

"J. L. Alcorn, Governor."

T. C. Catchings and T. M. Miller, for appellant.

E. J. Bowers and D. B. H. Chaffe, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This is a suit in equity to quiet the title of the plaintiff to a large tract of swamp or overflowed lands in Mississippi against the claim of the defendant to an adverse interest in the premises. The plaintiff seeks to have the defendant's pretended titles produced and canceled. The defendant, after answering, filed a cross bill seeking to have the plaintiff's alleged titles canceled and her right to the lands established. The court decided in favor of the defendant and cross complainant, and the plaintiff appeals to this court.

The first question raised is as to the jurisdiction of the circuit court. The original bill was filed in the chancery court of Pearl River county, Miss. The plaintiff was a Mississippi corporation, and the defendant a citizen of Michigan. The value of the land exceeded $2,000. On petition of the defendant the case was duly removed from the state court to the circuit court of the United States for the Southern district of Mississippi. The plaintiff moved to remand the case to the state court because the circuit court "has no jurisdiction in the premises, there being no ground of equity jurisdiction stated upon the face of the bill of complaint, save under a statute of the state of Mississippi, which cannot enlarge the equity powers of the federal courts." The court overruled the motion, and its order is assigned as error. The statute referred to in the motion is section 500 of the Annotated Code of Mississippi of 1892, and is as follows:

"Sec. 500. When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim or pretend to have any right or title thereto which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not; and any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner."

The seventh amendment to the constitution of the United States declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This amendment is a limitation on the equity jurisdiction of federal courts. If the legislation of states, providing for the trial of common-law cases in equity, was binding on federal equity courts, this amendment of the constitution could be made useless. Such state statutes do not control the federal courts. A state statute, therefore, which confers jurisdiction of common-law cases on state equity courts, thus dispensing with trials by jury, will not be administered in federal courts of equity. Scott v. Neely, 140 U. S. 106, 111, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 37 L. Ed. 804. It is well settled, however, that an enlargement of equitable rights may be administered as well by the United States courts as by state courts. Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123; In re Broderick's Will, 21 Wall. 503, 520, 22 L. Ed.

599; Greeley v. Lowe, 155 U. S. 58, 75, 15 Sup. Ct. 24, 39 L. Ed. 69; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. Courts of equity from time immemorial have exercised jurisdiction to cancel spurious titles and to remove clouds upon the title of real estate, thus preventing anticipated wrongs or mischiefs. To maintain such suit it was generally necessary for the plaintiff to be in possession of the real estate, and that his title should have been established at law, or founded on undisputed evidence or long-continued possession. The statute quoted distinctly relates to equitable rights. It enlarges such rights. It dispenses with the necessity for the plaintiff's possession. This enlargement of equitable rights will be administered in the United States courts. Holland v. Challen, 110 U. S. 15–26, 3 Sup. Ct. 495, 28 L. Ed. 52. The bill in the case at bar contains no specific averment as to the actual possession of the real estate. It alleges title in the plaintiff, but not possession. It does show, however, that the defendant is not in actual possession of the property. The lands are shown to be in Mississippi. She is shown to reside in Michigan. She is sued and served as a nonresident of Mississippi. No tenants are shown to be in possession. It does not appear from the record that a remedy by the action of ejectment was available to the plaintiff. An examination of the cases will show that the jurisdiction in equity in the United States courts to enforce statutes enlarging equitable remedies depends on the question whether or not the enforcement of the statute deprives a party of the constitutional right of trial by jury. Section 723 of the Revised Statutes of the United States, and the law as administered without regard to this statute, forbid equity to take jurisdiction where there is a plain and adequate remedy at law. If the record in this case showed that the defendant was in actual possession of the lands, so that an action of ejectment could have been brought against her for the lands, then it would appear that there was an adequate remedy at law, and jurisdiction in equity would not exist in the United States courts, although the statute conferred such jurisdiction on the Mississippi state courts. Whitehead v. Shattuck, 138 U. S. 146, 147, 11 Sup. Ct. 276, 34 L. Ed. 873. The result of the decision of the supreme court is that a state statute which enlarges equitable rights will be enforced and administered in the United States courts in all cases where its enforcement and administration do not conflict with the right of the parties to a jury trial. Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123; In re Broderick's Will, 21 Wall. 503, 22 L. Ed. 599; Hipp v. Babin, 19 How. 271, 15 L. Ed. 633; Thompson v. Railroad Co., 6 Wall. 134, 18 L. Ed. 765; Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Grand Chute v. Winegar, 15 Wall. 373, 21 L. Ed. 174; Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451. See, also, Harding v. Guice, 25 C. C. A. 352, 80 Fed. 162; Green v. Turner (C. C.) 98 Fed. 756. To review and quote from these cases would serve no useful purpose. That work has already been done by Judge Taft, speaking for the United States circuit court of appeals for the Sixth circuit, in Grether v. Wright, 23 C. C. A. 498, 75 Fed. 742. We will, however, quote the following from an opinion of the supreme court delivered by Mr. Justice Brown:

"This court has held in a multitude of cases that where the laws of a particular state gave a remedy in equity, as, for instance, a bill by a party in or out of possession to quiet title to lands, such remedy would be enforced in the federal courts, if it did not infringe upon the constitutional rights of the parties to a trial by jury." Greeley v. Lowe, 155 U. S. 58, 75, 15 Sup. Ct. 28, 39 L. Ed. 75.

It is conceded that the bill makes a case within the jurisdiction of the Mississippi chancery court, for the statute quoted dispenses with the necessity of the plaintiff's possession. As it appears that the defendant was not in possession of the lands, and that the plaintiff has no adequate remedy at law, and that the defendant is not deprived of the right of a trial by jury, there is no valid objection to the jurisdiction of the United States circuit court.

The other assignments of error relate to the merits of the case.

On the 3d of February, 1858, the lands in controversy were patented by the United States to the state of Mississippi. The litigation in this case is to settle the question as to the ownership of these lands; it being agreed that they are owned either by the appellant, the Southern Pine Company, or the appellee, Olivia B. Hall. The parties both deraign title from the state of Mississippi. On April 8, 1871, the legislature of Mississippi chartered the Pearl River Improvement & Navigation Company, hereinafter called the "Pearl River Company." This company was authorized to receive from the governor and the secretary of state of Mississippi patents for the land. On June 7, 1871, the secretary of state and the governor of Mississippi issued a patent for the lands to the Pearl River Company, which was duly recorded in the counties where the lands lie. The Pearl River Company on November 20, 1872, conveyed the lands, for a valuable consideration, to Matthew S. Baldwin. Baldwin on the 17th day of April, 1873, sold and conveyed the lands to Israel Hall for a consideration of $40,000. On November 5, 1874, Hall conveyed the lands to his wife, the appellee. The patent and all the deeds were duly recorded. Soon after the patent issued to the Pearl River Company the lands were listed for taxation, and the appellee and her vendors have paid taxes on them to the state of Mississippi since that time to the beginning of this suit. On the 7th of December, 1893, the state of Mississippi issued other patents to the lands in question. The appellant, the Southern Pine Company, by several conveyances has become the owner of whatever right and title these patentees obtained from the state. It will be seen by this statement that the appellee claims under the prior grant. The act of 1871 which incorporated the Pearl River Company required it within 60 days after the passage of the act to deposit with the secretary of state of Mississippi "a bond in the sum of $50,000, with two or more good securities, who shall make oath that they are worth the penalty of the bond, over and above all liabilities and exemptions, which securities shall reside in this state, to be approved by the governor." On the filing of such bond the act provided that patents were to be issued by the governor and the secretary of state to the Pearl River Company, which patents were to vest the fee-simple title to the lands in the company. Before the patents were issued the Pearl River Company

filed a bond in the proper office in the sum of $50,000, which was duly approved by the governor of Mississippi on May 12, 1871. The bond was not signed by, and did not purport to bind, the Pearl River Company. The bond is in due form, and is signed by four obligors. The objection urged to the bond by the appellant is that it is not the bond of the company. It is claimed that the legislature, in requiring the Pearl River Company to file "a bond * * * with two or more good securities," meant that it should be bound on the bond as principal. It is also said that the act provides that in "certain contingency it is the duty of the governor to commence a suit on the bond of said company." These expressions in the bond, it is said, show that the act required the filing of a bond executed by the Pearl River Company as a condition precedent to the issuance of the patent. The act does not say that the bond is to be executed by the Pearl River Company. The language used is that it shall "file in the office of the secretary of state a bond in the sum of $50,000, with two or more good securities, who shall make oath that they are worth the penalty of the bond, over and above all liabilities and exemptions, which securities shall reside in this state, to be approved by the governor." The purpose and intention of the legislature was to secure indemnity or security to the amount of $50,000. That was the leading purpose and thought. The makers of the bond were required to make oath that they were worth the amount of the bond. If it became "apparent to the governor that the said company had not complied with the act, * * * it shall become his duty to commence suit on bond of said company." These provisions make it clear that the purpose of the bond was indemnity or security to the state. The company would be liable, with or without bond, to suit for failure to perform the trust created by the act. It was liable to such suit whether it had been required to give bond or not. The state lost nothing in the way of security by the failure of the company to join in the execution of the bond. A solvent bond for the required sum being given, the purpose of the legislature was complied with. The bond was accepted by the governor as a satisfactory compliance with the act. This contemporaneous construction of the act by the executive of the state, who was vested with the authority by the legislature to approve the bond, is entitled to consideration and respect. In Edward's Lessee v. Darby, 12 Wheat. 207, 210, 6 L. Ed. 604, the supreme court said:

"In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

The bond being approved and the patents issued, the state received taxes on the lands from the patentee and those claiming under the patentee for a period of over 20 years. On April 19, 1873, the legislature, by an act of that date, formally recognized that "the lands had been patented to said company in compliance with the act of incorporation." Acts Miss. 1873, p. 120. It appears, therefore, that both the executive and legislative branches of the state government have recognized the sufficiency of the bond to authorize the issuance of the

patent under which the appellee claims. It does not appear clearly from the language of the act that it was intended by the legislature that the Pearl River Company should sign the bond. But, if it be conceded that such was the meaning of the act, it is a matter of minor importance. The important and essential purpose was to secure an indemnity by bond for $50,000. A good bond for that sum was given and accepted. After the acceptance of the bond and its approval by the governor, and the subsequent ratification of the governor's action by the legislature, the courts should be reluctant to disturb titles acquired in good faith by purchasers for value who relied on the patents issued by the governor and the secretary of state.

The case of Hardy v. Hartman, 65 Miss. 504, 4 South. 545, is relied on by the appellant. The court in that case said it did "not appear from the record that any patent signed by the governor and countersigned by the secretary of state was ever issued to the company for the land in question. * * *" The observation, therefore, at the conclusion of the case, that if a patent had issued it would have been void, must be regarded as an obiter dictum. This case, we think, cannot be held a judicial construction of the statute on the point here involved. If it should be so considered, although we would have great respect for the conclusion of that able and impartial court, we should be required, on the facts of this case, to exercise an independent judgment in the construction of the statute in question. The appellee in this case having acquired the rights here asserted before the decision of the supreme court of Mississippi just cited was rendered, she is entitled to invoke the independent judgment of this court as to the proper construction of the statute. In Bartholomew v. City of Austin, 29 C. C. A. 568, 85 Fed. 359, this court (Judge Pardee delivering the opinion) held:

"Where contracts or transactions have been entered into, and rights have accrued thereunder, before state laws applicable to them have been construed by the state courts, the federal courts will place their own interpretation on such laws, though the state courts have since adopted a different construction."

This view is fully sustained by the supreme court. In Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 21, 27 L. Ed. 365, the court said:

"When contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

The appellee has urged on our attention the fact that her vendor purchased and paid full value for the lands without notice of defect, if any, in the bond given by the Pearl River Company, and that she should be protected as a bona fide purchaser for value, without notice. It is also claimed that the state was by the facts estopped to issue the second patent for the lands. As we have determined that the bond given was a substantial compliance with the act of the legislature, we do not deem it necessary to examine these last-named contentions. The decree of the circuit court is affirmed.

## UNITED STATES ex rel. GRIGGS, Atty. Gen., et al. v. CHESAPEAKE & O. FUEL CO. et al.

(Circuit Court, S. D. Ohio, W. D. August 31, 1900.)

No. 5,298.

1. MONOPOLIES—CONTRACTS AFFECTING INTERSTATE COMMERCE.
A contract by which a corporation agrees to take the entire product of a number of persons, firms, and corporations engaged in mining coal and making coke in a certain district, which is intended for "Western shipment," to sell the same at not less than a minimum price, to be fixed by an executive committee appointed by the producers, and to account for and pay over to such producers the entire proceeds above a fixed sum per ton, to be retained as "compensation,"—the stated purpose being "to enlarge the Western market,"—and under which the shipments are made into other states, is one affecting interstate commerce, and is subject to the provision of the anti-trust law.

2. SAME—ANTI-TRUST LAW.
It is the declared policy of congress to promote individual competition in relation to interstate commerce, and to prevent combinations which restrain such competition between their members; and it is no defense to an action to dissolve such a combination as illegal under the anti-trust law that it has not in fact been productive of injury to the public, or even that it has been beneficial, by enabling the combination to compete for business in a wider field.

3. SAME—COMBINATION IN RESTRAINT OF TRADE.
By a contract between a fuel company and an association composed of 14 persons, firms, and corporations, engaged in producing coal and coke in a certain district, the company was to handle for a term of years the entire output of the mines intended for the Western market, and bound itself not to sell the product of any competing mines. A minimum price at which the coal should be sold was to be fixed by the executive committee of the association from time to time, and the company agreed to pay such price, to obtain as large a profit as possible, and to account to the association for all of the same, above a fixed sum per ton, which it was to retain as compensation. The amount to be furnished by each member of the association was also to be fixed by the executive committee, and each was to receive payment at the same rate, to be based on the average price realized for the particular grade furnished during the current month. *Held*, that such provisions were in restraint of trade, and rendered the contract illegal, under the anti-trust act of July 2, 1890 (26 Stat. 209), in so far as it related to interstate commerce.

In Equity. Suit to annul a contract and to dissolve a combination as illegal under the anti-trust law.

Wm. E. Bundy, U. S. Atty., and Sherman T. McPherson and Edward P. Moulinier, Asst. U. S. Attys.

Paxton & Warrington, Brown, Jackson & Knight, St. Clair, Walker & Summerfield, and Richard P. Ernst, for defendants.

THOMPSON, District Judge. This suit was brought by the United States district attorney for this district, by direction of the attorney general of the United States. The bill alleges that the defendants, other than the Chesapeake & Ohio Fuel Company, 14 in number, are producers and shippers of coal, and that some of these are makers and shippers of coke in the counties of Fayette and Kanawha, in the state of West Virginia, in what is known as the "Kanawha District," and that they produce nearly if not all of the coal, and make nearly if not all of the coke, shipped from said district; that a

great portion of the coal and coke so produced and made is shipped for sale and consumption into the states of Ohio, Kentucky, Indiana, Illinois, Michigan, Minnesota, Montana, and the Dakotas; that prior to the 15th of December, 1897, each of the defendants, other than the Fuel Company, sold their product in the several states mentioned without any restriction other than the natural and necessary competition between themselves and others, but that on that day they entered into a contract and combination in the form of a trust and conspiracy in restraint of trade and commerce among the several states mentioned, in regard to the sale and production of coal and coke, of which the following is a copy:

"This agreement, made this 15th day of December, 1897, between the C. & O. Fuel Company, a corporation created, organized, and existing under and pursuant to the laws of the state of West Virginia, and hereinafter called the 'Fuel Company,' of the first part, and the St. Clair Company, a corporation of West Virginia; John Carver and Enoch Carver, partners in business under the firm name and style of Carver Brothers; W. R. Johnson, M. T. Davis, doing business as M. T. Davis & Co.; John Carver and Enoch Carver, partners in business under the firm name and style of the Mecca Coal and Coke Company; S. H. Montgomery, doing business under the name of the Montgomery Coal Company; the Chesapeake Mining Company, a corporation of West Virginia; the Belmont Coal Company, a corporation of West Virginia; the Kanawha Splint-Coal Company, a corporation of West Virginia; the Robinson Coal Company, a corporation of West Virginia; Harry B. Smith, special receiver of the Lens Creek Coal and Coke Company; Joseph Renshaw, special receiver of the Big Black Band Coal Company; the Charlmore Coal Company, a corporation of West Virginia; and Robert Brabbin, Jr., and L. N. Perry, partners in business under the firm name and style of the Brabbin Coal Company; Jasper McCallister, Samuel Moore, and James Kelsoe, doing business as McCallister & Co.,—and together constituting the C. & O. Coal Association, and hereinafter collectively mentioned as the 'Coal Association,' of the second part: Whereas, the members of the said Coal Association are all miners and shippers of coal, and part of them makers and shippers of coke, on the line of the Chesapeake & Ohio Railway, in Fayette or Kanawha counties, West Virginia, and have formed and organized said association for the promotion of their common business interests in the mining of Kanawha coals and cokes; and whereas, the said Fuel Company has been incorporated and organized for the purpose of placing said Kanawha coals and cokes upon the Western market, its prime object to promote the sale of, and enlarge the Western market for, said coals and cokes: Now, therefore, this agreement witnesseth:

"(1) That the parties of the second part agree, in consideration of the covenants and agreements on the part of the party of the first part herein contained, each firm, individual, or corporation severally, for themselves, himself, or itself, and not for any other, and each of them doth hereby agree, to sell to the said Fuel Company exclusively the entire coal and coke output of the mine or mines operated by each of them respectively on said C. & O. Ry., or branches thereof, for Western shipment, for a period of not less than five years from and after the date of January, 1898, subject to all the provisions, terms, and conditions hereinafter contained, except as to such coal as may be sold by any member of said Coal Association to the Chesapeake & Ohio Railway Company for the consumption of said railway company, which said coal such member shall have the right to sell to said railway company direct, it being understood that this contract applies only to the coal and coke to be sold west of the respective mines of the members of said Coal Association, and shall not in any way apply to or interfere with the Eastern trade of the members of said association.

"(2) The minimum price f. o. b. mines of all the various grades of coal and coke sold and to be shipped West by the members of said association, and embraced in this contract, shall be fixed by the executive committee of said Coal Association from time to time, as it shall see proper, after consultation with the executive committee of the Fuel Company. The said Fuel Company

covenants, agrees, and binds itself that it will make no contract for the sale of any coal or coke of any members of said association at a price lower than such minimum prices to be fixed by such committee, and, further, that it will at all times endeavor to obtain the maximum price for such coal and coke. It is understood and agreed that the minimum prices hereinbefore mentioned are net prices f. o. b. mines, and not including any profit to the said Fuel Company, which is to get its profit over and above said prices.

"(3) That the said Fuel Company shall make its sales direct, and shall not make any contract for the sale of coal and coke to a third party in the name of any member of the said Coal Association, and shall have no right by any contract to bind any member of said association to any third party, except for river business, as hereinafter provided for.

"(4) The executive committee of said Fuel Company, who shall administer and have charge of its affairs, shall be composed of three (3) persons, one of whom shall at all times be a member of or officer of a member of said Coal Association, and shall from time to time, according to the by-laws or articles of association of said association, be designated as a member of such executive committee, and shall thereupon be appointed such member of such executive committee by said Fuel Company in the place and stead of the member of or officer of a member of said Coal Association previously occupying such office. The executive committee of said Coal Association shall consist of three members of or officers of members of said Coal Association, to be selected as such from time to time by the members of said Coal Association according to their by-laws or articles of association.

"(5) The said Fuel Company covenants, agrees, and binds itself to sell for shipment by rail via the said Chesapeake & Ohio Railway, and pay for to the members of said Coal Association as hereinafter agreed, not less than 600,000 tons per annum of coal and 75,000 tons per annum of coke; such sales and shipments to be disposed of in as nearly equal monthly quantities as possible. But in case said Fuel Company is unable for any time to make sales of coal or coke by reason of the failure or inability of the members of said association to make prices sufficiently low to enable said Fuel Company to meet the prices in the market where said coal or coke is sought to be sold, and to compete with other sellers of coal or coke in such markets, then there shall be an abatement of the minimum amount of coal or coke hereinbefore agreed to be taken annually by said Fuel Company, bearing the same proportion to such minimum amount of coal or coke as such time during which such inability to meet such market prices shall continue does to one year. The executive committee of said Coal Association shall, not later than the 20th day of each month, designate the percentage of the total product of each class and grade of coal and coke which they deem best to be shipped by each member of said association by rail as aforesaid during the succeeding month, which apportionment so made shall be furnished the general manager of said Fuel Company not later than the 20th day of said first-mentioned month, and all orders received to be shipped by rail as aforesaid during such succeeding month shall be distributed between the members of said Coal Association by said general manager according to such apportionments: provided that, if any member of said Coal Association shall be unable or shall not desire to ship West the full amount of any kind or grade of coal or coke apportioned to such member for any month, the said Fuel Company shall distribute the order for the deficiency so caused among the other members of said association who are shippers of such grade of coal or coke, in the proportion as between such other members fixed by said committee for such month: provided, further, that only actual inability shall excuse a member of said association from shipping so much of the apportionment for any month shall be required by the said Fuel Company for contribution to contracts previously taken by said Fuel Company.

"(6) The said Fuel Company shall make and render to the members of the Coal Association accurate and complete reports of all coke and coal shipped by rail as aforesaid, as follows: (a) A daily report of all sales, showing the net prices of such sales. (b) A monthly report showing the tonnage of the various kinds and grades of coal and coke shipped by members of said Coal Association and weighed during the month, or weighed during such month though shipped during a preceding month, together with the average price

for each grade or kind of coal or coke so shipped and weighed, which average price shall be computed upon the basis of the actual price, less gross profits, if any, received for all coal or coke sold, and the minimum price, fixed as hereinafter provided, for such month for coal or coke not sold in such month; said report to be made not later than the 10th day of each month for all coal and coke weighed, or weighed during the previous calendar month. The coal and coke shipped and weighed or weighed during such month shall be paid for by said Fuel Company to the members of said Coal Association according to the average prices, determined as aforesaid, and upon the sale after the end of each month of any coal or coke shipped and weighed, or weighed but not sold during such month, the surplus, if any, arising after deducting from the actual price received the minimum price for such kind and grade of coal or coke for such month and profit shall be paid forthwith to the shippers of such grade of coal or coke for such month according to their tonnage of such kind or grade of coal or coke for such month. And the said Fuel Company agrees and binds itself to pay as aforesaid, in cash, on or before the 20th day of each month, for all coal and coke during the previous calendar month.

"(7) The said Fuel Company further covenants, agrees, and binds itself to handle only such coal and coke as are produced by the above-mentioned members of said Coal Association, and not to handle, buy, or sell, for itself or on commission, any coal or coke produced by any other operator along said Chesapeake & Ohio Railway or branches thereof, or any coal or coke wherever produced, of the same grade as, or competing with, coal or coke produced by any of the members of said association, the prime object of this contract being to enlarge the sale of, and extend the Western market for, Kanawha coal and coke; and this shall not prevent the said Fuel Company from dealing in anthracite coal or New River coal or coke: provided, that New River coal or coke shall not be dealt in to the prejudice of, or sold as a substitute for, Kanawha coals and cokes: and provided, further, that in an emergency, and when absolutely necessary, other coals and cokes may be handled by said Fuel Company to meet such emergency. But no dealing in such anthracite, New River, or other coal or coke shall be done by said Fuel Company to an extent or in a manner incompatible with the prime object of this agreement, as hereinbefore recited.

"(8) That at any time, by a vote of two-thirds (⅔) of the members of said Coal Association, said Fuel Company may be allowed to handle any other coal or cokes for such time and upon such terms and conditions as may be prescribed by such vote.

"(9) The said Fuel Company is to receive a gross profit on all rail coal and coke sold, which shall not exceed ten (10) cents per ton of two (2,000) thousand pounds on any sale, which compensation shall be retained by said Fuel Company out of the monthly settlements of coal and coke sold; the true intent and meaning of this clause being that the Fuel Company shall get its profit over and above the net minimum price of said coal and coke f. o. b. mines as hereinbefore fixed, and, if the price at which said coal and cokes is sold by said Fuel Co. shall be sufficient to yield a sum exceeding said minimum price and gross profit of ten (10) cents per ton as aforesaid, then the difference shall be paid over to the members of said association in the manner and at the time hereinbefore mentioned, as they may be entitled under this agreement, as part of the purchase price to be paid for coal and coke by said Fuel Co.

"(10) The members of said association shall not be required to mine and ship coal when hindered or prevented by causes beyond their own control, such as strikes, accidents, refusal or inability of the carrier to provide transportation, &c.

"(11) The said Coal Association shall have the right once per month, through a committee not exceeding three in number, or a person designated by said committee, to examine the order, sales, and tonnage books of said Fuel Company.

"(12) The coal or coke of members of said Coal Association shipped in barges by river shall be handled by the said Fuel Company, as an agent, on the same terms and under the same conditions as are now established or may be hereafter established and prevail in Cincinnati market for the sale of river

coal, but the said Fuel Company shall not make time sales or extend credit without the consent of the shippers of such coal.

"13) All settlements for coal or coke shipped by rail as aforesaid shall be made upon the scale weights of the Chesapeake & Ohio Railway Company, as ascertained at its weighing stations now established or that may hereafter be established.

"(14) It is distinctly understood that nothing herein contained shall be construed to render the said members of said association liable as partners, in any way, manner, or form, either as between themselves or with the said Fuel Company; each of said firms, corporations, and individuals contracting herein for themselves, itself, or himself, and not one for the other.

"(15) The said Fuel Company further covenants, agrees, and binds itself that neither it nor any of its officers, employés, or servants will, with its knowledge, directly or indirectly, in any way, manner, or form, engage or become interested in the buying or selling of bituminous coal or coke in competition with the coal or coke of any of the members of said Coal Association, except under the terms and conditions of this agreement.

"(16) The members of said Coal Association above named, each for himself, itself, or themselves, and not one for the other, covenant and agree that the said members of said association will not sell or consign any coal or coke bound to points west of their respective mines, except under the terms and conditions of this agreement, during the period covered by this agreement, and that there shall be no pretended sale or lease of the property of the members of the said association made to evade this contract; but it is further understood and mutually agreed that this contract shall not be construed to prevent any bona fide sale, assignment, or lease of the respective properties operated by the members of said association, respectively, or the interest therein of any member of said association. And in case of such sale, assignment, or lease, the members of said association are not to be held responsible under this contract for the sale and delivery of any coal from such properties after such sale, assignment, or lease takes place. But in case the vendee, assignee, or lessee of any coal or coke property of any member of the Coal Association desires, he shall have the right to take the place of such member in this agreement.

"(17) And whereas, some of the members of said association have contracts for the sale of coal or coke, which cannot be completed until after this agreement goes into operation; and whereas, it is to the advantage both of such members and of said Fuel Company that such contracts be filled through said Fuel Company, it is further agreed that the members of said association having existing contracts to be completed during the period of this agreement shall on or before the 24th day of December, 1897, file with the general manager of said Fuel Company a memorandum of each of said contracts, and such of said contracts as are uncompleted on the first day of January, 1898, shall be completed through said Fuel Company; the Fuel Company to make no charge for its services in connection with such contract and collecting the proceeds of the same; said Fuel Company not to guaranty the collection of such proceeds, or be responsible for same unless collected by it. Such coal or coke so shipped on existing contracts shall not be taken into account in any way as a part of the traffic hereinbefore provided for in this contract, nor its prices taken into account in computing the average price for any month, but such as shall be shipped by rail shall be considered part of the minimum tonnage mentioned in the fifth clause of this agreement for the year in which it is shipped.

"(18) The said Fuel Company shall keep at its own expense one or more inspectors to examine and inspect from time to time, as often as may be necessary, the coal and coke produced, with a view of keeping up a proper standard of excellence. Should said inspector find coal or coke badly or improperly prepared, he shall immediately report all the facts in writing to the Fuel Company and to the operator preparing such coal or coke, and shipments from mine or mines producing such alleged improperly prepared coal or coke may be suspended after five (5) days' notice in writing to such operator, at the discretion of the executive committee of the Fuel Company, until such time at such operator may prepare such coal or coke properly. In any case such

operator shall have the right to refer the question whether such coal or coke is improperly prepared or not, or, if not so prepared, whether the same be so prepared at reasonable cost, to arbitration, as herein provided, which decision as to the preparation of such coal shall be final and binding on both parties; and in case said arbitration shall find such coal or coke improperly prepared, and shall further find that it is impossible or impracticable for such operator to remedy such faults at reasonable cost, he shall have the right to withdraw from, and have this agreement annulled as to him. If said Fuel Company shall make default in payment for any coal or coke shipped under this agreement according to the terms hereof, and said default shall continue for the space of fifteen (15) days, unless payment shall be withheld by reason of attachment, suggestion, garnishment, or other legal process against the member of said Coal Association on whose claim default is so made, such default shall, at the option of such member on whose claim such default it is so made, work an annulment of this contract as to such member: provided such member shall within ten (10) days after the expiration of said fifteen (15) days give notice in writing to said Fuel Company of the election of such member to exercise such right of annulment; and a failure to exercise this right for any such default shall not prevent the exercise of the same for any subsequent default. And a violation or failure to keep, observe, and perform any covenant or covenants herein contained by any party to this agreement shall, at the option of the party or parties thereby aggrieved, work an annulment of this agreement as to such party or parties on thirty (30) days' notice in writing. And no waiver of this right, in case of any violation or failure to keep, observe, and perform any covenant hereof, shall prevent the exercise of the same for any subsequent violation of, or failure to keep, observe, and perform, the same, or any other covenant hereof; provided, that upon any notice for the annulment of this agreement as hereinbefore provided being given by any parties or party, the party or parties to whom it is so given, if desiring to contest the rights of the parties or party giving said notice to annul this agreement, shall have the right to submit the question to arbitration, as herein provided, and the decision of such arbitrator shall be final and binding on all parties to such arbitration. But any withdrawal or annulment as to any member or members under this, or clause No. 18 hereof, shall not affect this contract as to the parties remaining, between themselves.

"(19) Any person, firm, or corporation now or hereafter producing coal to be shipped on the Chesapeake & Ohio Railway may become a party to this contract by signing the same, or an exact copy hereof, with the Fuel Company, or by an indorsement attached hereto may accept the provisions hereof; and, upon becoming such party hereto, such person, firm, or corporation shall be entitled to all the rights and privileges, and be subject to all the duties and liabilities, hereunder, the same as if he, it, or they had been named in said contract as one of the parties of the second part, and had duly signed and executed it with the others named therein: provided, that said association shall agree to such person, firm, or corporation becoming a party hereto by a majority vote of a quorum of its members.

"(20) It is understood and hereby agreed that in any matter or thing connected with this agreement, where any party hereto shall assert, maintain, or set up any claim, right, privilege, liability, or penalty in his, its or their favor, or against any other party or parties hereto, and thereby a controversy shall arise hereunder, then and in that event either party or parties to such controversy shall have the right to submit the said controversy to arbitration in the manner hereinafter set forth. There is hereby constituted and appointed an arbitration committee, which shall be composed of two persons and such third person as shall be by such two selected from time to time as any controversy may arise. Such two persons shall be selected as follows: Each and every year during the continuance of this contract the said Fuel Company shall appoint some person to serve upon said arbitration committee, and the parties of the second part shall also appoint one to serve upon said committee, of which appointment the Fuel Company and the association shall have notice, and the two persons so appointed shall continue to serve until their successors shall be appointed in the same manner. Whenever a controversy shall arise hereunder, the party desiring to submit such controversy shall notify the other party or parties to such controversy of the same, in

writing, and shall designate in such notice the time and place when said two arbitrators shall meet to hear the matter in controversy, and he or they shall also notify the said arbitrators to meet at said time and place. And at the time and place so designated said two arbitrators shall meet, and they shall select a third arbitrator, who, with the other two, shall constitute the full arbitration committee to hear and determine the said controversy, and whose award in all matters of law and fact shall be final, and shall be binding upon each and all of the parties to that controversy. Such notice may be served as a legal notice is served, or it may be mailed to the party, to be served at his or their post-office address. And any notice to any one or more of the parties of the second part may be served upon or sent by mail to the president and secretary of said association. If at the time and place said two arbitrators are required to meet, either one or both of them should fail or refuse to attend or serve, then the Fuel Company, by its agent or attorney, on the one side, may fill the vacancy caused by its arbitrator being absent or refusing to serve, and the association, by its officer, agent or attorney, may fill the vacancy caused by the absence of its arbitrator or his refusing to serve; and the arbitrator or arbitrators so selected by either or both of said parties as aforesaid shall select the third, which three shall, for that controversy, constitute the arbitration committee, and shall have the same powers, and their award shall be as final, as if the two arbitrators herein first provided for had attended and selected a third. If, upon having notice to attend at a time and place to settle a controversy, either party shall fail or refuse to attend, or shall fail or refuse to select an arbitrator when required hereunder so to do, the said association by its president, other officer or attorney, may select an arbitrator in the place or stead of the absent one; and, if such association shall fail or refuse to make such appointment, in that event the Fuel Company, by its agent or attorney, may make such appointment or appointments, and the two when so appointed in any of said modes shall select a third, and the three shall constitute the arbitration committee to hear and determine said controversy, whose award shall be final. A notice to arbitrate hereunder shall not fix a time longer than fifteen (15) days nor less than five (5) days from the time of giving said notice, unless by mutual consent. The place of such meeting of the arbitrators shall be at Cincinnati, Ohio, or Charleston, W. Va., unless by mutual consent. Said arbitrators shall have the right to adjourn their session from time to time or to such place or places as they may determine. And they shall make their award in not less than three days from the time the evidence is finally taken before or submitted to them; such award to be valid if signed by two of the arbitrators. Every award shall be executed in duplicate, and a copy thereof furnished to each of the executive committees herein mentioned. The failure of a regular arbitrator to attend at a time and place designated in any notice to him, and the appointment of another in his stead for any controversy, shall not for that reason vacate his general appointment as an arbitrator until his successor is appointed. If the two arbitrators appointed as above provided shall at any time fail or refuse for two days to appoint the third arbitrator, the latter shall be appointed by the judge of the circuit court of Kanawha county, West Virginia.

"Witness the following signatures:

"The C. & O. Fuel Co., Donald Macdonald, Pt.
"Robinson Coal Co., by Neil Robinson.
"W. R. Johnson.
"The Kanawha Splint-Coal Company, by F. E. Lair.
"Carver Bros.
"Enoch Carver.
"Jos. Renshaw, Special Receiver Big Black Band Coal Co.
"Charlmore Coal Co., Herndon & Renshaw, Mgrs.
"McCallister & Co., per James Kelsoe.
"Mecca Coal & Coke Co., by John Carver.
"Chesapeake Mining Co., by J. B. Lewis.
"Coalburg Colliery Co., by J. B. Lewis.
"Montgomery Coal Co., by S. H. Montgomery.
"Belmont Coal Co., by T. E. Embleton, Pt.
"Harris B. Smith, Spl. Receiver Lens Creek Coal & Coke Co."

—That this contract went into effect on the 1st day of January, 1898, and that the defendants, acting thereunder, monopolized and controlled the amount of coal and coke produced in the Kanawha district, and only permitted such amount of coal to be mined and coke to be made as could be sold by the Fuel Company in accordance with the provisions of the contract, the producers being permitted to ship only such amounts as should be apportioned among them by an executive committee of three selected by members of the association; that the defendants, acting under said contract, not only controlled the amount of coal and coke shipped into the states mentioned from the Kanawha district, but wholly destroyed competition in the sale of the same. And it is alleged generally that the said contract, and the operations thereunder, constitute an unlawful combination, in the form of a trust, in restraint of trade and commerce among the said several states, and that said defendants have combined and conspired with one another to monopolize, and have attempted to monopolize, by reason of said contract, and their acts and operations thereunder, a part of the trade and commerce in coal and coke among the said several states, all in violation of the act of congress of July 2, 1890. And the prayer of the bill is that the defendants be restrained from selling or shipping any coal or coke into any state, other than the state in which they reside, under said contract, and that they be restrained from continuing in any like combination or agreement, and from further agreeing and combining and acting in any manner as set out in said contract, and that the contract be declared void and illegal, and that said trust and combination be dissolved by decree of the court.

At the hearing no evidence was introduced by the complainant, but the case was submitted upon the bill and answer, and the evidence introduced by the defendants. The circumstances under which the contract was made, and the facts in relation to the operations of the defendants thereunder, as shown by the allegations of the answer and the evidence, are, in substance, as follows: The defendants other than the Fuel Company are owners of coal mines and producers and shippers of coal, and some of them are makers and shippers of coke. Their mines and coke plants are situated along the line of the Chesapeake & Ohio Railway, in the counties of Fayette and Kanawha, in the state of West Virginia, and in the territory known as the "Kanawha District." The counties of Fayette and Kanawha embrace nearly all of the district. A part of Putnam county is within this district. Besides the mines of the defendants, there are in the same district, on the Chesapeake & Ohio Railway, or south side of the Kanawha river, the mines of the following companies, viz.: The Great Kanawha Colliery Company, the Mt. Carbon Company, Limited, the Diamond Mine, the Forest Hill Coal Company, the East Bank Coal & Coke Company, the Polsue Coal Company, the Coalburg Colliery Company, the Stevens Coal Company, the Acme Mines, the Coal Valley Mining Company, and the Winifrede Coal Company,—and on the Kanawha & Michigan Railway, or north side of the river, the Boomer Mine, the Long-Acre

Mine, the Harwood Mine, the Cannelton Coal Company, the Kelly's Creek Coal Company, the Riverside Coal Company, the Peal Splint-Coal Company, the Marmet-Smith Company, the Plymouth Mines, and the Big Mountain Operating Company. The capacity of the mines of the defendants is about 4,800 tons of coal a day, and of the other mines on the same side of the river about 4,300 to 4,500 tons a day. The defendant coke producers make about 440 tons a day, and the other coke producers of the district about 300 tons a day. Some of the defendants operate mines on both sides of the Kanawha river, but none of the mines on the north side are covered by the contract in question. Macdonald, the president of the Fuel Company, prior to the organization of that company and the making of the contract had been engaged in selling coal and coke in Cincinnati and its vicinity from mines along the Chesapeake & Ohio Railway; but the Fuel Company, under the contract, has been selling coal and coke in West Virginia, Kentucky, Ohio, Indiana, Illinois, Michigan, Wisconsin, Missouri, Iowa, Nebraska, North Dakota, South Dakota, Arizona, and Mississippi. The extent and the places of the Western shipment by the defendants, other than the Fuel Company, prior to the making of the contract, are not shown; but the answer alleges that they "had no trade whatever in most of said states, and had very little in the others, except in Cincinnati, Ohio." The other districts and localities competing with the defendants in the Western market are: The New River fields, of West Virginia, with the capacity of about 2,000 tons of coke a day; the Flat Top fields, of West Virginia, on the Norfolk & Western Railway; the fields along the Baltimore & Ohio Railway, the West Virginia & Pittsburg Railroad, and the Ohio, West Virginia & Pittsburg Railroad, in West Virginia; the coal fields of Western Pennsylvania; the Hocking, Wellston, and Nelsonville coal fields, of Ohio; and the coal fields of Kentucky, Tennessee, Illinois, Iowa, and Missouri. The aggregate production of all these fields is said to be 115,000,000 tons of coal annually. The defendants' shipment West in 1897 was about 450,000 tons. In 1898 it was about 550,000 tons of coal and from 60,000 to 65,000 tons of coke. The twelfth clause of the contract, in relation to coke and coal shipped by river, was rescinded in June, 1898. Prior to the making of the contract there was a lack of uniformity in the preparation of coal and coke. Under the contract this has been remedied, and the quality of the product has been improved. The minimums of coal and coke which the Fuel Company was required to take and pay for, as provided in the fifth clause of the contract, was in excess of the production of the defendants' mines during the year preceding the making of the contract; the excess of coal being about 60,000 tons, and of coke about 30,000 tons. A man employed by the producers, the defendants other than the Fuel Company, and known as the "equalizer," makes the distribution of orders and cars to the shippers. About 3,000,000 tons of coal is shipped East over the Chesapeake & Ohio Railway from the New River and Kanawha districts annually. What portion is shipped from the Kanawha district does not appear. The facilities for placing coal and coke on the Western

market have been increased by the operation of the contract, and the monthly payments by the Fuel Company have relieved the operators from losses by bad debts, and have furnished the means for promptly paying the men in their employ. River shipments from the whole Kanawha district are double the shipments of defendants by rail. Prior to making the contract, single operators were sometimes not able to take and fill large contracts. It does not appear that under the contract prices have been materially increased or diminished, but have been maintained.

Two questions have been presented: (1) Does the contract in question relate to interstate commerce? (2) And, if so, will its performance restrain interstate commerce, within the meaning of the act of congress known as the "Anti-Trust Law"?

1. If it be assumed that the Fuel Company was to become the purchaser of the coal produced by the other defendants, and not their agent for its sale to others, with an interest in the profits, yet by the terms of the contract the coal and coke are to be delivered to the Fuel Company for "Western shipment,"—to markets in states other than West Virginia,—there to be sold for not less than a minimum price to be fixed by the executive committee of the association; and the Fuel Company is required to account and pay over to the members of the association all profits made over and above 10 cents per ton, which it is to retain as "compensation" for the use of its capital and for its services. The contract, read in the light of the circumstances under which it was made, shows that it contemplates and provides for the sale of coal and coke in states other than West Virginia; and the evidence shows that, in the performance of the contract, coal and coke have been sold in the states mentioned in the bill. Indeed, the prime object of the contract, as repeatedly expressed therein, is "to enlarge the sale of, and extend the Western market for, Kanawha coal and coke." The contract, therefore, and the combination thereunder formed by the defendants, have direct relation to interstate trade and commerce, and in carrying out its purpose interstate commerce has been directly affected.

2. This being so, the question is whether the provisions of the contract which give exclusive control of the output of the mines to the Fuel Company; which prohibit competition between the members of the association; which prohibit the Fuel Company from handling competing coals and cokes; which authorize the executive committee of the association to apportion to its members the class, grade, and quantity of coal and coke to be shipped each month; which fix a minimum price below which the Fuel Company is prohibited from selling coals and cokes in the Western market; and which fix the settlement price between the Fuel Company and the association by a method of monthly averages,—are lawful regulations for the conduct of the business of the defendants, or whether they are regulations in restraint of interstate commerce, as charged in the bill. It is claimed by the defendants "that restriction of competition among only a small proportion of the coal and coke operators or other producers of a particular state, which is ancillary to a main, lawful purpose, and which in fact results in

keener and larger competition and greater freedom and volume in interstate trade and commerce, violates no provision of the federal anti-trust act." The "main, lawful purpose" to which the noncompetitive features of the contract are ancillary, as claimed by the defendants, is "to enlarge the sale of, and extend the Western market for, Kanawha coal and coke." But, as is well said in the Addyston Case, "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." U. S. v. Addyston Pipe & Steel Co., 29 C. C. A. 151, 85 Fed. 282, 46 L. R. A. 131. Here no relationship between the parties to the contract exists which calls for the protection of the Fuel Company against the association, by the enforcement of the noncompetitive clauses of the contract. The alleged main purpose of the contract is a provision mainly for the benefit of the association, and incidentally for the benefit of the Fuel Company, by enabling it to earn a commission on sales; and the enforcement of the noncompetitive clauses of the contract would benefit the parties accordingly, but would afford no counterbalancing benefits to the public. It is said, however, that the increase in the volume of trade, the competition in a larger field of operations, the better condition of the product, and the maintenance of reasonable prices, resulting from the performance of the contract, benefit the public, and justify the partial restraint of trade. But the policy of the law looks to competition, as the best and safest method of securing these benefits, and not to combinations which restrain trade. It is opposed to the methods of combination, and will not suffer competition to be destroyed under the pretense that the public will be better served by combination. In the exercise of the power of regulation conferred upon it by the constitution, congress has chosen competition, in preference to combination, as the best factor for the maintenance of the life and the promotion of the ends of interstate commerce, and has prohibited "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations," and has declared that "every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor." Now, it is provided in the contract in question that the Fuel Company shall have exclusive control of "the entire coal and coke output of the mine or mines operated by each of them [members of the association], respectively, on said C. & O. Railway, or branches thereof, for Western shipment, for a period of not less than five years, * * * except as to such coal as may be sold by any member of said coal association to the Chesapeake & Ohio Railway Company for the consumption of said railway company"; and it is provided further "that the said members of said association will not sell or consign any coal or coke bound to points

west of their respective mines, except under the terms and conditions of this agreement, during the period covered by this agreement," and that the Fuel Company, "nor any of its officers, employés, or servants, will, with its knowledge, directly or indirectly, in any way, manner, or form, engage or become interested in the buying or selling of bituminous coal or coke in competition with the coal or coke of any of the members of said Coal Association, except under the terms and conditions of this agreement." And it is further provided that the minimum price shall be fixed by the executive committee of the association for "all the various grades of coal and coke sold and to be shipped West by the members of said association," and that the Fuel Company "will make no contract for the sale of any coal or coke of any members of said association at a price lower than such minimum price to be fixed by such committee." And it is further provided "that the Fuel Company shall make a monthly report showing the tonnage of the various kinds and grades of coal and coke shipped by members of said Coal Association and weighed during the month, or weighed during such month though shipped during a preceding month, together with an average price for each grade or kind of coal or coke so shipped and weighed, which average price shall be computed upon the basis of the actual price, less gross profits, if any, received for all coal or coke sold, and the minimum price, fixed as hereinafter provided, for such month, for coal or coke not sold in such month; said report to be made not later than the 10th day of each month for all coal and coke weighed, or weighed during the previous calendar month. The coal and coke shipped and weighed or weighed during such month shall be paid for by said Fuel Company to the members of said Coal Association according to the average prices determined as aforesaid." And it is further provided that the executive committee of the Coal Association "shall, not later than the twentieth day of each month, designate the percentage of the total product of each class and grade of coal and coke which they deem best to be shipped by each member of said association by rail as aforesaid during the succeeding month." Under these provisions the extent of the production of the mines, the shipment and sale of the product, and the making and regulation of the prices thereof, are subject to the control of the executive committee of the association. All competition among the members of the association in the production, shipment, and sale of their product is eliminated, and the combination enters the Western markets clothed with powers which enable it to exercise a large influence in those markets in regulating the supply and the prices of coal and coke. These provisions are in restraint of trade, and tend to monopoly, within the meaning of the act of congress, and render the contract illegal, in so far as it relates to interstate commerce. The important question is not whether the performance of the contract so far has resulted in actual injury to trade, but whether the contract confers power to regulate and restrain trade, upon those charged with its performance. The attempt to confer power to regulate and restrain interstate commerce by contract is a usurpation of the functions of congress, and

cannot be sustained upon the ground that trade has not in fact been injured. It is for congress to determine what regulations of trade will best promote the public good. It is the policy of congress to encourage and promote individual effort. It looks to individual competition, rather than to combinations, for the benefits which are to follow and flow from commerce between the states, and, in the exercise of its constitutional power, has prohibited all combinations which restrain trade. It is for congress to determine whether the policy it has adopted shall be maintained as the one which will best promote the interests of the country, or whether it shall abandon that policy and place the interstate commerce of the country in the hands of combinations. But until congress takes that course, as long as this act remains upon the statute books, it is the duty of the courts to condemn every contract which necessarily in its performance involves a restraint of trade, although it may not extend to the point of a monopoly of all that trade. The recent discussion of these questions in the cases of U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Joint-Traffic Ass'n, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; U. S. v. Addyston Pipe & Steel Co., 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122; Id., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, render their further discussion here unnecessary. The contract in question here, and the combination of the defendants thereunder, are in restraint of trade and commerce among the several states, and such trade has in fact been restrained in the performance of the contract; and the defendants, and each of them, therefore, will be enjoined from selling or shipping under this contract coal or coke into any state other than the state in which they reside, and the contract, in so far as it affects interstate trade and commerce, is declared to be void and illegal, and the combination of the defendants thereunder will be dissolved.

## ALGER v. KEITH et al.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 760.

1. VENDOR AND PURCHASER—RIGHTS OF PURCHASER—RESCISSION FOR FRAUD.
Where a purchaser, before buying property, causes it to be examined for himself, in order to verify the representations made by the vendor, and nothing is done by the vendor to prevent a full and thorough investigation, the purchaser cannot claim that the subsequent purchase was induced by the fraudulent representations of the vendor; but if his examination is rendered illusory and misleading by the bribery of his agent to whom it is intrusted, or by other fraud or artifice of the vendor, the contract is thereby vitiated, and may be rescinded by the purchaser, who has suffered damage thereby.

2. SAME—LIABILITY OF VENDOR—FRAUDS OF AGENT.
An option contract or title bond was executed by an owner of property to his agents, who were at the time negotiating a sale of such property in his behalf under an agreement that they should have all above a certain price received. Such contract was not recorded, nor its existence made known to the prospective purchaser, with whom the agents continued and

concluded negotiations for the sale, ostensibly as agents for the same owner, throughout; and in the conclusion of the sale he executed the deed to the purchaser and received the consideration. The real purpose of the bond was merely to secure the agents in the control of the property and in their share of the proceeds, as previously agreed on. *Held*, that such transaction did not terminate the agency, nor relieve the real vendor from responsibility for the fraud of the agents by which the sale was induced.

3. SAME—RIGHT OF PURCHASER TO RESCISSION—LACHES.

Complainant purchased a large tract of land from defendant, through his agents, chiefly for its supposed value as coal land; the agents having represented it as containing veins of coal of a specified thickness. Before purchasing, complainant sent two representatives to verify such representations, the first of whom was bribed by the agents of defendant; and through his collusion the second, who was sent principally to determine the feasibility of working the mines and getting the product to market, was prevented from examining as to the thickness of the veins. On the favorable reports of such representatives, complainant made the purchase. Soon after, in preparing to develop the mines, he discovered that the representations made by defendant's agents were false, and that the land did not contain veins of coal at the opening sufficient to render it of any value; but it was nearly five years thereafter before he discovered the bribery of his first representative, or the fraud and artifice by which the other had been misled, and in the meantime he had made two deferred payments on the property. *Held* that, as his option to rescind the contract of purchase did not arise until he had knowledge of the fraud which rendered his inspection worthless, he was not debarred by laches from equitable relief in a suit promptly commenced after such discovery, and his payment of the purchase money previously could not be considered an election to retain the property; it not appearing that he had been guilty of negligence in failing to sooner learn of the bribery of his agent.

4. PRINCIPAL AND AGENT—NOTICE TO AGENT.

Notice of facts to an agent is constructive notice to his principal only when it comes to the agent while concerned for his principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it.

5. SAME—CONTRACT CREATING AGENCY—OPTION TO PURCHASE LAND.

The execution by the owner of land of an option contract thereon, or title bond, does not per se constitute the holder his agent, and he will not be bound by fraud or misrepresentations inducing a sale to a second purchaser, where such contract is only what it purports to be on its face, and not intended merely as a form of agency; and the rule is the same although it is expected that the contract may be assigned before its expiration, in case the holder of the option should sell the property.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

This is a bill filed by Russell A. Alger to procure a rescission of the sale of a large tract of wild mountain land in Franklin county, Tenn. The defendants are Mrs. Louie H. Keith, executrix of the last will of John F. Anderson, the vendee in the conveyance to Alger; John W. Gonce, who had been the owner of the three-fourths interest in one of the tracts included in the conveyance by Anderson to Alger; and several others, who are sued as heirs and representatives of the heirs of John F. Anderson, as a class. The pleadings, in substance, aver that the said lands were purchased by complainant through O. J. Sheridan and W. J. Green, real-estate agents at Chattanooga, Tenn., doing business under the name of Sheridan, Green & Co., and that said Sheridan, Green & Co. were the agents of said John F. Anderson and of John W. Gonce in the sale of said lands to complainant; that said agents made many grossly false and fraudulent representations concerning the timber and coal upon said lands, and as to the title of the vendor to large and material parts of same; that complainant, who lived in a distant state, and never saw said property before the sale had been consummated, undertook to verify the truth of the represen-

tations so made, and for this purpose sent one or more persons to examine and report upon said property, but that the said Sheridan, Green & Co., by tricks, frauds, deceits, and artifices, had prevented such an examination as was intended and desired, and corruptly and fraudulently bribed one A. J. Freer, who was sent by complainant to measure the thickness of veins of coal at the entries or openings upon the property, and to inspect and estimate the timber upon the surface; that the property was bought upon the faith of the representations so made by the agents of the vendors, and upon the reports of those representing complainant, who had either been deceived and misled by the active fraud of the agents of the vendors, or corruptly bribed to hide the truth and induce the sale by false reports. It is then averred that the fraudulent and corrupt conduct of said Sheridan, Green & Co. in respect to the agents upon whom complainant relied was not discovered until April, 1894; the bill being filed in August of the same year. The answer denied all fraud, denied that Sheridan, Green & Co. were acting as agents for either the said John F. Anderson or John W. Gonce in making said sale, and denied that complainant had but recently discovered the alleged frauds practiced upon him by said Sheridan, Green & Co. A vast amount of evidence was taken, and the cause brought to a hearing before Clark, District Judge, who, in a full and careful opinion, found that the averments of the bill were fully sustained, and granted a decree for rescission, as prayed. Subsequently and at the same term a rehearing was allowed, and the case opened for proof upon alleged newly-discovered evidence tending to show that complainant had knowledge of the several frauds which he claimed had been practiced upon him several years before seeking rescission, and long antecedent to the date of his alleged discovery of the bribery of his agents. Much additional evidence was submitted upon this aspect of the case, and upon a final hearing the former decree was set aside and the bill dismissed upon the ground that complainant, after knowledge, had elected to abide by the transaction, or had been guilty of such delay in seeking rescission as to repel him from a court of equity, and remit him to his remedies at law upon the covenants of his deed, and his action for fraud and deceit. From this decree the complainant has appealed. Further facts will appear in the opinion.

Albert D. Marks, Floyd Estill, and J. J. Lynch, for appellant.
Frank Spurlock and John J. Vertrees, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

It will not be possible or profitable to go over in detail the complicated facts presented by the transcript of the record before us, and we shall chiefly advert to such of the more prominent matters which involve the substantial merits of the case, stating for the most part only those conclusions of fact which we reach from an attentive examination of the whole of the evidence. The case resolves itself into these several questions: First, did Gen. Alger make the purchase of the lands in question, induced by false and material misrepresentations made as to the character and extent of the timber and coal on the lands, and as to the title of the vendor to the lands included within the boundaries of his deed? Second, were the efforts of complainant to verify these representations before concluding the purchase frustrated by the artifices of the vendor or his agents, so that the fraudulent character of the representations was concealed, and false reports by complainant's agents thereby induced? Third, were Sheridan and his associates in the sale the agents of the vendor? Finally, does the evidence show that after knowledge of the fraud

the complainant exercised his option to take the property notwithstanding the fraud, or have the lapse of time and other circumstances interposed any bar to the maintenance of a bill for rescission? A collateral question will be the liability of the defendant John W. Gonce to account for that part of the purchase money received by him, as the owner of an interest in one of the parcels included in the deed of John F. Anderson.

1. In respect of the first question it may be said that before the conclusion of the sale the complainant discovered that the timber was not nearly so abundant or valuable as had been represented, and we are not satisfied that he was induced to make the purchase by reason of any representations in this regard. In regard to the representations touching the title of the vendor to the lands sold, it is perhaps established that there is a shortage in acreage, the sale having been by the acre; but this shortage is not of so material a character, nor the fraudulent character of the representations in that respect so well made out, as to justify a decree of rescission wholly on that account. The remedy upon the covenant of seisin and warranty will abundantly protect complainant, if pursued, against any consequence of such shortage. We may as well say here that the court below seems to have based its action wholly upon the question of fraud in respect to the representations as to the coal upon the lands, and the learned counsel upon both sides have expended their strength mainly upon the consequences to be deduced from the representations and frauds affecting the values of the land for coal-mining purposes. The case for rescission must turn here. There can be no reasonable ground to doubt but that this land was purchased mainly, if not altogether, upon the representations touching the existence of workable veins of coal, which were represented to show, in entries made by the vendor, or natural exposures, a thickness of from 4 to 11 feet. These representations were made in printed circulars and letters issued by Sheridan, Green & Co., who represented themselves as real-estate agents having the land for sale, and who addressed themselves to Gen. Alger, then and now residing at Detroit, Mich. Gen. Alger was a man of large means, and had been engaged in many important business enterprises, chiefly connected with the lumber interests of his state. The time was propitious for attracting his attention. The mountain region of Tennessee and North Alabama was known to be rich in minerals and timber, and a curious spirit of wild speculation in such lands was then prevailing, which led to much ultimate disaster to many of those who came under its influence. O. J. Sheridan and his partner had been residents of Michigan, and acquainted with complainant's speculative tendencies. Hence they addressed him, as a possible purchaser. He replied, making inquiries as to price, terms, etc. At this stage of the case another Michigan man, to some extent an acquaintance of the complainant, was utilized for the purpose of inducing a sale to him. This was one E. J. Lynn. Sheridan and Green, concluding that Lynn's acquaintance might be of value, secretly interested him in the commissions or profits to be made in case of a sale. Lynn's connection with them was not at once disclosed. He was

for a time held out as himself a probable purchaser, and an oral option given him. Lynn "dropped in" on Gen. Alger, accidentally, according to the color given the interview, and told the general of this body of land, and fixed his attention upon it. Finally the complainant determined to investigate the matter, being attracted at first by the vast quantities of valuable timber represented as standing upon it. He sent, for this purpose, one A. J. Freer to go over the land and report as to the representations made touching its timber and coal. Sheridan and his associates were notified that Freer would go down as the agent of complainant, and that complainant would be largely governed by his report. Without going into details, it is enough to say that Freer made glowing reports, both written and oral, to complainant as to the thickness of the coal veins exposed in the old entries and otherwise. He professed to have measured several veins which showed a thickness of solid coal of from 4 to 11 feet, and made a detailed report from entries made at the time and on the ground in a memorandum book. His timber report was, however, not particularly favorable, and the preponderance of evidence indicates that the timber value cut no material figure in inducing the further action of the purchaser. The report as to coal was, however, alluring. Veins of good coal, running from 4 to 11 feet, within a very short distance of a railroad giving a market at Chattanooga and Nashville, offered a great inducement to any one with capital. But complainant was not a coal man. His field had been timber. Still, here was a most attractive investment. In this situation, he induced one O. W. Shipman, a friend, who was a coal operator, to go down and look at the possibilities for a successful coal-mining enterprise. Shipman went. Freer went with him, as did Sheridan, the chief engineer of the deal. The old entries were visited. These were rude and not extensive. They had been made by the vendor, John F. Anderson, for local purposes in part, but chiefly to develop the possibilities of the property. They were the places theretofore examined by Freer, and the thickness of the coal vein had been measured and reported by him. When Shipman made his examination, it was found that water had accumulated in the bottom of the entries. Sheridan expressed great regret at this, as Shipman was unprepared to explore them in this condition. The result was that no examination of any value was made. In one entry a measuring stick was put down in the water until it rested on the bottom, which was represented by one of the laborers present as corresponding with the bottom of the vein exposed above the water. Measurements thus obtained corresponded with Freer's memorandum, and his report thus supposed to be verified. In other instances, Shipman simply looked at the openings and their relation to the railroad, and called upon Freer and Sheridan for information as to the thickness of the vein, as shown by Freer's former investigation. The prime purpose in sending Shipman was not so much to verify Freer's report as to the existence of workable veins of coal, as to report upon the facilities for mining and marketing the product. These openings were upon the side of the mountain, and Shipman was pleased with the accessibility of the coal, the markets,

and the transportation outlook, and so reported. The sale was concluded. The price aggregated $103,728. Of this amount, $51,364, or one-half, was paid in cash. For the remainder notes were made, payable in one, two, and three years from date,—all payable to John F. Anderson, the ostensible vendor. A warranty deed was executed and delivered, the title having been made satisfactory to the counsel representing complainant. The deed was dated March 14, 1889, but executed March 21, 1889. The price was paid and notes executed March 21, 1889. For the purpose of determining how best the property might be developed, Mr. O. S. Shipman in the summer of that year put a small force at work in developing the old entries and certain other exposures. In a short time it was shown that there was not a vein of coal on the property much exceeding 12 inches in thickness, and that the property was worthless for mining purposes.

2. How did this imposition come about? The proof makes it most evident that A. J. Freer at some stage of the negotiations was bribed by those engaged in making the sale. Just at what stage does not clearly appear, but certainly before the bargain was concluded. The property had been listed for sale by John F. Anderson under an agreement by which the agents were to receive all that they could obtain over $5 per acre. Subsequently, the vendor reduced his price to $4. We do not stop here to consider the contract for a sale to Sheridan, Green & Co., executed while the negotiations were pending, further than to say that the effect of that will be considered when we come to deal with the question of John F. Anderson's responsibility, as vendor, for the representations and frauds of O. J. Sheridan and those associated with him. The property was offered by Sheridan, Green & Co. to complainant at $7 per acre. This would make a commission or profit of $44,412 for the agents. To affect the conduct and action of A. J. Freer, the agent of complainant, Sheridan and Green and Lynn offered him one-third of the sum to be earned by the sale to Gen. Alger. This he accepted. The effort to show that he was given this interest, not to color his reports, but as blackmail demanded by him as the price for not actively advising against the purchase, is not even colorable. The distinction is not tangible. The fact remains that Freer was promised a share in the spoils in case a sale was made to complainant. When it was consummated he received $13,373.28 from Sheridan and associates, as the price of his services to them. Freer's report of the measurements of the exposed coal in the old Anderson entries was the report upon which complainant acted. That report he regarded as a verification of the representations made to him by Sheridan & Co. Now, it is satisfactorily shown that his measurements included interposing strata of slate and shale. Thus, one of the entries reported as showing a 48-inch vein of coal was made up of coal 12 inches, slate and shale 24 inches, topped with another vein of coal of 12 inches. This interposed slate is shown to have been premeditately painted by a wash of coal dust and water so that a casual observer would be misled. To prevent discovery by Shipman, the bottom of the entry at the breast of the vein was deepened so as to indicate that the vein was growing thicker. This was allowed

to fill with water, so that the exposed coal above the water extended presumptively to the bottom of the entry. The water was deliberately accumulated so as to prevent Shipman from discovering the artifice, and the vein was represented as extending to the bottom. By tricks and artifices Shipman was thus induced to rely upon Freer's statements as to thickness of that and other openings shown to him. By these diabolical schemes and artifices, the purpose of the complainant to verify the representations of the sellers' agents before buying was frustrated, and he thereby misled into paying a very high price for lands which have no great intrinsic value for either coal or timber. If the complainant investigated for himself, and nothing had been done to prevent his investigation from being as full and thorough as he desired, he could not say that he had purchased in reliance upon the representations of the sellers. Farrar v. Churchill, 135 U. S. 609, 615, 10 Sup. Ct. 771, 34 L. Ed. 246; Clark v. Reeder, 158 U. S. 505, 523, 15 Sup. Ct. 849, 39 L. Ed. 1070; Mining Co. v. Watrous, 9 C. C. A. 415, 419, 61 Fed. 163. But if a full and thorough investigation was prevented by artifice, practiced for the purpose of making the investigation illusory and the results misleading, it cannot be said that the vendor's responsibility for the truth of material representations is in any degree affected by the investigations thus rendered valueless by his own active intervention. So, if the agent of the buyer, intrusted to investigate and verify the seller's representations, collude with the latter, and thus betray his trust, no ground remains for failing to hold the seller to the most rigid responsibility for any sale induced by such practices. Any gratuity given to an agent of the buyer by the seller for the purpose of influencing the execution of his agency vitiates a contract which is subsequently made by the agent, as presumptively made under that influence, or subsequently made by the buyer himself, if in any material degree effected through the influence of the corrupted agent. City of Findlay v. Pertz, 31 U. S. App. 341, 13 C. C. A. 559, 66 Fed. 427. In this case we need not consider how far the option of rescission arises upon mere discovery of the corruption of an agent, independent of any actual damage to the principal. The fidelity of Freer to complainant was presumptively affected by the interest given him, dependent upon a sale consummated. That he concealed and misrepresented the facts, and actively aided in misleading and deceiving Shipman, who might have discovered the worthless character of the coal veins he sought to examine, admits of no doubt.

3. How far is John F. Anderson answerable for the representations and fraudulent devices and artifices practiced upon the complainant? The defendants say that Sheridan and Green were vendees under Anderson, and were dealing on their own account in selling this property, and that Anderson only made the deed because he held the legal title and at their direction. This property was placed in the hands of Sheridan and Green, as real-estate agents, by John F. Anderson, December 8, 1888. His agreement was to give them all they could realize over $5 per acre, as their compensation for finding a purchaser. Subsequently this was changed to all they could get over $4 per acre. December 10, 1888, Sheridan, Green & Co. prepared and

issued a circular offering the lands for sale, and mailed this to Gen. Alger, writing him at the same time. December 24th complainant replied, asking particulars, and saying he would send a man down to look at it, if it was not too late. Several letters followed. In one, of January 7, 1889, Sheridan, Green & Co. wrote that:

"The aggregate thickness of the three veins of coal is about fourteen feet when opened, and they become more heavy as they are developed. Three miles in a direct line from where one of the openings has been made, the outcropping is eleven feet thick, and about four thousand acres of land is underlaid with the vein."

In the same letter they said:

"You will ask, 'Why has it not been developed long ere this?' We reply that the owner has held it upwards of fifty years, and his pet hobby has been to develop it himself. * * * Were it not for the fact that the owner has to have the money, and that money is hard to command here, you could not purchase the land for $20 per acre."

January 9, 1889, complainant acknowledged receipt of above letter, and asked for "a legal refusal of this property," and, if it was as expected, he would take it. The price asked by these agents from Gen. Alger was $7 per acre. Just at this point in the negotiations, Sheridan, Green & Co. became apprehensive that their agency might be revoked or the price raised by their principal if he should discover the price they were about to obtain, and the large compensation they would thereby earn. To guard against this, they consulted counsel, and under his advice procured an option for 60 days at $4 per acre, agreeing to pay one-fourth cash within that time, and give lien notes for the remainder. For this option they offered $500, and to forfeit same if they did not make the cash payment within 60 days. Anderson accepted this proposition, and gave a title bond, obligating him to make title to them if within 60 days they paid one-fourth of the price in cash, and to make a deed and deposit it in escrow so soon as a survey could be made. He further agreed, that he "would not offer the land for sale to any person whatsoever, or tell the price at which I sold, until after the sixty days have passed." "I agree further to tell any person who may call to see me about the land, or write about it, that you have purchased it, and that I understand your price is ten dollars per acre."

The contention of defendants is that these agreements operated as a revocation of the former relation of agency, and that thereafter Sheridan, Green & Co. were acting for themselves, as the equitable owners of the land, and were no longer the agents of John F. Anderson for its sale. Conceding, for the purpose of the case, that a bona fide sale, by title bond, would operate as a revocation of any former relation of agency, as between the principal and his agent, such revocation would not be effectual as to third persons who continued to deal with knowledge of the original agency, and without knowledge of its revocation. The revocation of an agency does not take effect, as to third persons, until made known to them. "Persons who deal with an agent before notice of the recall of his powers are not affected by the recall." Hatch v. Coddington, 95 U. S. 48, 56, 24 L. Ed. 339, 341; Johnson v. Christian, 128 U. S. 374, 381, 9

Sup. Ct. 87, 32 L. Ed. 412. This is but an application of the known maxim of the law that, when one of two innocent persons must suffer, he shall suffer who by his own conduct or silence has misled the other. It is true that Gen. Alger did not at this time know who was the owner for whom Sheridan, Green & Co. professed to be acting at the date of this revocation. He did know, however, that they were acting only as agents for an undisclosed principal, who was the owner of the property. Who that principal was, was disclosed later, and while they still professed to be acting as his agents. Neither the option contract nor title bond was ever put to record, and neither was ever disclosed to complainant. During the subsequent investigations which complainant set on foot to verify the antecedent fraudulent representations of Sheridan, Green & Co., while confessedly the agents of John F. Anderson, complainant's agent, A. J. Freer, was corrupted; and his other agent, Shipman, was prevented from making any thorough examination by the artifice of flooding the entries. Being thereby induced to rely upon the statements of Freer and Sheridan, both of whom went with him to the coal openings, as to the thickness of the veins, he repeated to John F. Anderson, at his house, these representations, who then confirmed and adopted them by saying that he had worked two of the veins for 20 years, and that they were from "four and one-half feet, and upward," in thickness. More than this, when complainant, still later, sent his Michigan attorney, Col. John Atkinson, to Tennessee, to investigate the title, Atkinson was introduced by Sheridan to John F. Anderson as the owner. Anderson did not then, nor at any other time, disclose that he had theretofore sold the land to Sheridan and Green, but, on the contrary, proceeded to point out some of his corners and lines, and held himself out as owner and vendor. Col. Atkinson says upon this point that, while he does not recall any express statement by Anderson that he was the person selling the lands to Gen. Alger, "Anderson pointed out the lands which he said he owned, and which General Alger was purchasing, and I dealt with him as the seller. The deed ran from him to General Alger." The whole tenor of the evidence satisfies us that, from the inception of the negotiations to the delivery of the deed, Sheridan, Green & Co. held themselves out as the agents for the owner, and, before they were closed, introduced John F. Anderson as the owner whom they represented, and that John F. Anderson knew that they were so holding themselves out, and that he confirmed this by his silence, and his conduct in representing himself as the owner and seller for whom they were acting, both to Shipman and Col. Atkinson. Upon the whole of the evidence, we reach these conclusions: First. That Sheridan, Green & Co. were in no bona fide sense purchasers from Anderson of this property. They were impecunious, and confessedly had no intention to become the buyers. This, we are satisfied, John Anderson knew, and that he and they regarded and treated the option contract and title bond as a mere form of agency adopted to secure to the agents the control of the negotiations, and all that could be realized for the lands above $4 per acre. Doggett v. Emerson, 3 Story, 700, 7 Fed. Cas. 804; Mason v. Crosby, 1 Woodb. & M. 342, 16 Fed. Cas. 1016; Hough v.

Richardson, 3 Story, 659, 12 Fed. Cas. 566; Clark v. Reeder, 158 U. S. 505, 15 Sup. Ct. 849, 39 L. Ed. 1070. Second. If the title bond and option contract were good-faith transactions, they did not operate as a revocation of the previous authority of Sheridan, Green & Co. to sell as agents as to this complainant, because he was led by the conduct and silence of all parties to continue negotiations in the full belief that they were still acting for John F. Anderson as the owner and seller. Hatch v. Coddington, 95 U. S. 48, 56, 24 L. Ed. 339; Johnston v. Christian, 128 U. S. 374, 381, 9 Sup. Ct. 87, 32 L. Ed. 412. Third. The contract was one negotiated by Sheridan, Green & Co., assuming to be acting for John F. Anderson. He adopted the sale made by them, and whether they had been antecedently authorized to make the sale for him is of no moment. He accepted the benefits of the sale; made the deed as vendor and owner. He thereby ratified this act, and takes with the benefit all of the burdens. He thereby becomes responsible for any representations and frauds practiced by them by which the sale was induced. 2 Pom. Eq. Jur. 909; Mechem, Ag. 148.

4. Has the complainant, with knowledge of the fraud perpetrated upon him, elected to abide by the transaction notwithstanding the fraud? The deed was executed March 21, 1889. The complainant discovered the thinness of the coal veins, and the consequent worthlessness of the property for coal-mining purposes, as early as the summer of 1889. His deferred purchase-money notes matured in 1890, 1891, and 1892, and were paid as they matured. This bill was not filed until August, 1894,—something more than five years after the transaction. No statute of limitations has barred the suit, and none has been relied upon. The defense is that by the retention of the property, and the payment of the deferred purchase-money notes, the complainant has elected to hold onto his bargain. To avoid the prima facie effect of this delay in seeking rescission, the bill, in substance, avers that in purchasing the property complainant was misled and deceived by the reports of his agent, A. J. Freer, as to the coal deposits, and that he did not discover the corruption of this agent until the spring of 1894, and that he then caused this bill to be filed. The defendants deny this, and aver that he made the discovery of Freer's bribery shortly after he bought the property. Upon this issue a great mass of evidence has been submitted and upon this issue the result must turn. To prove knowledge and an election to stand by the bargain, defendants have relied, among other things, upon a letter from Gen. Alger, of March 21, 1889, to Sheridan, Green & Co., in which he said that he was "in receipt of a letter from your place informing me that the coal on the land I have purchased is not a regular vein, but is simply in pockets; that it has been proven so; and that it is notoriously known as being not a regular vein of coal, and that is the reason why it has never been worked. Of course, if I have been 'salted' in this way, I do not care to increase my investments there, but will let it stand and get out of it what I can." Complainant had not purchased this property alone, nor chiefly, upon the representations of the vendor and his agents. He had undertaken to verify their representations by an investigation. Freer pre-

tended to have gone into the entries and to have measured the exposed veins of coal, and his reports to complainant confirmed the statements made by Sheridan, Green & Co. The property had, therefore, been purchased upon the report of Freer, which confirmed all that had been represented. Having bought upon his own investigation, the option of rescission did not arise, unless his agent had been corrupted, or the investigation otherwise rendered deceptive and illusory by some active fraudulent conduct of the vendor. There is no pretense that at the date of this letter complainant had any reason to doubt the truth of Freer's reports confirming the specific statements of the vendor's agents in respect to the thickness of the veins, as exhibited in the vendor's entries. Neither did the discovery made by Shipman in the summer of 1889 as to the worthlessness of the property as a coal-mining property give complainant an option of rescission. Having bought upon his own investigation, he had no right to demand rescission unless it could be made to appear that that investigation had been made illusory through the fraudulent conduct of the vendor. Freer had for many years been his trusted agent in the examination of timber land for him, and complainant had reason for reposing absolute confidence in his honesty and integrity. Freer was not a coal miner. But it was reasonably supposed that he could measure the thickness of a vein of coal, and could be relied upon to do that with care, and to make a truthful report. Shipman was an expert. But his investigation was defeated, as we have elsewhere shown, by the fraudulent artifices of blowing up the bottom of the entries and flooding them so as to make access difficult, and give to the coal exposed the appearance of a vein extending from the bottom of the flooded entry. While his development work done in the summer of 1889 demonstrated that slate and shale were interposed between two thin veins of coal, and that coal, slate, and shale had been measured together as coal, yet he supposed, from confidence in Freer's integrity, that he had been simply misled into mistaking slate for coal, or careless in his measurements. This, too, was the view taken by complainant at that time. The means whereby complainant's investigation, through Freer and Shipman, had been frustrated, and a worthless property imposed upon him, did not come to light until long after the discovery of the thinness of the veins of coal. Until he should discover that his agents had been bribed or deceived by the fraudulent artifices of the vendor, complainant had no option of rescission. It is not for defendants to say that the vendee's confidence in Freer was misplaced, and that he should have sooner suspected his want of fidelity, and sooner discovered his treachery. Complainant knew that Freer was not an expert in coal mining. But he believed he was incorruptible. It was easy, therefore, to believe, as both complainant and Shipman did, that he had mistaken shale and slate for coal, and measured all together, until other facts came to light incompatible with an honest mistake. But not until much later did any of the facts come to light which indicated that confidence in Freer had been misplaced.

It is next sought to fasten constructive knowledge of Freer's bribery upon complainant through the disclosures made in an equity suit in the state chancery court, at Chattanooga, between O. J. Sheridan and his partner, W. C. Green. Green and Sheridan fell out over the money paid Freer, and Green claimed Sheridan was wrongfully holding $13,377.28, received as part of the firm's share of the sale to Alger. Sheridan claimed that this sum had been paid to Freer for his services in selling Anderson's land to Gen. Alger, and that the payment had been made with the knowledge and approval of Green. This Green denied. The facts were established as claimed by Sheridan, who filed in that suit Freer's receipt for an unnamed sum "in full of his interest in profits of the sale" to Gen. Alger of the Anderson lands. Sheridan wrote to Gen. Alger about this suit, and represented Green as claiming more than his share of the spoils, but in no way intimated that the disagreement concerned a payment made to his agent, Freer. None of the newspaper notices of the suit disclosed this feature of the litigation, and neither did the pleadings. The use which Sheridan had made of the money which Green sought to have accounted for only came to light in the evidence filed in 1890 and 1891. Complainant did not learn of the facts thus disclosed by that litigation until 1894. He was not a party to the suit, and is not, therefore, to be charged with constructive notice. To the testimony of O. J. Sheridan that he in the summer of 1889 told Gen. Alger of his payment to Freer, and that the general expressed his gratification that Freer had been thus generously dealt with, we can attach no importance. It is denied by Gen. Alger with indignation, and is incredible in itself. Neither can we attach any credit to Sheridan's evidence that he told Shipman of his payment to Freer in May, 1889. The deposition in which this was deposed to was taken in February, 1898. By stipulation it is agreed that Shipman was then non compos mentis, and had been since 1897, and that he died in February, 1898. Hence he could not be called to show when and how he first learned of Freer's bribery. But in 1895 Shipman gave a deposition touching his development work done in the spring and summer of 1889, in which he states that there was nothing developed which indicated Freer's corruption, and that he "told General Alger that he must have made a mistake and measured the block bond for coal." This disposes of the effort to show that Sheridan had in May previous told Shipman of his bribery of Freer. But it is said that in March, 1890, Shipman learned of this matter through a meeting between himself, Sheridan, Judge Moon, and others, touching another land deal, in which Freer's treachery to Alger was discussed, and the story related by some of those present, and that this was made the basis for excluding Sheridan from any interest in the new deal. It may be that Shipman there and then learned of Freer's corruption, though the evidence is not clear or satisfactory. But, if he did, his knowledge was not the knowledge of complainant. His relation to complainant was limited to the single matter of investigating the coal deposits on this land before the purchase. Afterwards he was again employed in doing some development work preparatory to mining operations. This latter matter was also con

cluded long before March, 1890, and his agency for that purpose was at an end. Neither did he represent complainant in the proposed new deal for another body of lands, which Sheridan was endeavoring to engineer. Shipman, Milliken, and some others were, but not Gen. Alger. Gen. Alger had been solicited by Shipman to take an interest in the proposed new deal. He at once declined to have anything to do with any scheme in which Sheridan was concerned. Aside from any knowledge that Sheridan had bribed Freer, he had abundant reasons for such an attitude, in the worthless character of the lands which he had been induced to buy through Sheridan. It is possibly true that Shipman desired to get Sheridan out of the new deal, hoping that in such an event the general might be yet induced to try mountain lands again. Still, Shipman did not represent him; could not bind him by things he said or anything he should learn in his efforts to exclude Sheridan. Notice of facts to an agent is constructive notice to his principal only when it comes to the agent while concerned for his principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it. Notice after the agency has terminated will not, ordinarily, affect the principal. Nor is a principal bound by any subsequent narration of a past occurrence. "The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it." Packet Co. v. Clough, 87 U. S. 528, 22 L. Ed. 406.

Evidence of declarations of an agent as to the past transactions of his principal are inadmissible, as mere hearsay. Goetz v. Bank, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515. But it is said that at some time Gen. Alger did learn from Shipman the fact of Freer's bribery. This he admits in his second deposition. But when was this? The complainant in 1893 employed Col. John Atkinson to investigate his title and bring suit to obtain a rescission, upon the ground that the vendor had knowingly and fraudulently included lands in his deed to which he had no title, or, failing rescission, to obtain relief upon the covenants of the deed. For the purpose of starting such a suit, the firm of Marks, Fitzpatrick & Lynch, lawyers, in Franklin county, Tenn., were retained by Col. Atkinson. The deed did not show a sale by the acre. To ascertain the facts in this respect, Judge Moon, at Chattanooga, was consulted, as probably having knowledge. He advised counsel of the suit between Sheridan and Green, and that they should examine that record. This was done in April, 1894. Freer's want of fidelity was then disclosed, and a synopsis of the evidence was prepared and submitted to Ex-Gov. Sherwood, the local agent for complainant. This was May 11, 1894. This document was placed in the hands of Col. Atkinson by Sherwood, and communicated to Gen. Alger by Col. Atkinson. Col. Atkinson testified that this was the first information which reached him of Freer's treachery, and that when he communicated it to Gen. Alger the latter refused to credit it, until a photograph copy of Freer's receipt, filed in the case of Sheridan v. Green, was shown him, and that thereupon this bill was filed so soon as it could be prepared. Much comment has been made upon the vague-

ness and uncertainty of Gen. Alger in this matter of the date when he acquired knowledge of Freer's treachery. It must be admitted that Gen. Alger is not what lawyers call a "good witness." We do not know that this is to his discredit. His memory of dates is bad. He admits it, and his whole evidence indicates it. It appears in matters about which he could have had no interest in simulating. Thus, the date when Col. Atkinson learned of Freer's bribery, how he acquired his knowledge, and the date when he communicated this knowledge to Gen. Alger, is a date fixed almost to a demonstration by the testimony of Mr. Roy Fitzpatrick, of Winchester, Tenn., and that of Col. Atkinson himself. Still, Gen. Alger was quite uncertain as to the year when Col. Atkinson had come to him with the synopsis of the evidence from the record in the suit of Sheridan v. Green, and the photographic copy of Freer's receipt, filed in that suit. We acquit him of all intentional concealment, and credit him with an exhibition of conscience, which, under temptation, refused to be certain about dates. The explanation is, in part, that the complainant was a man of many affairs, and was in the habit of intrusting their management and details to agents. He depended upon their vigilance, their fidelity, their memories, and did not burden himself with details. This Anderson deal he placed in the hands of his attorney, Col. Atkinson, when he found reason to believe that his title was defective, and there he left it. This, we deduce from his evidence, is a just explanation of this inattention to dates. The sum of all to be deduced from his two depositions is this: That both Shipman and Col. Atkinson talked to him about the bribery of Freer. He cannot be certain whether he was first told of it by Shipman or Atkinson, but probably the latter, though their communications came to him very closely together. When this question became important in the course of the evidence, Shipman was incapable of testifying, as we have before explained. But for this misfortune, we might have had a statement as to when and how he first learned of Freer's treachery. The point is, however, sufficiently cleared by the evidence of Col. Atkinson, who states that he informed Gen. Alger of the disclosure appearing in the suit of Green v. Sheridan in May, 1894; that complainant then manifested surprise, and refused to credit the story until confronted with a photographic copy of Freer's receipt, taken from that suit. We conclude, upon all the evidence, that this was the first knowledge which came to complainant which gave him the right to elect whether he would rescind the contract of sale or abide by his bargain.

In the case of Mining Co. v. Watrous, 9 C. C. A. 415, 61 Fed. 163, 186, we had occasion to consider the kind of knowledge which is necessary to put a vendee to an election. We then said:

"When a purchaser acquires knowledge that he has been defrauded, he has an election of legal remedies. He may keep the property and sue for damages, or repudiate the contract and demand rescission. These remedies are not concurrent, but inconsistent, and the adoption of one of necessity excludes the other. The rule is well settled in equity that after knowledge of the fraud the party must, within reasonable time, make an election as to whether he will affirm the trade, notwithstanding the fraud, or offer to restore the property and demand the return of his purchase money. If, after the knowledge of the

facts which entitle him to rescind, he deal with the property as owner, it is evidence of acquiescence, and an affirmance of the contract."

In that case, as in this, the vendee at an early day learned that he had made a prodigiously bad bargain, and that things were not as had been represented. In that case, as in this, the property had been bought after an investigation which seemed to verify the representations of the seller. In that case the agent of the buyer took his own samples from places of his own selection in the silver mine which was the subject of the sale, and the property was bought upon the result of an analysis of the samples thus taken. The mines soon proved worthless. But no right of rescission arose unless the samples had been "salted" by the vendor so as to make them nonrepresentative of the ores of the mines. Until evidence that the samples had been tampered with by the vendors could be secured, there was no ground for filing a bill for rescission. We said:

"Without evidence that his samples had been tampered with by defendants, he had no knowledge of facts entitling him to rescission. Knowledge of their guilty complicity in the intrusion of metallic silver was and is the knowledge upon which the option of rescission arose."

We also said:

"Neither rumors nor suspicions required an election. Either would demand diligence in effort to discover the truth, for, after facts are known, calculated to excite suspicion, laches would be imputed if there was negligence in inquiry."

This is the law applicable to the case in hand. Knowledge that the investigation undertaken by complainant had been thwarted by the fraudulent artifices of the vendor was the knowledge upon which the option of rescission arose. It is not made clearly to appear just at what stage of the negotiations Freer was corrupted. Most likely it occurred between his two visits to the property. It is not impossible that on his first inspection of the old openings upon the property he was deceived by the painted slate, and ignorantly measured a stratum of slate or shale with two thin veins of coal, one above and one below the shale. It is also possible that his corruption came about through his own initiative after the first inspection and after his first report to Gen. Alger. But all of this is immaterial if before the conclusion of the purchase he was given an interest which was in conflict with his duty to Gen. Alger. One thing is clear: He was bought before his second inspection of the property. Whether he then discovered the artifice by which his former investigation had been thwarted, if in fact he had ever been deceived, is not vital. He might have done so if his fidelity had not been in the meantime shaken. Gen. Alger was thereby deprived of the vigilant observations of an honest agent, and through confidence in him the discoveries which might have come from a thorough investigation by Shipman, who was an expert, were in all probability completely thwarted. In such a situation the right of rescission arose when it was discovered that the inspection and investigation which complainant undertook to make, and upon which he relied, had been frustrated by bribery and other fraudulent schemes adopted to make such investigation worthless. That he did not discover the facts

which entitled him to rescission sooner is in part due to the fact that complainant resided in a distant state, and in part to the secret and pernicious character of the frauds perpetrated upon him. His confidence in Freer was known. Advantage of that was taken. His loyalty to and faith in Freer were only shaken when confronted with his receipt. The case is one of actual fraud, involving deep moral turpitude. Neither is it one in which the vendor's liability is purely constructive, for there are circumstances tending to show that the vendor was to some extent aware of the artifices resorted to in dressing up the entries to present a false appearance, though he was probably unaware of the bribery of Freer. In such cases courts of equity will look with some indulgence when the defense is laches or acquiescence, and require very clear evidence that the defrauded party has assented after full knowledge of the fraud and his rights in the matter. McIntire v. Pryor, 173 U. S. 38, 43, 19 Sup. Ct. 352, 43 L. Ed. 606; Saxlehner v. Eisner & Mendelsohn Co., 179 U. S. 19, 21 Sup. Ct. 8, 45 L. Ed. —. The evidence does not satisfy us that there has been either such laches in discovering the fraud, or such an election to abide by the bargain after full knowledge of the facts upon which the option of rescission depended, as should now prevent full relief.

5. We now come to the question of the liability of the defendant John W. Gonce. One of the tracts of land included in the deal of John F. Anderson to the complainant was a body of between 4,000 and 5,000 acres, known as the "Gray Grant." This tract in 1888 was owned by John F. Anderson, John W. Gonce, and others, as tenants in common. For the purpose of partition it was sold under a decree of the chancery court for Franklin county, and bought by John W. Gonce, to whom the sale was confirmed. At the sale there was an agreement between Gonce and Anderson that the latter might share in the purchase to the extent of one-fourth, upon paying that proportion of the cash payment required by the decree of sale, and of each of the deferred purchase-money notes to be executed by Gonce. John F. Anderson was the grandfather of John W. Gonce, and they were near neighbors. Anderson neglected to avail himself of his right to join in the purchase, but claimed to be the equitable owner of a one-fourth interest in this land, subject to the payment of one-fourth of the price which Gonce was to pay, and for which Anderson was bound as Gonce's surety upon his purchase-money notes. When Anderson listed his own lands for sale with Sheridan, Green & Co., he probably included this Gray tract, though this is not clear. January 11, 1889, when he gave to Sheridan, Green & Co. the option contract before mentioned, he included this Gray tract in the description of those lands which he obligated himself to sell to them if they should exercise the option of buying. John W. Gonce denies that he ever authorized his grandfather to thus list his interest in this land with Sheridan, Green & Co., or that he ever authorized its inclusion in the option contract or title bond given them; and there is no evidence whatever justifying us in finding that either act was done by any arrangement, agreement, or understanding between them. Some time after this had been done,

Gonce learned, through A. J. Freer, who was inspecting the Anderson lands for complainant, that the Anderson title bond included the Gray land. He at once told Freer that this was without authority, and that the land was his, and was not for sale. This was repeated to Sheridan, who at once visited Anderson and demanded an explanation, and was assured that Gonce, as a grandson, would ratify his action. Gonce was sent for, and urged to allow this land to go into the proposed sale to Sheridan, Green & Co. He did not prove as manageable as anticipated. Sheridan threatened to hold the old man liable upon his title bond if he did not straighten the matter out. Thereupon the grandmother joined in appealing to Gonce to protect his grandfather. He refused absolutely to adopt anything his grandfather had done, but did agree to sell to his grandfather his interest at $4 per acre, and gave a written contract to John F. Anderson obligating himself to make him a quitclaim deed if within 40 days he should elect to buy and pay one-fourth cash; balance, with interest, in one, two, and three years. This contract was made and delivered February 8, 1889. Gonce testifies that he then supposed that Sheridan, Green & Co. were dealing with John F. Anderson as buyers for themselves, and had no intimation that they were negotiating with complainant as agents for John F. Anderson, or otherwise, and that he did not know that complainant was the real purchaser until he was called upon to make a deed, as he was obligated to do by his contract with John F. Anderson. When the sale to complainant was being concluded, Anderson, in order to perfect his own title, as he was bound to do, demanded a quitclaim deed from Gonce. The controversy between Anderson and Gonce as to the interest owned by Anderson in the Gray land under the agreement between them for a joint purchase was adjusted by an agreement that Anderson should pay $4 per acre for a three-fourths interest, and $1 per acre for the remaining fourth, and that Gonce should be secured in his purchase money by placing his deed in escrow, to be delivered to complainant when a deposit should be made with the bank of the cash part of the payment due Gonce, and of one of complainant's purchase-money notes, indorsed by Anderson, which note should be held until collected, and enough of the proceeds applied to pay off the deferred payments going to Gonce. As Gonce had not obtained the title from the court under whose decree he had purchased the land, he included in his deed to John F. Anderson a direction to the court that the title should be made to complainant, being then advised that complainant was the assignee of John F. Anderson. Gonce's deed to Anderson is dated March 11, 1889; and Anderson's, including the same land, to complainant, was executed March 21, 1889. There is no evidence implicating Gonce in any of the frauds, artifices, or misdeeds of either John F. Anderson or his agents, Sheridan and Green. There were no coal entries or openings upon the Gray land, and no representations are shown to have been made by Gonce in respect to either that tract, or any of the lands sold by John F. Anderson to the complainant. Gonce is shown by the evidence to have been indisposed to sell his lands, and there is nothing to indicate any kind of concert with his grandfather in any of the

dealings culminating in the sale to complainant, other than his reluctant agreement to sell to him, and the arrangements concerted for the security of the price he was to receive from him. It is clear, from all the evidence, that Gonce has been guilty of no fraudulent conduct whatever; and if he is to be held liable in aid of John F. Anderson, to the extent that he received purchase money, it must be upon the ground that, as an inference of law, the relation of agent and principal existed between Gonce and John F. Anderson, or Sheridan and Green and Gonce, and that he is therefore liable for their acts and misdeeds. It cannot be, and we do not understand the learned counsel for complainant to so contend, that the fact that the owner of land executes an option contract or makes a title bond constitutes the option or title-bond holder, per se, the agent of the owner. Sales by option contract and title bonds are common modes of sale in Tennessee, and if the transaction be what it purports to be, and not a mere cover for an actual agency, there is no solid ground for holding that by such a contract the relation of principal and agent is created. Neither does the mere fact that the option contract is given by one tenant in common to another affect the legal relation, if the transaction be not colorable. Nor is the principle different if the option be given with expectation that it may be assigned before it expire. Such an obligation does not constitute the option holder, per se, the agent of the owner, and whatever passes between him and a stranger is res inter alios acta, unless there be other circumstances making the owner liable. Complainant's counsel have cited and relied upon the cases of Clark v. Reeder, 158 U. S. 505, 15 Sup. Ct. 849, 39 L. Ed. 1070; Daniel v. Mitchell, 1 Story, 172, Fed. Cas. No. 3,562; Doggett v. Emerson, 3 Story, 700, Fed. Cas. No. 3,960; and Mason v. Crosby, 1 Woodb. & M. 342, Fed. Cas. No. 9,234. In none of these cases is there any support for the theory that an option holder or a title-bond holder is per se the agent of the owner. In Daniel v. Mitchell, cited above, Todd, the holder of the title bond, had also an agreement that he should sell the land, and receive one-half of the excess over $4 per acre if he should succeed in making a sale. He made a sale, and the deed was made direct by the owners, who held the legal title. All of the owners were held liable in aid of Todd, against whom a decree went as having received all of the purchase money, from his having acted as their agent in making the sale. The case is sound. The title bond was, in substance, a mere agency. That it was so appeared from the agreement tacked on, that Todd should sell and be compensated by the excess over a given price. He therefore sold for the owners, and was their agent. In Doggett v. Emerson, cited above, Emerson, acting for himself and others owning land, gave to Williams a title bond, agreeing to make title on being paid a stipulated price per acre. Williams made a sale, and Emerson and associates caused a deed to be made by the state direct to the purchaser. Williams made untrue representations. The owners were made liable for his misconduct, upon the ground that the evidence showed that the real relation was that of principal and agent, and that the object was to conceal the agency of Williams, and give him

all he could realize over a fixed price. In Mason v. Crosby, 1 Woodb. & M. 342, Fed. Cas. No. 9,234, the facts were much the same as those in Doggett v. Emerson. Upon the extrinsic evidence, Justice Story found that the title bond given Fifield was intended as a mere form of agency. All these cases cited go upon the solid ground that, if the facts show that the option or title bond was in substance a mere authority to sell for the owner, the mere form of the transaction will not change the true relation between the parties. Such an option contract was given by John F. Anderson to Sheridan and Green. But upon all of the evidence we reached the conclusion that it was a mere form of agency, and that the relations, therefore, existing were not, in substance, changed. It was, as we conclude, intended that Sheridan and Green should sell the lands for Anderson, the option agreement and dependent title bond being a mere form for securing to them all they could realize over an agreed price. All of the occurrences subsequent thereto seemed to bear out this deduction. The case against John W. Gonce is plainly distinguishable upon the evidence in this transcript. We are not satisfied that his agreement to sell his interest in this Gray land was colorable, or other than what it purported to be on its face. Nor do any of the occurrences subsequent to its execution justify the contention that he adopted the sale of his land as one made by Anderson for him.

The decree of the circuit court must be affirmed so far as it refused relief against John W. Gonce, but reversed so far as it denied the relief of rescission. The costs of appeal will be divided between complainant and the executrix of John F. Anderson, the latter paying three-fourths of the whole. The case will be remanded for further proceedings not inconsistent with this opinion, when the costs below may be taxed as the court shall adjudge.

## ILLINOIS TRUST & SAVINGS BANK v. DOUD et al.

## DOUD v. ILLINOIS TRUST & SAVINGS BANK et al.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1900.)

Nos. 1,316, 1,317.

1. CORPORATION—NOT REQUIRED TO EXERCISE ALL POWERS.
No corporation is required to exercise all the powers granted to it as a condition of the exercise of any of them, unless such a requirement is expressly made in some statute or ordinance under which it obtains some of its powers and privileges, or its powers are inseparably connected with each other.

2. SAME—FORFEITURE OF FRANCHISE.
It is only for the violation of an express provision of the law under which a corporation derives its powers or privileges, or for such a misuse or nonuse of them as results in a substantial failure to fulfill the design and purpose of its organization, that a forfeiture of a franchise will be decreed.

3. RAILROAD MORTGAGE—PREFERRED CLAIM—INTEREST ADVANCED.
The claim of a creditor for money loaned to pay interest upon a prior mortgage debt is inferior in equity to the lien of a prior mortgage, and cannot be given a preference over it in the administration of the mortgaged property under a receivership in foreclosure.

4. SAME—FORECLOSURE—PREFERRED CLAIM.

A mortgagee of the property, acquired and to be acquired, and of the income, of a quasi public corporation, such as a railroad company, takes a lien on the net income after the current expenses of operation in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these expenses.

5. SAME.

A court of equity engaged in administering mortgaged railroad property under a receivership in a foreclosure suit may, in its discretion, prefer unpaid claims for current expenses, incurred in the ordinary operation of the railroad within a limited time before the receivership, to the bondholders secured by a prior mortgage, in the distribution of the income or the proceeds of the mortgaged property; but the right to give such preference is confined to claims of this class.

6. SAME—CLAIM FOR CONSTRUCTION.

The broad language of the dicta in Fosdick v. Schall, 99 U. S. 235, 252, 25 L. Ed. 339, that "necessary operating and managing expenses, proper equipment, and useful improvements" are to be deducted from the current income before the net income out of which the mortgage is to be paid arises, has been disapproved and modified, and the class of claims entitled to equitable preference has been limited to those just mentioned, so as to exclude claims incurred for the construction of permanent and beneficial improvements to the mortgaged property outside the current expenses of its ordinary operation, by the later decisions of the supreme court in Kneeland v. Trust Co., 10 Sup. Ct. 950, 136 U. S. 89, 98, 34 L. Ed. 379; Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 11 Sup. Ct. 61, 137 U. S. 171, 196, 198, 34 L. Ed. 625; Thompson v. Railroad Co., 10 Sup. Ct. 29, 132 U. S. 68, 71, 73, 74, 33 L. Ed. 256; Thomas v. Car Co., 13 Sup. Ct. 824, 149 U. S. 95, 110, 37 L. Ed. 663; Southern Ry. Co. v. Carnegie Steel Co., 20 Sup. Ct. 347, 176 U. S. 257, 296, 44 L. Ed. 458; and Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 20 Sup. Ct. 363, 176 U. S. 298, 315, 44 L. Ed. 475.

7. SAME—PREFERENTIAL CLAIM—TEST.

The test of the equity which entitles the claim to preference over the mortgage in foreclosure is the consideration of the claim, whether it was or was not for a part of the current expenses of ordinary operation within a limited time before the receivership.

8. SAME—RULE OF THE MARITIME LAW.

The rule of the civil and maritime laws allowing priority to the last creditor who furnishes necessary supplies and repairs to conserve the thing has not been adopted by the supreme court in the distribution of the proceeds of the foreclosure of railway mortgages.

9. SAME—NECESSITY OF CONSERVATION AND CONTRACT OF MORTGAGOR.

Neither the fact that the consideration of the claim conserved the property and increased the security of the mortgagee, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor pledged or mortgaged the current income to secure the payment of the claim, will raise a preferential equity in its favor, if its consideration was not a part of the current expenses of the ordinary operation of the property.

10. SAME—DIVERSION OF INCOME.

If a mortgagor diverts the current income from the payment of claims for current expenses which have this preferential equity to the payment of claims of other classes, so that current expenses remain unpaid when a receiver is appointed, the court may, out of the income accruing during the receivership, restore to the unpaid claims for current expenses the amount so diverted. But, if there has been no diversion, there can be no restoration, and the amount of the restoration may not exceed the amount of the diversion.

11. SAME—MONEY LOANED FOR CONSTRUCTION PURPOSES.

A loan to a quasi public mortgagor on a pledge or mortgage of its income of money to make a substantial, beneficial, and necessary addition

to its mortgaged property entitles the lender to no preference in equity in the distribution of the income or proceeds of the property over the claim of a prior mortgagee whose mortgage covered all the income and property of the mortgagor, acquired and to be acquired.

12. ESTOPPEL—MINORITY OF BONDHOLDERS CANNOT BIND MAJORITY THEREBY.
The trustee of and the majority of the bondholders secured by a mortgage are not estopped from enforcing its lien by the knowledge, acts, or omissions of a minority of the bondholders.

Caldwell, Circuit Judge, dissenting.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

For opinion below, see 89 Fed. 235.

This appeal involves the right of a creditor of a mortgagor, a quasi public corporation, to a preference in payment over a prior mortgagee. On June 15, 1892, the Ottumwa Electric Railway, a corporation, engaged in furnishing steam heat and power, in operating a street railroad by electricity, and in furnishing electric light to the city of Ottumwa, executed a trust deed, which will hereafter be called a mortgage, to the Illinois Trust & Savings Bank, a corporation, to secure the payment of its 200 bonds of $1,000 each, which were issued and sold to bona fide purchasers. This mortgage covered the property of the mortgagor, acquired and to be acquired, and its rents, income, and profits. On March 28, 1896, the mortgagee filed its bill to foreclose this mortgage, and upon its request a receiver was appointed on April 14, 1896, to impound the income of the mortgagor under the mortgage for the benefit of the mortgagee. No accumulated income came to the hands of the receiver upon his appointment, and the order appointing him did not impose upon the mortgagee the payment of the claim of the intervener hereafter mentioned out of the income or the property as a condition of this appointment of the receiver. On June 15, 1896, Levi B. Doud intervened in this suit, and filed his petition, in which he prayed that he might have a lien upon the income collected by the receiver and upon the mortgaged property and its proceeds superior to that of the mortgagee for the sum of $11,000 and interest, which he had loaned to the mortgagor in 1894 and 1895 to enable it to construct an addition to its plant and to pay the accruing interest on its mortgage debt. The claim of the intervener was referred to a master in chancery, who found that $6,000 of it was for money loaned to pay an installment of interest on the mortgage debt, that $5,000 was loaned to enable the mortgagor to construct the addition to its plant, and that the intervener was not entitled to a preferential lien for any part of his claim. Exceptions were filed to this report, and the circuit court held that the intervener was entitled to a preferential lien for the $5,000 furnished to construct the addition, but was not entitled to such a lien for the $6,000 loaned to pay the interest, and rendered a decree accordingly, from which the mortgagee and intervener have appealed.

The facts disclosed by the record which are material to the issues presented by these appeals are these: The Ottumwa Railway, at the time it borrowed this money of the intervener, was engaged in three classes of business. It was operating a street railway by electrical power, it was furnishing steam heat and power to customers, and it was furnishing electric light to private customers and to the city of Ottumwa. It had a power plant with a boiler capacity of 750 horse power and an engine capacity of 600 horse power, and it had a lease of 190 horse power from the Iowa Water Company for a rental of $6,000 a year, which would expire on March 1, 1895. The three classes of business which this corporation was conducting were carried on together by the use of this power, but either class was susceptible of operation without the other, and the power which the mortgagor could produce at its own plant was ample to operate the railway, to furnish steam heat and power to its customers, and to furnish electric light to some, and probably to all, its private customers; but it was not sufficient to do these things and to furnish light to the city in addition. The mortgagor had acquired permission

from the city to operate the railway and to furnish electric light and power derived from other corporations by purchase. The permission to operate the railway was a separate permission, granted by separate ordinances; while the permission to erect poles, string wires, and to furnish electric light and power was another permit, granted by distinct ordinances, and entirely separate from the permission to operate the railway and to furnish steam heat and power. In the summer of 1894 the mortgagor was furnishing electric light to the city of Ottumwa under a contract which would expire on March 1, 1895, which entailed an annual loss of $2,700. The water company had passed into the hands of a receiver. Its contract to furnish 190 horse power would expire in March, 1895, and it was unable to furnish this power after that date; and the power it was furnishing was less than 190 horse power, and was unsatisfactory and inefficient. The mortgagor could operate its railway, furnish its steam heat and power, and probably supply its private customers with electric light from its own plant without this 190 horse power; but it could not do these things and also furnish the city with electric light without more power. The furnishing of electric light was the most profitable of its three occupations, but its contract to furnish this light to the city entailed a loss of $2,700 per annum upon it. The intervener, Doud, owned a majority of the capital stock of the mortgagor, and knew the facts and the situation of the railway company. Thereupon the railway company, about October 1, 1894, made a new contract with the city to furnish it electric light, which it estimated would yield it a profit of $4,000, and Doud agreed with it that he would loan to it the necessary funds to construct an addition to its plant and power, so that its available power should be raised from 600 horse power to 1,000 horse power, and that $6,000 of the money he loaned might be used to pay the installment of interest due on the mortgage December 1, 1894; and the mortgagor agreed with him that it would repay this loan after the addition had been paid for out of its current revenues. Thereupon the railway company constructed an addition to its plant, which consisted of a brick building 70 feet long and 44 feet wide, a Corliss engine of 400 horse power, a boiler of 250 horse power, and certain shafting and pulleys, at a cost of $19,000. It also constructed a half mile of track at an expense of $1,500. This addition was worth $19,000, and, without reckoning interest on the investment, or any deterioration, it effected a saving of $4,000 per annum in the operations of the company. The addition was worth $19,000, and the entire property of the company was worth $150,000. Between November 6, 1894, and October, 1895, the intervener loaned the mortgagor $13,000 for the purposes and under the agreement recited, and took its notes bearing 7 per cent. interest for this loan. Six thousand dollars of this money was used with the consent of the intervener to pay the interest on the mortgage which fell due December 1, 1894, and the larger part or all of the remainder was applied to paying for the addition. The installments of interest on the mortgage which fell due in June and December, 1895, were not paid. Meanwhile the mortgagor applied $2,000 of the current revenues of the railway company to the payment of its debt to Doud, and $10,000 more to payment for the addition to the plant, and then left $3,485.95 owing on machinery the title to which was retained by the seller until payment was made. The receiver, after his appointment, paid this sum and $2,152.33 for taxes, $2,726.76 for labor claims incurred just prior to the receivership, and $8,961.44 on account of paving bonds out of the current earnings of the property during the receivership. The holders of 58 of the bonds secured by the mortgage in suit resided in the city of Ottumwa, and knew in the fall of 1894 that the mortgagor was about to erect this addition to its plant, and that the intervener was to loan it money for that purpose, but they did not advise, consent to, or protest against it, and neither the trustee nor any of the holders of the majority of the outstanding bonds had any notice of these facts until after the addition was completed. After the commencement of this suit the Ottumwa bondholders bought the bonds of the nonresidents for 75 per cent. of their face value. The addition was built between November 1, 1894, and June 1, 1895, and, while the payment of the interest due December 1, 1894, with the money loaned by the intervener, prevented a default in the mortgage. The Ottumwa

bondholders declined to loan the money, or any of it, to the railway company to pay the installment of interest due December, 1894, or to construct the addition.

E. E. McElroy and H. Scott Howell, for Illinois Trust & Savings Bank, trustee.

William McNett (W. D. Tisdale, on the brief), for Levi B. Doud, intervener.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Is a loan to a quasi public corporation upon a pledge or mortgage of its current income to enable it to construct a substantial and beneficial addition to its plant, which was necessary to the maintenance of the volume of its business, but was not indispensable to its continuance as a going concern, entitled in equity to a lien upon the income or corpus of its property superior to the lien of a prior mortgage, which covered all its income, and all its property acquired before and after its execution? A careful examination of the record has convinced us that this is the question which this case presents. Counsel have earnestly argued that other issues are before us, and that this question is conditioned by other facts, and before we proceed with its discussion we will briefly notice these arguments, and state the reasons why they have not proved persuasive.

It is contended that the construction of the addition was necessary to keep the Ottumwa Electric Railway a going concern. This fact was alleged in the intervening petition, and the burden was on the intervener to establish it. The claim was made that the allegation was admitted in the answer, but the only admission there was that the new building and machinery were convenient and necessary to enable the railway to serve all its customers, including the city of Ottumwa, with electric light; but it was expressly denied that it was absolutely necessary or required to enable it to conduct its business and comply with its charter. The proof is conclusive that the railway was conducting three classes of business,—operating a street railway by electricity, furnishing steam heat and power, and furnishing electric light; that it could conduct either one or two of these occupations without the others or the other, and that it had ample power, without the new building and machinery, to operate its street railway, to furnish its customers with steam heat and power, and to furnish some of its customers with electric light. The evidence is undisputed that the most profitable of its three occupations was furnishing electric light, and that under its contract with the city the furnishing of this light to the city of Ottumwa was entailing a loss of $2,700 per annum upon it. The conclusion is irresistible that, if the railway had abandoned the furnishing of light to the city at the expiration of its contract, it would have retained all the profitable portion of its electric lighting, and would have saved an unnecessary expense of $2,700 per annum. There is no proof that this could not have been done. No witness goes further than to say that the new building and ma-

chinery were "an absolute necessity if we expected to continue in the city street-lighting business, and carry on the same amount of other lighting that we had up to that time." No witness comes to say that they were necessary to enable the railway to operate its street railway, to furnish its steam heat and power, and to furnish all its private customers with electric light. As the burden was on the intervener here, the conclusion of fact must be that the new building and machinery were necessary to enable the railway to continue furnishing electric light to the city, but that it could have conducted all its other business without them. This proof falls far short of establishing the proposition that the addition was necessary to keep the railway a going concern. It could have abandoned the furnishing of lights to the city and have conducted all its other business without the new building and machinery, without any loss, and with an assured gain of the $2,700 per annum it was losing on its contract with the city. It could have abandoned the business of furnishing electric light entirely, and have continued to operate its street railway and to furnish steam heat and power to its customers, or it could have abandoned all its business but the operation of its street railway, and it would still have been a going concern. The intervener not only failed to prove that the new building and machinery were indispensable to the maintenance of the railway as a going concern, but he clearly established the fact that they were not necessary for that purpose, and that they were only necessary to enable it to carry on a branch of its business—the lighting of the streets of the city—which had always entailed upon it a loss of $2,700 per annum.

But it is said that, if the railway had failed to make a new contract with the city and to light the city streets with electricity, its franchise would have been forfeited, and that in this way the construction of the new building and the purchase of the new machinery were indispensable to the continuance of its operation as a corporation. There are several answers to this proposition. Under its articles of incorporation the railway derived from the state power (1) to buy, construct, sell, lease, and operate street railways in Ottumwa; (2) to buy, construct, sell, lease, and operate a plant for furnishing steam heat and power; and (3) to buy, construct, sell, lease, and operate a plant to supply and furnish electric light to the city of Ottumwa and its inhabitants. This corporation derived the privilege of erecting its poles and stringing its wires along the streets of Ottumwa to furnish electric light from a set of ordinances entirely distinct from those which permitted the use of the streets of the city for its street railway and for its pipes to furnish steam heat and power. The ordinances relative to its electric lighting imposed no conditions upon its business of furnishing steam heat and power, or upon its business of operating the street railway. Now, conceding that the franchises of a public or quasi public corporation may be forfeited for misuse or renunciation, still the entire failure of this corporation to exercise its power to furnish electric light would have furnished no ground for the forfeiture of its franchises to furnish steam heat and power and to operate

its street railway. Another of the franchises granted to this corporation under its articles was the power to buy, hold, use, and sell the corporate stock of any competing corporations in the city of Ottumwa. None of the franchises to operate a street railway, to furnish electricity, or to furnish steam heat and power could have been forfeited because the corporation had not exercised its power to purchase the stock of rival corporations. No corporation is required to exercise all the powers granted to it by its organic law as a condition of the exercise of some of them unless that requirement is expressly made by some statute or ordinance under which it derives some of its powers or privileges, or the powers are inseparably connected with each other. Again, there is no evidence in this record that the franchise to furnish electricity to the inhabitants of the city and to the city itself would have been forfeited, or that any action to that end would have been instituted, if the railway company had not taken a new contract from the city to light its public places. No such action could have been maintained, in any event, before the city tendered to the railway a contract to pay a reasonable price for the lighting, demanded that the railway should furnish the light, and the latter refused. There is no evidence that the city ever took or contemplated any such action. The inference is unavoidable from the evidence that the new contract was not sought or obtained by the city, but was urged and secured by the corporation. The assertion that the franchise to furnish electric light would have been forfeited if none had been furnished to the city, has no evidence to support it, and, in the absence of evidence that action would have been taken to secure such a forfeiture, it was a contingency too remote, speculative, and uncertain to deserve the consideration of a court of equity. Not only this, but, when the ordinances of the city under which the railway is conducting its business of electric lighting are examined, it is found that they contain no provision or requirement that the corporation shall furnish electric light to the city, and the only provision for a forfeiture is contained in these words:

"In the event of said company, its successors and assigns, failing to comply with any of the provisions of this ordinance, or having their lights in operation within sixty days from the date of its acceptance of this ordinance, then it or they shall forfeit to the city of Ottumwa all rights given or permission granted under this ordinance."

As there was no provision in any of the ordinances which required the railway to furnish electric light to the city, or required the city to purchase electric light of the railway, and as one was a quasi public and the other a public corporation, each was left free to contract or to refuse to contract with the other on the subject, and neither would have forfeited any franchise it possessed by such a refusal. It is only for the violation of an express provision of the organic law under which a corporation derives its powers or privileges, or for such a misuse or nonuse of them as results in a substantial failure to fulfill the design and purpose of its organization, that a forfeiture of a franchise will be decreed. State v. Omaha & C. B. Railway & Bridge Co., 91 Iowa, 517, 526, 60 N. W. 121;

State v. Farmers' College, 32 Ohio St. 487; State v. Commercial Bank of Cincinnati, 10 Ohio, 535; Harris v. Railway Co., 51 Miss. 602; Chicago City Ry. Co. v. People, 73 Ill. 541; State v. Real-Estate Bank, 5 Ark. 595; State v. Societe Republicaine de Secours aux Emigrés Francais de la Guerre, 9 Mo. App. 114. There is no basis in the law or in the facts of this case for the claim that any franchise of the railway would have been forfeited, or that it would thereby have been compelled to cease to be a going concern, if it had failed to furnish the city with electric lights.

Another position of counsel for the appellant is that by subdivision "b" of article 2 of the mortgage the railway was compelled to construct this new building and purchase the new machinery. That article reads as follows:

"Said company hereby covenants and agrees that so holding and enjoying the property, works, and plant hereby mortgaged, or expressed and intended so to be, that it will: (a) Pay all taxes and assessments thereon during the continuance of this mortgage; that it will not suffer any lien superior to the lien hereby created to attach to said works and plant or any part thereof. (b) Keep and maintain the property hereby mortgaged in good order and condition, and in active operation, and duly keep and observe all laws and ordinances lawfully enacted in any way relating to or affecting the franchises, easements, and privileges now owned or hereafter acquired by it. (c) At all times hereafter provide for and pay the principal and interest of and upon the bonds hereby or intended hereby to be secured, as the same shall become due and payable, according to the tenor and effect thereof."

The argument is that the provision that the mortgagor shall "duly keep and observe all laws and ordinances lawfully enacted in any way relating to or affecting the franchises, easements, and privileges now owned or hereafter acquired by it," required the mortgagor to construct the new building and purchase the new machinery in order to furnish electric light to the city of Ottumwa. That argument is answered by the fact that there was no ordinance or law which required the railway to furnish electric light to the city, or to make any contract with it concerning such light. It is further answered by the fact that the same article of the mortgage contained a covenant that the mortgagor would not suffer any lien superior to the lien created by the mortgage to attach to the mortgaged property, and it thereby covenanted that it would not permit the lien of this intervener to become superior to the lien of the mortgage. The conclusion is irresistible that neither the organic law of the railway, nor the ordinance under which it was operated, nor the provisions of the mortgage imposed any forfeiture of any franchise for its failure to furnish electric light to the city of Ottumwa, or required it to furnish such light, or to construct the additions to its plant and power under consideration, in order to enable it to continue a going concern.

It is contended that it is inequitable for the trustee and the bondholders to insist that the lien of their mortgage is superior to that of the intervener, because the Ottumwa bondholders knew that the addition to the plant and power of the mortgagor was being made, and that the intervener was loaning the money to the mortgagor to assist in paying for it. But the residents of Ottumwa owned only 58 of the bonds, while the majority of them were held

by nonresidents, who knew nothing of the construction of the addition or of the loan of the intervener until after the new building was erected and the new machinery was purchased. The bondholders in Ottumwa could not, by their action, estop the trustee or the majority of the bondholders; and, if the intervener has any claim against the residents who held these 58 bonds, it is against them individually, and not against the trustee, or the mortgagees, which it represents. Moreover, the Ottumwa bondholders did not advise, consent to, or request the loan from the intervener, and he was not induced to make it by any of their acts or omissions. The mortgage which secured them was of record, and contained a covenant that the mortgagor should make no lien superior to theirs. The intervener knew this fact, and made his loan in the face of it. The bondholders had the right to believe, and doubtless did believe, that he had advanced his money upon the credit of the mortgagor, and that he took his rights subject to the lien of their mortgage. The facts constitute no estoppel against them from insisting upon their prior lien. There is nothing unjust nor inequitable in their position, and the fact that after the commencement of this suit they purchased the bonds of the nonresidents in no way changes the situation.

It is argued that the claim of the intervener to a superior lien has some equity in it in some way, because before the suit to foreclose the mortgage was commenced $10,000 of the current income of the mortgaged property was applied to payment for the construction of the addition to the plant and power, and because, subsequent to the appointment of the receiver, the latter has paid from the current income which he received taxes, labor claims, paving bonds, vendors' liens upon machinery purchased, and repairs, to the amount of more than $17,000. It is claimed that these acts constitute a diversion of the income, and that this diversion establishes an equity in favor of the intervener. The argument and claim are based on a misapprehension of the character and effect of a diversion of income which will establish a preference in equity. Unpaid claims for the current operating expenses of a quasi public corporation for a limited time anterior to the receivership have a superior equity to the lien of the bondholders under a prior mortgage. It is the diversion of the income of the mortgaged property from these claims, which have a superior equity to the claim of the bondholders, that forms one of the grounds of the preferential lien which is vouchsafed to them. But it is only when the income is diverted from the payment of these claims which have a higher equity to the payment of those which stand upon a lower plane that any equity arises in favor of anyone on account of diversion. In Fosdick v. Schall, 99 U. S. 235, 253, 254, 25 L. Ed. 339, Chief Justice Waite said that, if the officers of the company "give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. * * * Whatever is done, therefore, must be with a view to a restoration by the mortgage

creditors of that which they have thus inequitably obtained. It follows that, if there has been in reality no diversion, there can be no restoration, and that the amount of restoration should be made to depend upon the amount of the diversion." Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; Union Trust Co. v. Illinois M. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; Wood v. Safe-Deposit Co., 128 U. S. 416, 420, 421, 9 Sup. Ct. 131, 32 L. Ed. 472. Now, in the case in hand there never was any diversion of the current income from the payment of the operating expenses of the railway which was not fully restored by the payment of the labor and other claims which the receiver satisfied. All the operating expenses have been paid, and no unpaid claims on their account, no claims on account of money loaned to pay for material, supplies, or labor used in the operation of the property of this railway, are presented to the court, or are in existence. The claim of the intervener is for money loaned to pay interest on the mortgage debt, to construct a new brick building 70 feet long and 44 feet wide, and to purchase new machinery which increased the available power of the mortgagor 66⅔ per cent. The cost of this new building and machinery was $19,000. Its erection was not one of the current operating expenses of the mortgagor, but was an original construction for the purpose of increasing its capacity and power. The question whether or not the claim for the money loaned for this construction was superior in equity to that of the mortgagee will be subsequently considered. Whether it was or not, there was no diversion of the income from the payment of a claim of superior equity to the payment of one of inferior equity. The $10,000 which was taken from the income to pay for the construction of the addition was applied to the same purpose, and stood upon the same plane in equity, as the claim of the intervener for the money he loaned for the same purpose. The income applied by the receiver to the payment of vendors' liens upon the machinery, taxes, paving bonds, and repairs was applied to the payment of claims of equal or superior equity to that of the intervener. There was, therefore, no diversion of the current income of the mortgagor from the payment of claims of superior equity to the payment of claims of inferior equity, and hence no equity in support of the claim of the intervener upon this ground.

It is claimed that the $6,000 used to pay the interest on the mortgage debt, which accrued on December 1, 1894, was loaned to pay for the construction of the addition to the power and plant, and not to pay the interest on the bonds. The testimony upon this subject is that the intervener agreed to loan to the mortgagor the necessary money to enable it to construct the contemplated addition to its plant and power in consideration of the agreement by the railway to apply its current income, after the addition was paid for, to the payment of the loan made by the intervener. Pursuant to this agreement, he loaned to the company $1,500 on November 7, 1894, for which he took its promissory note. Pursuant to the same agreement he loaned it on November 27, 1894, $6,000, for which he took its promissory note; and at the time of the loan

he agreed that this money might be used to pay the interest on the mortgage bonds which fell due on December 1, 1894, and it was so used pursuant to that agreement. The legal effect of the facts disclosed by this evidence was that the intervener loaned this $6,000 to the mortgagor to enable it to pay its interest on the mortgage debt in consideration of the agreement of the mortgagor to apply its current income, after payment had been made for the new addition, to the payment of this loan. The effect of this loan was to prevent the mortgagee from foreclosing its mortgage for default of this interest, and to keep the property in the control of the mortgagor until the contemplated addition was completed. The claim of a creditor for money loaned to pay interest on a mortgage debt is inferior in equity to the lien of a prior mortgage, and cannot be given a preference over it. This proposition is conclusively established by Penn v. Calhoun, 121 U. S. 251, 252, 7 Sup. Ct. 906, 30 L. Ed. 915; Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 196, 11 Sup. Ct. 61, 34 L. Ed. 625; Southern Development Co. v. Farmers' Loan & Trust Co., 24 C. C. A. 497, 79 Fed. 212, 215; United States Trust Co. v. Western Contract Co., 26 C. C. A. 472, 81 Fed. 454, 464. In Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 196, 11 Sup. Ct. 68, 34 L. Ed. 634, Mr. Chief Justice Fuller, in delivering the opinion of the supreme court, upon this question aptly said:

"So far as disclosed, the interest coupons were paid, not purchased (Ketchum v. Duncan, 96 U. S. 659, 24 L. Ed. 868; Wood v. Safe-Deposit Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472), and cannot be set up as outstanding; and the contention is wholly inadmissible that the bondholders, because they received what was due them, should be held to have assented to the running of the road at the risk of returning the money thus paid, if the company, by reason of unrealized expectations on the part of those who made the advances, should ultimately turn out to be insolvent, and unable to go on. By the payment of the interest, the interposition of the bondholders was averted. They could not take possession of the property, and should not be charged with the responsibility of its operation. It is true that a railroad company is a corporation operating a public highway, but it does not follow that the discharge of its public excuses it from amenability for its private obligations. If it cannot keep up and maintain its road in a suitable condition, and perform the public service for which it was endowed with its faculties and franchises, it must give way to those who can. Its bonds cannot be confiscated because it lacks self-sustaining ability. To allow another corporation, which for its own purposes has kept a railroad in operation in the hands of the original company, by enabling it to prevent those who would otherwise be entitled to take it from doing so, a preference in reimbursement over the latter on the ground of superiority of equity, would be to permit the speculative action of third parties to defeat contract obligations, and to concede a power over the property of others which even governmental sovereignty cannot exercise without limitation. And if all these advances should be considered as applied in payment of the operating expenses only, upon the theory, where such was not literally the fact, that they supplied a deficit created by the payment of interest out of the gross earnings, the same remarks would be applicable."

The $6,000 loaned by the intervener on November 27, 1894, was loaned for and applied to the purpose of paying accruing interest on the mortgage bonds, and the claim for it is entitled to no preferential lien upon the corpus or income of the property covered by the mortgage prior to it. But $5,000 of the amount due the intervener

was loaned to enable the mortgagor to pay for the addition to its plant and power, and the question recurs, is a loan to a quasi public mortgagor, upon a pledge or mortgage of its income, of money to make a substantial and beneficial addition to its plant and power, which was necessary to enable it to maintain the volume of its business, but which was not indispensable to enable it to continue a going concern, entitled in equity to a lien upon the income or corpus of the property superior to the lien of a prior mortgage which covered all its income and all its property, acquired and to be acquired? The order appointing the receiver did not require him to pay claims of this character in preference to the mortgage debt out of the income or proceeds of the property, and the authorities which rest upon such an order (Dow v. Railroad Co. [C. C.] 20 Fed. 269; Central Trust Co. v. Texas & St. L. R. Co. [C. C.] 22 Fed. 135; Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co. [C. C.] 53 Fed. 182) do not rule this case. Nor is the decision in Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C.) 30 Fed. 332, which seems to be relied upon by counsel for intervener, even persuasive upon the issue here presented. It is said that in that case unsecured claims to the amount of more than $3,000,000 were allowed and given a preference in payment over a prior mortgage, and that $2,200,000 of these preferential claims were for moneys borrowed by the mortgagor, after the mortgage was recorded, to complete its lines of railroad, and make improvements upon its system; and it is claimed that the decision in that case is an authority for the proposition that it is within the power and province of a court of equity to impose upon a mortgaged property superior liens for such claims against the seasonable protest of the holders of bonds secured by the mortgage. This claim is founded on a complete misapprehension of the question presented, and of the scope and effect of the decision in that case. It is true that in the earlier administration of the receivership of the Wabash Railway System more than $3,000,000 of floating indebtedness was given a preference in payment over a prior mortgage, and that $2,200,000 of this indebtedness was for money borrowed by the railway company "for the meeting of its expenses and the keeping its road in successful operation and completing its lines"; but how was this result accomplished? Did the court decide in 30 Fed., against the objection of the mortgage bondholders, that such preferences could lawfully be made, and then make them? Not at all. The mortgagor filed the bill which instituted that suit, and the court in its original order appointing a receiver upon that bill, which was made before the mortgagees had appeared in the suit, or made any demand of the income, or any claim to the property or its proceeds, directed the receiver to first protect and pay this floating indebtedness. Certainly, that order did not decide that claims for money borrowed for the construction or completion of a railroad were entitled to preference over the mortgagees, because, until the mortgagees made demand for the income, or commenced a foreclosure of their mortgages, they had not impounded the income, and either the mortgagor or the court could properly apply it to the payment of unsecured

debts. Railroad Co. v. Cowdrey, 11 Wall. 459, 463, 20 L. Ed. 199; Dow v. Railroad Co., 124 U. S. 652, 8 Sup. Ct. 673, 31 L. Ed. 565. After the receivers were appointed upon the bill of the mortgagor, a suit was commenced to foreclose a junior mortgage upon the entire Wabash Railway System, and this latter suit was consolidated with that brought by the mortgagor, and a decree of foreclosure and sale, subject to the rights of the creditors secured by underlying mortgages upon various lines which constituted the system, was rendered. This decree gave to the claims based on this floating indebtedness of the mortgagor a preference in payment over this junior mortgage, but the decree was not the result of a decision upon the rights of the mortgagees as against the claimants for these preferences. It was rendered in their presence, and without objection on the part of the trustees of the various mortgages. The trustees of the underlying mortgages and of the junior mortgage which was foreclosed were parties to the suit, and the decree "was signed and entered, all parties in interest present, and none objecting." Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C.) 30 Fed. 335. Not only this, but no attempt had ever been made to set aside the orders which were made at the inception of the receivership that these unsecured debts should be first paid out of the income and the proceeds of the mortgaged property. Id. 340. Under this decree, to which the trustees of the various mortgages had silently assented, a sale had been made, and a purchasing committee had bought the property. Then it was that the case arose in 30 Fed. which is presented and relied upon by counsel, and it arose in this way: After the purchasing committee had bought the property under this decree, some of the bondholders who were secured by underlying mortgages upon some of the lines of railway which constituted a part of the Wabash System petitioned the court to direct the receivers or the purchasers at this sale to pay taxes upon the lines covered by their mortgages, and to pay the interest upon their bonds. The court held that they were estopped by the presence and silence of their trustees, who represented them, and by their own silence while the decree was rendered and the sale was made, from questioning its terms, or the rights of the purchasers to the property, without the imposition of additional burdens. The question in that case, and the only question presented and decided, was whether or not the decree was a contract between the court and the purchasers under it, so that it could not be changed after the sale, at the suit of bondholders, whose trustees had silently assented to it; and the court held that it was such a contract. The question whether or not claims for money loaned for the construction of parts of the railroad were entitled to preference in payment over the mortgages was not decided. Those claims had been allowed a preference by consent, and the case is no authority upon the issue before us.

Returning to the question, the contention of the intervener is that it should be answered in the affirmative, because the new building and machinery, to construct and purchase which he loaned his money, conserved the mortgaged property, increased the security

of the mortgagee to the full amount expended upon it, and made its operation more economical; and because the mortgagor agreed with him to apply the current income of the property to the payment of his loan after payment for the building and machinery had been completed. On the other hand, the mortgagee insists that it should be answered in the negative, because it is only current debts arising in the ordinary course of the business of a quasi public corporation within a limited time before the appointment of a receiver that are entitled to a preference in payment over a prior mortgage, and this is not such a debt. It strenuously maintains that neither the fact that the money borrowed was used to preserve the property, increase the security, and make the operation of the plant more economical, nor the fact that the mortgagor agreed to repay it out of the current income, have taken this debt out of the class of unpreferred claims, and transferred it to the class preferred in equity, or displaced the lien of the prior mortgage, in the face of which the intervener loaned his money and took his contract and his chances. It is certain that the expense of constructing this new brick building 70 feet long and 44 feet wide, and the purchase of this new machinery at an expense of $19,000, to make an addition to a plant worth only $150,000, and which increased the available power of the mortgager 66⅔ per cent., cannot be held to be one of the current operating expenses of the corporation incurred in the ordinary course of its business. The work for which the money was loaned was a work of construction and enlargement, and not a work of operation. Was the claim for the money borrowed to carry on this work of construction entitled to a lien on the mortgaged property and its income superior to that of the prior mortgagee? This court has held that the replacing of an old gear wheel and pinion worn out in service by a new one was one of the current expenses of the operation of a cable railway, and that the claim for the purchase thereof was entitled to a preference in payment over a prior mortgage (Trust Co. v. Clark, 81 Fed. 269, 26 C. C. A. 397, 49 U. S. App. 453); and that a claim for personal injury caused by the negligence of a railroad company in the operation of its road was entitled to no such preference (Trust Co. v. Riley, 70 Fed. 32, 16 C. C. A. 610, 36 U. S. App. 100). But it has never answered the question now in hand. We turn to the decisions of the supreme court for the answer.

In 1863 the question was presented to the supreme court in Dunham v. Railway Co., 1 Wall. 254, 267, 17 L. Ed. 584. In that case a mortgage was made upon a "road built and to be built" before the railroad was completed. The railway company, the mortgagor, was unable to finish it. Thereupon it delivered possession of its uncompleted railroad to a contractor, who agreed to finish it, and stipulated with him that he was to have and keep possession and control of the section of the road which he engaged to complete, and its earnings, until the company should make full payment to him of whatever amount it should owe him under the contract: that, until he was fully paid, he should operate the road, and apply the earnings—First, to payment for operation; second, to reim-

bursing himself for all money which he might advance; and, third, to the payment of the interest on the mortgage bonds. The railroad was worthless in the condition in which he found it. He completed the section whose possession was delivered to him, and by the expenditure of his own money made the railroad available and operative, and increased the security of the mortgagees. The trustee of one of the mortgages filed his bill to foreclose it. The contractor insisted that under his contract with the mortgagor, and in view of the fact that his action had conserved the property, and increased the security, he was entitled to a prior lien upon the income and proceeds of the property over the lien of the mortgage. The supreme court said:

"Contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance, but, if he had, and one had been executed and delivered, the rule would be the same. Registry of the first mortgage was notice to all the world of the lien of the complainant, and in that point of view the case does not even show a hardship upon the contractor, as he must have known, when he accepted the agreement, that he took the road subject to the rights of the bondholders. Acting, as he did, with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the bondholders had joined with the company in making the contract. No effort appears to have been made to induce them to become a party to the agreement, and it is now too late to remedy the oversight."

In 1870 the same question arose in Railroad Co. v. Cowdrey, 11 Wall. 459, 464, 481, 482, 20 L. Ed. 199. In that case the railroad company had given three mortgages upon its uncompleted railroad, which covered its income and its after-acquired property. After these mortgages had been made, there remained five miles of railroad between Galveston City and Virginia Point which were not constructed, and which the railroad company was unable to build. Thereupon it made a fourth deed of trust to one Tucker, as trustee for Robert Pulsford, to secure his payment for the iron that was to be used and that was used in laying the track of this five miles of railroad, and for the money advanced to build it. In this mortgage it was expressly agreed that Pulsford should have a special lien on the railroad iron which was used in the construction of this railroad from Galveston City to Virginia Point. The trustees of the prior mortgages brought suits to foreclose them. Pulsford intervened, and claimed a first lien on the portion of the road laid with his rails. He insisted that when the prior mortgages were made that part of the road was not in existence; that the mortgagor had been unable to build it; that without it the previous work done was worthless; that his iron saved the railroad, rendered it capable of being used; and that on the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel he was entitled to priority. Pages 465, 480, 11 Wall., and pages 202, 206, 20 L. Ed. The supreme court said:

"As to the first point, without attempting to review the many authorities on the subject, it is sufficient to state that, in our judgment, the first, second, and third deeds of trust or mortgages given by the Galveston Railroad Company to the trustees, estops the company, and all persons claiming under it and in

privity with it, from asserting that these deeds do not cover all the property and rights which they profess to cover. Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet, if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. * * * Mr. Pulsford, as holder of the fourth mortgage, is an assignee of the railroad company, claiming under it, with full notice of the other mortgages. He is in privity with the company, and is bound by the estoppel. As to the other point,—giving priority to the last creditor for aiding to conserve the thing,—all that is necessary to say is that the rule referred to has never been introduced into our laws except in maritime cases, which stand on a particular reason. * * * By the common law it is an inflexible rule that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the question here. The rails put down on the company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them." Pages 480–482, 11 Wall., and pages 206, 207, 20 L. Ed.

In Hale v. Frost, 99 U. S. 389, 391, 392, 25 L. Ed. 419, in a suit to foreclose a mortgage upon a railroad, Hale, Ayer & Co. intervened, and asked to be allowed a preference in payment of their claim, a part of which was for supplies furnished to the machinery department of the company, and used in the ordinary operation of the road, and a part for materials for construction purposes. The court held that the interveners were entitled to a preference in payment over the bondholders secured by the prior mortgage as to so much of their claim as was for supplies furnished and used in the ordinary operation of the road, but that they were not entitled to any preference in the payment for the material they had furnished for construction purposes.

In 1886, in Porter v. Steel Co., 120 U. S. 649, 671, 7 Sup. Ct. 741, 30 L. Ed. 830, in suits to foreclose prior mortgages which covered the income and after-acquired property of the mortgagors, the interveners had furnished the money with which large portions of the railroad were constructed, had thereby made the security valuable which was before nearly worthless, and a railroad operative which could not have been successfully operated without the completion of the lines built with the money of the interveners. They presented their claim for a preference in payment over the bondholders secured by the prior mortgages out of the income and proceeds of the mortgaged property. The circuit court sustained their claim, and entered a decree accordingly. The supreme court reversed the decree, and said:

"The claims of the appellees are for the original construction of the railroad. This is not a case where the proceeds of the sale of the property of a railroad, as a completed structure, open for travel and transportation, are to be applied to restore earnings which, instead of having been applied to pay operating expenses and necessary repairs, have been diverted to pay interest on mortgage bonds and the improvement of the mortgaged property; the debts due for the operating expenses and repairs having remained unpaid when a receiver was appointed. The equitable principles upon which the decisions rest applying

to the payment, out of the proceeds of the sales of railroad property, of such debts for operating expenses and necessary repairs, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a subsisting mortgage upon it. These five appellees gave credit to the company for their work. It was construction work, and none of it was for operating expenses or repairs, and none of it went towards keeping a completed road in operation, either in the way of labor or of material. When these claims accrued, the road of the company had not been opened for use. The claims accrued after the mortgage had been executed and recorded, and after $1,000,000 of the bonds secured by it had been issued and pledged to innocent bona fide holders for value. We are not aware of any well-considered adjudged case, which, in the absence of a statutory provision, holds that unsecured floating debts for construction are a lien on a railroad superior to the lien of a valid mortgage duly recorded, and of bonds secured thereby, and held by bona fide purchasers for value. The authorities are all the other way."

In Wood v. Safe-Deposit Co., 128 U. S. 416, 420, 421, 9 Sup. Ct. 131, 32 L. Ed. 472, which was decided in 1888, one Starr, who had raised money to defray the expenses of the construction of water-works upon the property mortgaged, and who for all purposes of the case stood in the shoes of the mortgagor, had paid 117 coupons with funds which he had raised for construction purposes. After he paid them, he delivered them to contractors in payment for materials they furnished to construct the plant, and they insisted that Starr's failure to apply the money he raised to the payment of the expenses of construction was a diversion of the fund which enabled them to obtain priority, under the doctrine of Fosdick v. Schall. But the supreme court answered:

"The argument is unsound. There are several answers to it. First, it overlooks the vital distinction between a debt for construction and one for operating expenses. The doctrine of Fosdick v. Schall is applicable wholly to the latter class of liabilities. In the case of Cowdrey v. Railroad Co., 93 U. S. 352, 23 L. Ed. 950, it was settled that the doctrine does not apply where it is a question of original construction. Secondly, it overlooks the important fact that the doctrine only applies where there is a diversion of the income of a 'going concern' from the purpose to which that income is equitably primarily devoted, viz. the payment of the operating expenses of the concern."

In Thompson v. Railroad Co., 132 U. S. 68, 73, 74, 10 Sup. Ct. 29, 33 L. Ed. 256, decided in 1889, the White Water Valley Railroad Company had been organized to construct and operate a railway from Hagerstown, in Indiana, to Harrison, on the boundary line between that state and Ohio. It had made a mortgage upon its property, acquired and to be acquired, and its income, to secure the payment of certain bonds which it issued. It had constructed its road from Harrison to Cambridge City, leaving the distance from the latter place to Hagerstown, between seven and eight miles, unconstructed. It was without means to equip the railroad constructed, or to construct the portion not yet built. It leased its road to another company to complete the construction, equip, and operate it. The lessee made a contract with Benjamin E. Smith and Henry C. Lord to construct the remaining portion of the line, and issued certificates to those contractors for the money expended by them in the work of construction. The lessor and lessee united in executing and delivering a mortgage upon the section of the railroad built by Smith and Lord in trust to secure the holders of the certificates mentioned, and agreed that those holders should have

a perpetual lien upon all the earnings of the line constructed by means of these certificates to secure the payment of the semiannual interest due upon the certificates. The mortgage was foreclosed without making Smith and Lord or the holders of the certificates parties, and a purchaser under the decree claimed the road free from the lien of the certificates and the mortgage made to secure them. The holders of the certificates brought suit to enforce their lien. They insisted that they were entitled to a prior lien upon the section which had been built with the money obtained by the certificates, because that money conserved the road and increased the security of the mortgagees, and because they had an express agreement with the mortgagor to apply the portion of the railroad which this money built and the income of it to the payment of these certificates. The supreme court said:

"The claims of the complainants, whatever validity and force may be given to them as liens upon the earnings of the section of road from Cambridge City to Hagerstown, between the parties agreeing to such liens, are entirely subordinate to the rights of the bondholders under the mortgage of the White Water Valley Railroad Company, executed for their benefit to trustees on the 1st of August, 1865. * * * The decision in the case of Railroad Co. v. Cowdrey also covers the only plausible position of the complainants, that they have a lien upon the earnings of the section, because with their moneys the road over it was constructed. But the work was not done at the request of the mortgagees, but upon a contract with the lessee of the road, which had stipulated as one of the considerations of the lease to construct that part of the line. With those contractors the bondholders, secured by the mortgage of August 1, 1865, had no relations, and incurred no obligation to them. In the case cited it was contended that priority should be given to the last creditor for aiding to conserve the road. But the court answered that this rule had never been introduced into our laws, except in maritime cases, which stand on a particular reason; that by the common law whatever is affixed to the freehold becomes part of the realty, except certain fixtures erected by tenants, which do not affect the question; and that the rails put down upon the company's road become a part of the road. Here the same rule applies, and not only the rails, but those permanent fixtures which are essential to the successful operation of the road, become a part of the property of the company, as much so as if they had existed when the mortgage was executed."

In Railroad Co. v. Hamilton, 134 U. S. 296, 298, 299, 301, 10 Sup. Ct. 546, 33 L. Ed. 905, decided in 1890, the Toledo, Delphos & Burlington Railroad Company made a mortgage in 1880 upon its property, acquired and to be acquired, and its income, to secure bonds which were subsequently issued thereunder. In 1883 that railroad company made several contracts with one who subsequently became the intervener in a suit to foreclose that mortgage, to the effect that he should construct a dock for it in the city of Toledo, and he fulfilled the contract. The railroad company failed to pay the contract price, and he sought priority over the mortgage bondholders in payment out of the income and proceeds of the mortgaged property. The circuit court sustained his claim. The supreme court reversed the decree, held that no act of the mortgagor and third parties could displace the lien of the mortgage in favor of a claim for money due for construction of additions to the property mortgaged, and, among other things, said:

"Neither did the fact of the construction of the dock, and the subsequent improvement of the mortgaged property, give, as reported by the master, to

Hamilton an equitable lien prior in right to the lien of the mortgage, or furnish equitable reasons why the legal priority belonging to the mortgage should be displaced. It is true cases have arisen in which, upon equitable reasons, the priority of a mortgage debt has been displaced in favor of even unsecured subsequent creditors. See St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co., 125 U. S. 658, 673, 8 Sup. Ct. 1011, 31 L. Ed. 832, in which many of these cases are collected, and the equitable principles underlying them stated. But those principles have no application here. The work which Hamilton did was in original construction, and not in keeping up, as a going concern, a railroad already built. The amount due him was no part of the current expenses of operating the road. There was, as to him, no diversion of current earnings to the payment of current expenses."

In Southern R. Co. v. Carnegie Steel Co., 176 U. S. 257, 259, 296, 20 Sup. Ct. 347, 44 L. Ed. 458, and Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 315, 20 Sup. Ct. 363, 44 L. Ed. 475 (cases which were decided in 1900), the supreme court had occasion again to consider the question before us. In the former case the Richmond & Danville Railroad Company, the mortgagor, had been engaged in operating a system of railroads comprising 3,320 miles. The Carnegie Steel Company had sold to the mortgagor, shortly before the appointment of receivers in the suit to foreclose the mortgage upon it, 4,203 tons of rails, which were necessary to replace old and worn rails upon the various lines of railroad operated by the mortgagor. These rails conserved the property and increased the security. The supreme court held that the claim for these rails was for a part of the operating expenses of the railroads of the mortgagor, and that it was entitled to preference in payment over the claim of the prior mortgagee. In the latter case, the Houston & Texas Central Railway Company, the mortgagor, was operating 521 miles of railroad. In the years 1882, 1883, and 1884 it purchased 18,581 tons of rails, which were indispensable to the maintenance of the company as a going concern, and which were used to replace old and worn rails upon the roads operated by the mortgagor. Half the purchase price of these rails remained unpaid. The claimant for this unpaid purchase price insisted that it was entitled to a preference in payment over the mortgagee out of the income and proceeds of the Waco & Northwestern Division of the mortgagor's railroad system, which consisted of 58 miles, 37 miles of which were relaid with rails furnished under the contracts with the mortgagor. The court held that the purchase price of these rails was not a part of the ordinary expenses of operating the railroad, and refused to allow a preference to the claim. Counsel for the claimants in each of these cases earnestly and persistently urged that these rails were necessary to the operation of the railroad, that they conserved the property, that they increased the security, and that for these reasons the claims should be preferred. In the former case the supreme court held the purchase price of the small quantity of rails in that case one of the ordinary expenses of the operation of the railroad, and then said:

"We must not be understood as saying that a general unsecured creditor of an insolvent railroad corporation in the hands of a receiver is entitled to priority over mortgage creditors in the distribution of net earnings, simply because

that which he furnished to the company prior to the appointment of the receiver was for the preservation of the property and for the benefit of the mortgage securities. That, no doubt, is an important element in the matter. Before, however, such a creditor is accorded a preference over mortgage creditors in the distribution of net earnings in the hands of a receiver of a railroad company, it should reasonably appear from all the circumstances, including the amount involved and the terms of payment, that the debt was one fairly to be regarded as part of the operating expenses of the railroad, incurred in the ordinary course of business, and to be met out of current receipts." Page 296, 176 U. S., page 362, 20 Sup. Ct., and page 475, 44 L. Ed.

In the latter case the court declared:

"The principal ground upon which the Lackawanna Company bases its claim for the relief asked is that when each of the above contracts was made the Waco division was in such condition that new rails were imperatively required in order that the road might be safely used for the transportation of persons and property. Such, it may be assumed, was the condition of the road when the rails were contracted for and delivered; for it was so found by the master to whom the intervening petition of the Lackawanna Company was referred with direction to take the account prayed for, and to report the facts, and to that report no exceptions were filed. * * * This court has uniformly held that in the distribution of the current earnings of an insolvent railroad company, whose property is being administered by a receiver, mortgage creditors could not be postponed to unsecured creditors, unless the debts due the latter were of the class known as current debts arising in the ordinary course of business, and properly chargeable upon current receipts. The decision in each case has been more or less controlled by its special facts. But we are of opinion that such expenditures as those incurred in the making of the contracts with the Lackawanna Company were not such as are made in the ordinary course of the operations of a railroad, and cannot be deemed current debts within the rule that a railroad mortgagee, when accepting his security, impliedly agrees that the current debts of a railroad company, contracted in the ordinary course of its business, in order to keep it a going concern, shall be paid out of current receipts before he has any claim upon such income. Southern R. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, and authorities there cited. They are rather to be regarded as extraordinary expenditures, outside of the ordinary course of business, and incurred for purposes not of repair, but of construction. This court has said that it is the exception, not the rule, that the priority of mortgage liens can be displaced. Kneeland v. Trust Co., 136 U. S. 89, 98, 10 Sup. Ct. 950, 34 L. Ed. 379; Thomas v. Car Co., 149 U. S. 95, 111, 13 Sup. Ct. 824, 37 L. Ed. 663. We have said that priority of unsecured claims is recognized only in a few specified cases in which equity and good conscience require that the vested liens of mortgage creditors shall be postponed in the application of current earnings to current debts. Sound principle forbids that a court of equity should imply an agreement upon the part of mortgage creditors to subordinate their claims to such debts as those due to the Lackawanna Company. To so hold would place their rights at the mercy of the railroad company having charge of the property upon which their recorded liens rest."

This is the last decision of the supreme court upon the question in dispute to which our attention has been called.

The authorities to which we have now adverted establish the propositions that a claim for money borrowed or for service rendered or material furnished to construct a necessary, permanent, and beneficial improvement or addition to the mortgaged property of a quasi public corporation is not entitled in equity to a preference in payment out of the mortgaged property or income over the claims of the bondholders secured by the lien of the prior mortgage, in the face of which the claim accrued; and that neither the fact that the consideration of the claim conserved the property,

increased the security of the mortgagee, and rendered the operation of the property more economical, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor pledged or mortgaged the current income to secure the payment of the claim, can raise such an equity as will entitle it to a preferential lien upon either the income or the corpus of the mortgaged estate over the lien of the prior mortgage. These propositions conclusively answer the question presented in this case.

Nor will a perusal of the authorities from the supreme court cited by counsel for the intervener, and a careful examination of the facts and opinions in those cases, disclose any decision adverse to this answer or to any of the propositions upon which it rests. As usual in cases of claims for preferential liens in equity, the case of Fosdick v. Schall, 99 U. S. 235, 251, 252, 25 L. Ed. 339, 342, has been cited, quoted, and made the foundation of the argument for the intervener. It is true that Chief Justice Waite in delivering the opinion of the supreme court in that case said:

"We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character, and affect peculiar interests. * * * The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and, when companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid, and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements."

But it is an interesting fact that these remarks, upon which so many arguments are based for the preference of unsecured to secured creditors in the application of the income and proceeds of mortgaged property, were obiter dicta, and that the supreme court has ever since they were delivered been industriously engaged in limiting their terms and restricting their effect, until it has finally declared in the cases of Southern R. Co. v. Carnegie Steel Co. and Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., supra, that no claim which is not a current debt incurred in the ordinary course of the operation of the property of the mortgagor can be allowed a preference in payment over the lien of the prior mortgage. The decision in Fosdick v. Schall, 99 U. S. 255, 25 L. Ed. 339, was far from the broad proposition contained in the remarks we have quoted, and was in no way supported by them. It was that a claim of a vendor of cars for their rent for six months immediately prior to the receivership, which was, under the contract of sale,

a part of the purchase price of the cars, was entitled to no equitable lien upon the proceeds of the mortgaged property superior to that of the mortgage bondholders, and the decree of the circuit court which gave such a preference was reversed.

In Huidekoper v. Locomotive Works, 99 U. S. 258, 260, 25 L. Ed. 344, the circuit court had given preference in payment over the mortgage to the claim of a creditor for a balance of the purchase price of rolling stock which had been secured upon the locomotives, and had been partially paid by a foreclosure of the lien thereon. The supreme court reversed the decision of the court below, and declared that the vendor had no equitable lien upon any fund in court as security for his debt.

Miltenberger v. Railway Co., 106 U. S. 286, 308, 311, 1 Sup. Ct. 140, 27 L. Ed. 117, is another case upon which much reliance seems to be placed by counsel for the intervener. In that case the supreme court sustained a decree which directed the receivers operating the mortgaged property to pay, in preference to the mortgage debt, the arrears due for operating expenses of the railroad for a period not exceeding 90 days prior to the appointment of a receiver, an amount not exceeding $10,000, to several connecting lines of railroad, in settlement of ticket and freight balances, and in payment for materials and repairs, a part of which accrued more than 90 days before the appointment of the receiver, and the expenses of constructing six miles of railroad and a bridge, which were built subsequent to the appointment of a receiver, pursuant to the orders of the court. Much stress is laid upon the fact that under this decree the expenses of constructing the six miles of railroad and the bridge were preferred in payment to the lien of the mortgage. But the railroad and bridge were not constructed by the mortgagor prior to the appointment of the receiver, but by the receiver under the orders of the court. Moreover, the mortgagees in that case had contented themselves with merely protesting generally and disclaiming all interest under the receivership. Without other action to prevent the construction of the railroad and bridge, and with full knowledge that the receiver was proceeding to construct them under the orders of the court, they had remained silent until the receiver had incurred the expenses of the construction and had completed the work. The court held that, under these circumstances, they were estopped from claiming that the expenses so incurred should not be paid out of the income or proceeds of the mortgaged property. It said:

"A court of equity, however it might act on the question of original authority or discretion, if presented in season and under circumstances of good faith, will not visit upon innocent parties dealing with a receiver, within the authority of its orders, consequences which result from the inequitable negligence and supineness of a party to the suit, or of those represented by him." Page 308, 106 U. S., page 159, 1 Sup. Ct., and page 125, 27 L. Ed.

The case was decided upon the principle of estoppel, and not upon the theory that a claim for the expense of construction was superior in equity to the lien of a prior mortgage.

In Trust Co. v. Souther, 107 U. S. 591, 593, 595, 2 Sup. Ct. 295,

27 L. Ed. 488, it was held that the court appointing a receiver might properly order him, before paying the mortgage debt, to pay out of the proceeds of the mortgaged property all amounts owing by the railroad company for labor or supplies that accrued in the operation and maintenance of the railroad within six months prior to the appointment of the receiver, where the receiver had, with the consent of the mortgagee, used the income which he obtained during the receivership in making permanent repairs and improvements on the property, instead of paying the claims for labor and supplies.

In Burnham v. Bowen, 111 U. S. 776, 783, 4 Sup. Ct. 675, 28 L. Ed. 596, the decision was that, in a case in which the income of the receivership had been diverted to pay for the right of way, the court might charge a claim for fuel necessarily furnished to, and used by, the railroad company in the ordinary course of the operation of its road, and within 12 months prior to the receivership, as a lien upon the mortgaged property superior to that of the mortgage, but Mr. Chief Justice Waite added:

> "We do not now hold, any more than we did in Fosdick v. Schall, or Huidekoper v. Locomotive Works, 99 U. S. 258, 260, 25 L. Ed. 344, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them, and used to pay the general creditors of the road. All we then decided, and all we now decide, is that, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

In Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963, claims for amounts due employés of the road for services within six months preceding the appointment of the receiver, and for debts incurred for the ordinary expenses of the receivers in operating, repairing, and maintaining the road in passable condition, were allowed a preference in payment over the claim of the mortgagee.

In Penn v. Calhoun, 121 U. S. 251, 7 Sup. Ct. 906, 30 L. Ed. 915, a claim of a bank for money loaned to and used by the mortgagor to pay current expenses and pressing debts, just before the foreclosure, was refused a preference in payment over the mortgage debt.

In Sage v. Railroad Co., 125 U. S. 361, 375, 379, 8 Sup. Ct. 887, 31 L. Ed. 694, an unsecured creditor obtained a judgment against the company, and upon a creditors' bill secured the appointment of a receiver, who proceeded to operate the railroad, and to collect the income for the benefit of the judgment creditor. Individual bondholders, who were secured by a mortgage upon the railroad and its income, intervened, without the appearance of their trustees, in the suit brought by the unsecured judgment creditor, and the supreme court held that they did not thereby deprive him of his priority of right to the income accumulated by the receiver appointed under his bill.

In St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co., 125 U. S. 658, 673, 8 Sup. Ct. 1011, 31 L. Ed. 832, the supreme court refused to make the amount due for the rent of a track used by the

mortgagor before the appointment of a receiver a preferred claim to that of the bondholders upon the proceeds of the mortgaged property. In the opinion Mr. Justice Matthews thus enumerates the claims that may be preferred in the distribution of the income:

"It is undoubtedly true that operating expenses, debts due to connecting lines growing out of an interchange of business, and debts due for the use and occupation of leased lines, are chargeable upon gross income before that net revenue arises which constitutes the fund applicable to the payment of the interest on the mortgage bonds." Page 673, 125 U. S., page 1017, 8 Sup. Ct., and page 837, 31 L. Ed.

In Trust Co. v. Morrison, 125 U. S. 591, 612, 8 Sup. Ct. 1004, 31 L. Ed. 825, a preference in the distribution of the proceeds of the sale of mortgaged property was allowed to a surety who had executed a bond for an injunction that enabled the railroad company to prevent the sale of its rolling stock on execution and to continue the operation of the railroad. But Mr. Justice Bradley, in rendering the opinion of the court, quoted the remark of Mr. Chief Justice Waite in Burnham v. Bowen, which appears above, and declared that it was not the intention of the court to decide anything in conflict with that declaration.

In Kneeland v. Trust Co., 136 U. S. 89, 98, 10 Sup. Ct. 950, 953, 34 L. Ed. 379, 383, the supreme court held that a claim for the rent of rolling stock for three months immediately prior to the filing of the bill for foreclosure was not entitled to a preference over the mortgage debt in the distribution of the proceeds of the sale of the property, although the rolling stock was used during that time by a receiver of the railroad company appointed on a creditors' bill. In delivering the opinion of the court in that case, Mr. Justice Brewer said:

"The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it, and whoever has dealings with a company when property is mortgaged must be assumed to have dealt with it on the face of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced."

In Railroad Co. v. Wilson, 138 U. S. 501, 508, 11 Sup. Ct. 405, 34 L. Ed. 1023, the claim of an attorney for services rendered to the railway company in recovering its engines from the receiver of an-

other corporation, and for obtaining an allowance against that receiver for $1,500, was allowed a preference over the lien of the mortgage, because his services were rendered in the ordinary course of the operation of the railroad, and inured to the benefit of the mortgagee. But another claim which he presented for services rendered for the mortgagor, which secured no benefit to the mortgagee, was denied a preference.

In Thomas v. Car Co., 149 U. S. 95, 110, 111, 112, 13 Sup. Ct. 824, 37 L. Ed. 663, a preference was denied to a debt from a railroad company to a car company for rental of cars prior to the commencement of the suit to foreclose the mortgage. Mr. Justice Shiras, in delivering the opinion of the supreme court, quoted with approval the language of Mr. Justice Brewer in Kneeland v. Trust Co., 136 U. S. 97, 10 Sup. Ct. 953, 34 L. Ed. 383, which we have copied supra, and said:

"The case of a corporation for the manufacture and sale of cars, dealing with a railroad company whose road is subject to a mortgage securing outstanding bonds, is very different from that of workmen and employés, or of those who furnish from day to day supplies necessary for the maintenance of the railroad. Such a company must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity."

In Trust Co. v. Cooper, 162 U. S. 529, 16 Sup. Ct. 879, 40 L. Ed. 1062, a coal and railway company had made an agreement with a contractor for the construction of a building for it. After the contractor had commenced his work a receiver of the property of the company was appointed under foreclosure proceedings. The building which the contractor was erecting was not covered by the mortgage. The contractor then proceeded, under an order of the court, and with the consent of the receiver, towards the completion of the building. The court held that, as the building was an asset in the hands of the receiver, the claim of the contractor for the work done upon it was entitled to payment out of the income or out of the proceeds of the property of the railroad company. But this case is not in point here, because the building constructed was not covered by the mortgage.

In Virginia & A. Coal Co. v. Central R. & Banking Co., 170 U. S. 355, 370, 18 Sup. Ct. 657, 42 L. Ed. 1068, a claim for coal furnished and used in the operation of the lines of railroad of the mortgagor was held to be one of the current expenses in the ordinary course of the operation of a railroad, and to be entitled to preference in equity over the mortgage lien. In rendering the decision the court again called attention to the very few and exceptional cases in which preferential liens may be allowed under the decisions of that court. Mr. Justice White said:

"In concluding that the claims of the interveners were entitled to priority out of the surplus earnings which arose during the control of the road by the court, we must not be understood as in any wise detracting from the force of the intimations contained in the recent utterances of this court in the Kneeland Case, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, and the Thomas Case, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, as to the necessity of a court of equity confining itself within very restricted limits in the application of the

doctrine that in certain cases a court having a road or fund under its control may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims originating prior to a receivership."

All the cases cited by counsel for the intervener from the supreme court which bear upon the question in hand have now been reviewed. While there are dicta in some of the earlier opinions of that court (notably in Fosdick v. Schall) upon which a plausible argument that a claim for material or money furnished for a "permanent improvement" to the mortgaged property may be preferred to a prior mortgage, there is no decision of that court to that effect, or adverse to the principles established and affirmed by the line of cases opening with Dunham v. Railway Co., 1 Wall. 254, 267, 17 L. Ed. 584, in 1863, and closing with Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 315, 20 Sup. Ct. 363, 44 L. Ed. 475, which have been examined in an earlier part of this opinion. Since those authorities decide the question before us, and as the decisions of the supreme court are conclusive here, it would be an idle task to consider the opinions of other courts. When a careful examination and analysis of the facts and opinions in all the cases in the supreme court upon the subject of preferential claims in suits to foreclose mortgages of quasi public corporations is made, and dicta are distinguished from adjudications, the decisions of that court will be found to sustain these propositions: A mortgagee of the property, acquired and to be acquired, and of the income of a quasi public corporation, such as a railroad company, obtains a lien upon the net income of the company after the current expenses of operation incurred in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these current expenses, before the net income to which he is entitled arises. A court of equity engaged in administering mortgaged railroad property under a receivership in a foreclosure suit may prefer unpaid claims for current expenses of the ordinary operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property. If such a mortgagor diverts the current income from the payment of current expenses to the payment of interest on the mortgage debt, or to the improvement of the mortgaged property, so that current expenses remain unpaid when a receiver is appointed, the court may, out of the income accruing during the receivership, restore to the unpaid claims for current expenses the amount so diverted. But if there has been no diversion there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion. The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver. It does not include claims for money loaned, or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property. The

broad language of the dicta in Fosdick v. Schall, that "necessary operating and managing expenses, proper equipment, and useful improvements" are to be deducted from the current income before the net income out of which the mortgage debt is to be paid arises, has been disapproved and modified, and the class of claims entitled to equitable preference has been limited, by the later decisions of the supreme court in Kneeland v. Trust Co., 136 U. S. 89, 98, 10 Sup. Ct. 950, 34 L. Ed. 379; Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 196, 198, 11 Sup. Ct. 71, 34 L. Ed. 625; Thompson v. Railroad Co., 132 U. S. 68, 71, 73, 10 Sup. Ct. 29, 33 L. Ed. 256; Thomas v. Car Co., 149 U. S. 95, 110, 13 Sup. Ct. 824, 37 L. Ed. 663; Southern R. Co. v. Carnegie Steel Co., 176 U. S. 257, 296, 20 Sup. Ct. 347, 44 L. Ed. 458; and Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 315, 20 Sup. Ct. 363, 44 L. Ed. 475,—to claims incurred for the current expenses of the operation of the mortgaged property in the ordinary course of the business of the mortgagor. The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the operation of the mortgaged property, which inured to its benefit, and which was incurred in the ordinary course of its business, within a limited time anterior to the appointment of the receiver, the claim may be preferred. The supreme court has refused to apply the principle of the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel to the distribution of the proceeds of the foreclosure of mortgages of quasi public corporations. Railroad Co. v. Cowdrey, 11 Wall. 459, 474, 482, 20 L. Ed. 199; Thompson v. Railroad Co., 132 U. S. 68, 74, 10 Sup. Ct. 29, 33 L. Ed. 256. If the consideration of a claim is not a part of the current expenses of the ordinary operation of the mortgaged property, but is a part of the expense of constructing a permanent addition or improvement to it, out of the ordinary course of its operation, neither the fact that it tended to conserve and improve the property and increase the security of the mortgagee, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor pledged or mortgaged the current income to secure it, will give the claim a preferential equity over the lien of a prior mortgage. Dunham v. Railway Co., 1 Wall. 254, 267, 17 L. Ed. 584; Railroad Co. v. Cowdrey, 11 Wall. 464, 481, 20 L. Ed. 202; Thompson v. Railroad Co., 132 U. S. 71, 73, 74, 10 Sup. Ct. 29, 33 L. Ed. 256; Railroad Co. v. Hamilton, 134 U. S. 296, 301, 10 Sup. Ct. 546, 33 L. Ed. 905; Southern R. Co. v. Carnegie Steel Co., 176 U. S. 257, 296, 20 Sup. Ct. 347, 44 L. Ed. 458; Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 315, 20 Sup. Ct. 363, 44 L. Ed. 475.

The consideration of the claim for money loaned to pay for the addition to the plant and power of the mortgagor, for which a preference is sought in this case, was not one of the current expenses of the operation of the mortgaged property in the ordinary course of business, but it was money loaned to pay an extraordinary expense of the mortgagor, incurred not for the operation of its prop-

erty, but for the construction of a new and permanent addition to and improvement of it. The claim was therefore inferior in law and in equity to the prior lien of the recorded mortgage, in the face of which it arose; and the decree below, which gave it a preference over the claims of the bondholders secured by that mortgage, must be reversed, and the case must be remanded to the court below, with directions to overrule the exceptions to the master's report and to enter a decree in conformity therewith, and it is so ordered.

CALDWELL, Circuit Judge (dissenting). At the threshold of this case we are confronted with the question whether the doctrine of preferential debts, applicable to railroads, has any application to a corporation like the mortgagor in this case. In Wood v. Safe-Deposit Co., 128 U. S. 416, 421, 9 Sup. Ct. 132, 32 L. Ed. 473, the supreme court said:

"The doctrine of Fosdick v. Schall has never yet been applied in any case except that of a railroad. The case lays great emphasis upon the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out."

In Hanna v. Trust Co., 36 U. S. App. 61, 16 C. C. A. 586, 70 Fed. 2, and in Ford v. Trust Co., 36 U. S. App. 203, 17 C. C. A. 31, 70 Fed. 144, the question was adverted to, but not decided, by this court. The majority opinion makes no reference to this question, but by implication puts the corporation in this case on the footing of a general traffic railroad in the matter of preferential debts. I express no opinion upon that question. If the doctrine is applicable to this corporation, then the decree of the circuit court should be affirmed. The opinion of Judge Woolson (Illinois Trust & Sav. Bank v. Ottumwa Electric Ry. Co. [C. C.] 89 Fed. 235) shows what the decree was, and the grounds upon which it was rested. No extended review of the authorities on the doctrine of preferential claims is called for by this case. They have been fully reviewed by the supreme court in the late case of Southern R. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458; and their review by the majority of the court in this case throws no new light on the subject, but, from the standpoint from which it is made, serves rather to darken it. The cases of Dunham v. Railway Co., 1 Wall. 254, 17 L. Ed. 584, and Railroad Co. v. Cowdrey, 11 Wall. 459, 20 L. Ed. 199, are cited in support of the majority opinion. As these cases were decided long before Fosdick v. Schall, the court might, with exactly as much pertinency and relevancy to the case at bar, have cited every case from the Year Books down. The question of giving certain classes of the general indebtedness of a railroad company preference over a mortgage on the road first came before the circuit courts in suits to foreclose such mortgages. Some of those courts, perceiving the difference between a railroad and all other kinds of property, and between a mortgage on a railroad and a mortgage on lands and lots (Farmers' Loan & Trust Co.

v. Kansas City, W. & N. W. R. Co. [C. C.] 53 Fed. 182; Same v. Northern Pac. R. Co. [C. C.] 71 Fed. 245), were constrained by considerations of equity and justice, which no court of equity could disregard, to give certain classes of indebtedness of the railroad company preference over the mortgage. The power was exercised very sparingly at first, but more liberally by some chancellors than others. The first case in which the supreme court took up and fully considered the question of the power of a court of equity to make preference in suits to foreclose a mortgage on a railroad was the now justly celebrated case of Fosdick v. Schall, 99 U. S. 253, 25 L. Ed. 339. The unanimous judgment of the court was delivered by Chief Justice Waite, and the opinion in that case is the foundation of the doctrine in the federal courts, and no case prior to that judgment has any application to the doctrine. No case has since gone to the supreme court, involving the question of preferential debts, in which the court has not rested its decision on the doctrine of that case, or cited it approvingly. In the very last reported case (Southern R. Co. v. Carnegie Steel Co., supra) involving the question the court quotes extensively and approvingly from the opinion in Fosdick v. Schall. In every case which has come before that court involving the question of preferential debts, it has referred approvingly to the case of Fosdick v. Schall; and in no single one of them is that case criticised, overruled, or declared obiter dicta. In view of these facts it is a matter of surprise to find it stated in the majority opinion that the greater part of the unanimous opinion of the supreme court in Fosdick v. Schall is obiter dicta and to be disregarded. It is difficult to harmonize all the judicial utterances and conclusions in the different cases that have been considered by that court. But this is not surprising when we reflect that the whole doctrine is of modern origin, and that it is not based on any written law, but upon equitable considerations, the application of which rests in a large degree upon the sound judicial discretion of the chancellor, having due regard to the circumstances of the particular case. Some contrariety of opinion and practice in the application of a principle resting solely on equitable considerations, the application of which are dependent on the exercise of that uncertain quantity called "judicial discretion," was inevitable. It was in view of these considerations that the supreme court, unlike the majority of this court in the case at bar, has uniformly refused to lay down any fixed and inflexible rule for the application of the doctrine. Every case is left to be determined on its own special equities. In Fosdick v. Schall the supreme court said:

"No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act."

And in Southern R. Co. v. Carnegie Steel Co., supra, after reviewing the cases, the supreme court says:

"It is apparent from an examination of the above cases that the decision in each one depended upon its special facts. This court has uniformly refrained from laying down any rule as absolutely controlling in every case

involving the right of unsecured creditors of a corporation, whose property is in the hands of a receiver, to have their demands paid out of net earnings in preference to mortgage creditors."

And this is again repeated at page 292, 176 U. S., page 358, 20 Sup. Ct., and page 473, 44 L. Ed., where it is said:

"Each case, as already observed, must depend largely upon its special facts."

In Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 315, 20 Sup. Ct. 363, 369, 44 L. Ed. 475, 484, decided on the same day with the Carnegie Steel Company Case, the court said:

"The decision in each case has been more or less controlled by its special facts."

And like utterances are found in other opinions of that court.

In the case of Farmers' Loan & Trust Co. v. American Waterworks Co. (C. C.) 107 Fed. 23, in which the intervener, the Holly Manufacturing Company, was allowed $44,000 as a preferential claim for three engines and other material furnished to the Waterworks Company, Judge Sanborn says:

"It is perhaps impossible, and, if possible, it would be unwise, to draw the line of demarkation between claims that may and those that may not be preferred to the mortgagees in payment out of the income earned by an insolvent corporation, after receivers in foreclosure are appointed, or out of the corpus of the property. The special circumstances of each case will necessarily and rightfully influence the discretion of the court."

In the case at bar the majority of the court find the machinery and other improvements procured and built with the money of the intervener were not necessary to keep the corporation a going concern, or to prevent a forfeiture of its charter, or to enable it to discharge any duty it owed to the public and was bound to discharge, and that, as the contract to light the city entailed a loss of $2,700 per year on the company, the addition and improvement of its plant which enabled it to continue to perform that contract was an actual damage to the company. In the face of these findings, there is no rule or decision under which the intervener's claim could be held to be preferred. And when the court arrived at these conclusions this case was decided against the intervener, and all that it said thereafter is obiter dicta and not binding on this or any other court. But, in disregard of the rule of the supreme court to confine the decision in this class of cases to the particular facts and circumstances of the case in hand, the majority opinion, after finding facts which effectually dispose of the case at bar, proceeds to a general discussion of the doctrine of preferential debts, and concludes by laying down numerous inflexible and cast-iron rules for the determination of all cases which may arise in the future. One of these rules declares:

"The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver. It does not include claims for money loaned or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property."

As applied to this case, this rule, for the reasons we stated, is obiter dicta, and, moreover, is not law. It is in direct conflict with the judgment of this court in Trust Co. v. Riley, 36 U. S. App. 100, 16 C. C. A. 610, 70 Fed. 32, in which the judge who writes the majority opinion in this case wrote the unanimous opinion of the court. After a full review of the authorities the court, speaking by Judge Sanborn, said:

"From this brief review of the decisions of the supreme court bearing upon this question, we think these propositions may properly be deduced: First. There are certain claims against a mortgaged railroad, accruing before the appointment of a receiver, which are entitled to a preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership, and out of the proceeds of the sale of its property. Second. It is an indispensable element of every such claim that it is founded upon property furnished or services rendered to the mortgagor which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee. Third. Claims of this character have been given a preference over the mortgage debt by these decisions on one of two grounds,—either on the ground that the mortgage is a lien on the net, and not on the gross, income of the railway company; and where that part of the income which is applicable to the payment of current expenses of operation, proper equipment, and necessary improvements has been diverted to pay interest on the mortgage debt, or to otherwise benefit the security, and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the diverted fund by taking an equal amount from the earnings of the railway company during the receivership, and applying it to the payment of these claims in preference to the mortgage debt. Fosdick v. Schall; Burnham v. Bowen; St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.; Railroad Co. v. Hamilton; Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.,—supra."

Again it is said:

"Repairs and improvements increase the value of the security of the bondholders."

It will be observed that among the claims classed as preferential by the court are claims "founded upon property furnished or services rendered to the mortgagor, which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee," and debts incurred for "proper equipments and necessary improvements," or any expenditure that operates "to otherwise benefit the security." The intervener's claim in this case is founded on property furnished to the mortgagor which enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee. It is for "proper equipments and necessary improvements," and was an expenditure that operated to benefit the security, so that it falls exactly within the rule announced by this court in Trust Co. v. Riley.

Contrary to the finding of the majority of the court, I find, from a careful consideration of the facts disclosed by the record, that the improvements made were necessary to enable the company to continue as a going concern, so far as relates to furnishing lights, and to carry out its contract to light the city, and to discharge its obligations under its charter. It is immaterial whether the contract to furnish light was profitable or unprofitable to the company. It was a contract to perform public service of vital importance to the

city and its inhabitants. The doctrine that a corporation bound by contract to light the streets of a city may with impunity repudiate that contract whenever it proves to be unprofitable or its plant inadequate to the purpose is not sound. When the company entered into a contract to light the streets of the city, it took upon itself the discharge of a public duty which it was bound to perform according to the terms of its contract. Neither its insolvency, nor the fact that its plant was inadequate for the purpose, nor the fact, if it was a fact, that compliance with its contract entailed a loss, would be received by the law as an excuse for its nonperformance. It is conceded that the company was saved $4,000 a year in expenses by these improvements and additions to its plant. The improvements and additions passed to the mortgagees, under the mortgage, and were worth all or more than they cost. The company would have been liable to the city for the breach of its contract to light its streets, so that the failure of the company to comply with its contract would not relieve it of any loss under the contract, but would impose new and additional liabilities upon it. It would, moreover, have furnished a ground for the forfeiture of its charter. It is not necessary to prove that this forfeiture would have been enforced. It is enough that it might have been. The contention of the majority that, where a company's charter authorizes and requires it to operate a street railroad and an electric plant sufficient to light the streets of a city, it must be regarded as a going concern as to both, so long as it operates one of them, and that it cannot, therefore, be said that improvements and additions made to one of them, without which it must have been abandoned, were necessary to keep the company a going concern, is too obviously untenable to require discussion. In Fosdick v. Schall, supra, without assuming to enumerate all the kinds of claims which might be allowed, the court specified the following:

"Outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable."

Again:

"The income out of which the mortgagee is to be paid is the net income obtained from deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements."

In Central Trust Co. v. Wabash St. L. & P. Ry. Co. (C. C.) 30 Fed. 332, over $2,000,000 of claims were allowed for borrowed money "in order to provide means for the meeting of its expenses and the keeping of its road in successful operation, and completing its lines as aforesaid." See Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. Ry. Co. (C. C.) 53 Fed. 182. In Trust Co. v. Clark, 26 C. C. A. 397, 81 Fed. 269, preference was given to a claim for a gear wheel and pinion. In Manhattan Trust Co. v. Sioux City Cable Co. (C. C.) 76 Fed. 658, for power furnished a street railway. In Railroad Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. Ed. 1023, a preferential claim was allowed for attorney's fees. In Morrison's Case, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. Ed. 825, an allowance was made

for damages suffered by reason of an injunction bond to prevent the sale of rolling stock. In Manhattan Trust Co. Case (C. C.) 76 Fed. 658, an allowance for an electric generator. In Miltenberger Case, 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117, claim was allowed for the construction of five miles of road, repairs on bridge, purchase of engines, etc.; some of the claims existing before, and some accruing after, appointment of the receiver. In Cleveland, C. & S. Ry. Co.'s Case (C. C.) 86 Fed. 73, claim allowed for the construction of railroad bridge. In Atkins' Case, 3 Hughes, 307, Fed. Cas. No. 604, for moneys advanced by bondholders and stockholders to pay labor claims. In Farmers' Loan & Trust Co. v. American Waterworks Co., supra, claim allowed for engines, hydrants, boilers, valves, etc., furnished the American Water Company at Omaha. Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C.) 71 Fed. 245, claim allowed on account of going on an appeal bond, upon the same principle as Morrison's Case. In Farmers' Loan & Trust Co.'s Case (C. C.) 71 Fed. 250, claim allowed for taxes paid. Penn Mut. Life Ins. Co.'s Case, 141 Ill. 35, 31 N. E. 138, claim allowed for right of way damages. In Southern R. Co. v. Carnegie Steel Co., supra, a claim for steel rails was held to be a preferential debt. And in Farmers' Loan & Trust Co. v. Lamont, 69 Fed. 23, 16 C. C. A. 364, 32 U. S. App. 480, this court held a claim for rent of a waiting room for passengers and an office for the company's ticket agent was a preferential debt.

## SAFE-DEPOSIT & TRUST CO. OF PITTSBURG v. WRIGHT et al.

(Circuit Court of Appeals, Third Circuit. November 30, 1900.)

No. 3, September Term.

1. JUDGMENTS—COLLATERAL ATTACK.
   In a suit for the partition of lands which were subject to the lien of certain judgments, the court cannot, on distribution of the proceeds of the lands after their sale, inquire into the consideration of the notes on which a senior judgment was rendered, for the purpose of giving a later judgment priority.
2. SAME—CONCLUSIVENESS—JUDGMENT ENTERED ON WARRANT OF ATTORNEY.
   A judgment entered on a warrant of attorney, under the established law of Pennsylvania, until reversed or set aside, has all the qualities and conclusive effect of a judgment on a verdict.
3. SAME—IMPEACHMENT FOR FRAUD—JUNIOR LIENHOLDER.
   While the holder of a junior judgment may collaterally impeach a senior judgment for fraud against himself, to the extent of defeating the priority of lien, he cannot do so on the ground merely that the judgment was fraudulent as against the defendant.
4. PROMISSORY NOTE—CONSIDERATION—INDEBTEDNESS OF ANCESTOR.
   A note given by heirs for a debt of their ancestor, which was enforceable against his estate, although it had ceased to be a lien upon his realty, is not without consideration, so that a judgment rendered thereon can be impeached by the holder of a junior judgment against the makers, in the absence of fraud or collusion to defeat the rights of such junior creditor.
5. EXEMPTION—WAIVER.
   Under the law of Pennsylvania, the right of exemption is a personal privilege, which may be waived; and a waiver of such right in a note under seal, which has passed into judgment, is irrevocable.

Appeal from Circuit Court of the United States for the Western District of Pennsylvania.

W. G. Guiler, for appellant.

R. H. Lindsey, for appellees.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. This is an appeal from the order and decree of the circuit court of the United States for the Western district of Pennsylvania sustaining the exceptions filed by the Second National Bank of Brownsville, Pa., to the master's report on distribution of the funds realized by him from the sale of certain real estate under proceedings instituted in said circuit court for partition of the said real estate among heirs at law of Thomas S. Wright, late of Fayette county, Pennsylvania, deceased, who died intestate and seised of said real estate. Thomas S. Wright died intestate November 7, 1893, leaving to survive him a widow, Nancy Wright, and the following named children: Harry S. Wright, John A. Wright, William D. Wright, Moses Wright, Bessie Wright, and Thomas S. Wright, all of whom were of lawful age at the time of the said proceedings and sale of said real estate, and Charles S. Wright, a minor, and Nancy Wright Gribble, minor daughter of Nancy Wright Gribble, deceased, who was a daughter of the said intestate. This suit or proceeding in partition was instituted by Harry S. Wright, above named, one of the co-parceners, and a citizen of the state of Illinois, against the widow, Nancy Wright, and his brothers and sisters above named, the other co-parceners, all of whom were citizens of the state of Pennsylvania. Charles S. Wright and Nancy Wright Gribble, the minors, appeared by their guardian, William Parkhill. At the time of his death the said Thomas S. Wright was indebted to the Second National Bank of Brownsville on certain bankable notes. No suits were brought on these notes by the bank within two years after Wright's death, and under the laws of Pennsylvania the lien for the debt thus evidenced against the real estate expired, although the debt itself survived, and judgment was recoverable on the same in a suit against the estate. In January, 1897, more than three years after the death of Thomas S. Wright, and after the expiration of the lien for the debt due from him to the bank, the widow, Nancy Wright, and five of the decedent's children, namely, Harry S., Moses, John A., William D., and Bessie Wright, all sui juris, executed under their hands and seals, and delivered to the bank, a note containing a warrant of attorney, with a confession of judgment for $8,815, the amount of Thomas S. Wright's indebtedness to the bank. The judgment note was dated January 21, 1897, was payable 12 months after date, with interest from May 1, 1897, at the rate of 5 per cent., and contained a waiver of exemptions. The judgment upon this note and warrant was entered in a Pennsylvania state court of competent jurisdiction on January 29, 1897, and was the first lien on the real estate, of which the defendants above named, as heirs at law of their father, were co-parceners, and therefore

became the first lien on the proceeds of the sale of the same, which were in the court below for distribution. The sale was made clear of all liens by a master, under a decree of the court. Two contesting junior judgments against the same defendants were entered in the state court, on warrants to confess judgment, on March 28, 1898,—one in favor of Nancy Wright, for $1,485; the other in favor of Harry S. Wright, administrator of Thomas S. Wright, deceased, for $1,716.91. The master appointed by the court to make the sale was also directed to make distribution of the proceeds and report his findings to the court. All these judgments were against the widow and children of the intestate, and were liens upon their several interests in these lands, as derived from him. There were no judgments against the intestate, Thomas S. Wright, and no liens against these lands, other than those appertaining to the said judgments against the said co-parceners and widow. It was contended in behalf of the plaintiffs in the two junior judgments against the heirs at law that the prior judgment against them should be disallowed as a lien upon the fund, on the ground that it was given without consideration, and because, as was also asserted by counsel in his argument before the master, said judgment was entered by collusion and in fraud of subsequent judgment creditors. As to this assertion there was no independent evidence whatever.

In the return of the distribution made by the master, the judgment in favor of the Second National Bank, above referred to, was postponed to the subsequent judgment entered in favor of Harry S. Wright, administrator of Thomas S. Wright, deceased, against himself, individually, and the other heirs at law, on the ground that the note on which judgment was entered in favor of the bank was without consideration, and voluntary on the part of Nancy Wright and the heirs at law who executed it. The judgment against the same heirs at law in favor of Nancy Wright, however, was not allowed this preference, on the ground that Nancy Wright had voluntarily executed under seal the note and warrant of attorney given to the bank, upon which judgment in its favor was entered, and had thereby consented to the execution of the same by her sons. The note, therefore, it was said, could not be a fraud as to her. It thus appears that the master assumed to examine the consideration of the obligations upon which the judgments had been entered, and to determine whether the prior judgment of the bank should or should not be postponed in the distribution to those subsequently entered. This was clearly a collateral attack upon the prior judgment, and as such within the inhibition of the rule universally applied in such cases. Judgments and decrees of courts having jurisdiction of the person and subject-matter, regularly entered, import verity; and the policy of the law forbids that the solemn judgments of courts of justice should be set aside, or their efficacy impaired or interfered with, except in a manner and by a direct proceeding as solemn and regular as that in which the pronouncement of the judgment itself was made. This was the view of the court below, which accordingly allowed the exceptions to the master's report, and ordered distribution to be made upon the judgments in

the order of their priority. In this we think the learned judge of the court below was clearly right.

The judgment in favor of the bank was entered on a warrant of attorney, but was, in the language of the learned judge below, "as much an act of the court as if it were formally pronounced on nil dicit or a cognovit, and until it is reversed or set aside it has all the qualities and conclusive effect of a judgment on a verdict." The decisions of the supreme court of Pennsylvania in Braddee v. Brownfield, 4 Watts, 474, and Lennig's Appeal, 93 Pa. St. 307, referred to by the learned judge below, establish this proposition as the law of Pennsylvania.

This judgment, then, in favor of the bank, was a first lien upon the property which had been sold, and was conclusive upon the master in making distribution of the proceeds of sale. Neither he, nor the court of which he was an officer, could in this proceeding for partition do otherwise than recognize this judgment in all its efficiency, and give to it the priority which apparently belonged to it on the records of the court in which it was rendered. No jurisdiction existed in the court below, in this collateral proceeding, to question the bona fides of the note upon which the judgment was entered, or to otherwise attack the integrity of its record. No petition or statement was filed before the master by the creditors in the junior judgments alleging fraud or collusion. In fact, nothing in the way of pleadings, or substitutes therefor, were filed in the case for the purpose of attacking the validity of the judgment, or its right to priority of lien as against the plaintiffs or holders of the junior judgments. If there is irregularity or error in the judgment of a court having jurisdiction of the subject-matter and the parties, it cannot for that be impeached in a collateral proceeding. It "can only be vacated on motion in the court in which it was rendered, or reversed for error in an appellate jurisdiction." It is well settled, however, that fraud in the entry or obtaining of a judgment may be shown in a collateral proceeding by others than the parties to the judgment, where such fraud affects injuriously the interests of such others. The debtor or defendant in a judgment will be allowed, in a proper proceeding, to show fraud, as against himself, practiced by the plaintiff in obtaining the judgment; but such fraud against the debtor or defendant, merely, will not avail third parties, such as the holders of junior judgments, for the purpose of affecting the lien of the prior judgment. The fraud that can be taken advantage of by third parties must be such as affects them; that is, the entry or obtaining of the judgment sought to be impeached must be a fraud upon the interests or rights of such third parties, whether it be a fraud on the defendant or debtor or not. From this, of course, it follows that, though a judgment be fraudulently obtained as against the defendant, it may not be a fraud as against third parties. It has become a well-settled rule, therefore, that subsequent creditors and plaintiffs in junior judgments may collaterally impeach the senior judgment as having been entered or obtained by collusion between plaintiff and defendant, with intent to defraud or hinder such subsequent creditors. In such case, if the impeach-

ment be successful, the effect is not to vacate the judgment, but only to disallow its interfering lien, so far as such subsequent creditors are concerned, leaving it in force as between the original parties, and for all other purposes. Fraud, however, cannot be presumed in such a case. The collusion and fraudulent intent should be alleged in some appropriate written statement or pleading, and it must in all cases be satisfactorily proved. In the case before us there was no allegation of such collusion and fraudulent intent, except such as was made ore tenus by counsel to the master, and no evidence whatever that such had been practiced against the contesting judgment creditors. The only testimony relied upon for that purpose by counsel in the argument was that of one of the defendants, to the effect that the judgment in favor of the bank was without consideration and voluntary, because it was given by the heirs at law and widow, for no indebtedness of their own to the bank, but solely for that of the intestate. And the master's finding merely states that the bank's judgment "is without consideration, except the preexisting debts of Thomas S. Wright [the intestate], and that the judgment note or bond upon which it is entered is voluntary." Want of consideration, however, is not of itself sufficient to support a collateral attack upon a judgment. Not even when coupled with fraud upon the defendants is it sufficient, as is clearly stated in Thompson's Appeal, 57 Pa. St. 175. Fraud upon the defendant in the judgment attacked is not necessarily fraud against the junior judgment creditors. Upon the evidence disclosed in the record, and upon the master's finding of fact, as above stated, we think there is an entire failure to show collusion with fraudulent intent, or with what amounts to fraudulent intent, against these attacking junior judgment creditors, and that upon this ground alone the judgment of the court below, sustaining the exceptions to the master's report, should be affirmed. The whole contention of appellant is founded on the assumption that the note to the bank, upon which judgment was confessed, was without consideration, and therefore void as against subsequent creditors. We have already shown the inefficacy of this contention in this case, even if such assumption were true. But we do not think that it is true. The lands of these defendants, which were subject to the lien of the judgments against them, had devolved upon them as the heirs at law and widow of the intestate, and for two years after his death were subject to a lien for the indebtedness of the intestate to the bank. The bank had lost that lien by not prosecuting its claim within that period. The debt was not, however, extinguished, and would have supported a suit against the administration of the intestate's estate. The giving of the note, with warrant to confess judgment, by the widow and heirs at law, was in effect a continuance of that lien against the same lands in their hands, and a recognition of a moral obligation to restore to the plaintiff the legal advantage of which it had been deprived by operation of law. The notes thus given come clearly within the rule which sanctions a promise made in consideration of a preexisting legal obligation, though at the time determined by a positive legal requirement. Such a moral obligation is now universally

recognized in American and English jurisprudence as sufficient consideration to support a promise.

The court below was also right in allowing the exceptions to the master's finding that Nancy Wright and Bessie Wright were entitled to the exemption under the law of Pennsylvania, which they had expressly waived. We quote and adopt the language of the learned judge in the court below:

"In Pennsylvania it is conclusively settled that the statutory exemption is a personal privilege, and may be waived. Case v. Dunmore, 23 Pa. St. 93; Bowman v. Smiley, 31 Pa. St. 225. Here the waiver was in writing and under seal, and it had become part of the judgment. Clearly it was irrevocable. Id. In the case of Hoffman v. McDermond, 1 Pittsb. R. 197, cited by the master, the waiver was oral and without consideration."

It follows, of course, that the court below was right in approving the master's action in refusing to postpone the bank's judgment to that of Nancy Wright. The bank's judgment was entitled to the priority which was evidenced by the record, and the order and decree of the court in the premises is accordingly affirmed.

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## HAYES v. FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO.

(Circuit Court, E. D. Pennsylvania. December 7, 1900.)

No. 6.

NATIONAL BANKS—ASSESSMENT ON SHAREHOLDERS—LIABILITY OF PLEDGEE.

A pledgee of shares of stock in a national bank, with a power of attorney in blank to transfer the same indorsed thereon and signed by the pledgor, does not become liable as owner for an assessment thereon by causing them to be transferred on the books of the bank to a third person for the purpose of being held by him as trustee for both parties, and in accordance with the contract of pledge, although the pledgor did not expressly authorize such transfer.

On Motion for New Trial.

J. G. Johnson and Asa W. Waters, for plaintiff.

R. C. Dale, for defendant.

McPHERSON, J. B., District Judge. I think that the facts in this case do not differ materially from the facts in Anderson v. Warehouse Co., 111 U. S. 479, 4 Sup. Ct. 525, 28 L. Ed. 478, and therefore that in accordance with that decision, which was recognized as correct in Pauly v. Trust Co., 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844, this motion must be refused. In the last-named case several rules relating to the liability of shareholders in national banking associations were laid down by the supreme court, and the fourth of these rules (to be found at the foot of page 619, 165 U. S., page 470, 17 Sup. Ct., and page 849, 41 L. Ed.) is evidently founded upon Anderson v. Warehouse Co. The rule is as follows:

"That if one receives shares of stock in a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and, being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another under

an agreement that they are to be held as security for the debt due from the real owner to his creditor,—the latter acting in good faith, and for the purpose only of securing the payment of that debt, without incurring the responsibility of a shareholder,—he, the creditor, will not, although the real owner may, be treated as a shareholder, within the meaning of section 5151 of the Revised Statutes."

The case now before me comes precisely within this rule, except that there was no proof of an express agreement that the shares transferred to Hand on the books of the bank should be held as security for the debt due from the Delamaters, the pledgors and the real owners of the shares, to the Fidelity Company, the creditor and pledgee. It does not seem to me, however, that this difference is important, because the jury have found as a fact that the shares were always thus held by Hand as security, and that, when the Fidelity Company caused the name of Hand to be inserted in the blank powers of attorney signed by the pledgors, the company did so with the intention, not of converting the shares to their own purposes, or of treating them as if the company was the real owner, but solely with the intention that Hand should hold them as trustee for all the parties concerned. This being the fact, and Hand's title being thus in reality a title in trust for both parties to the pledge, I think it should make no difference that the pledgors did not formally agree that the shares should be transferred. Even if they had refused to agree to the transfer, they have suffered no harm or injury, and it is difficult to see upon what ground they could be heard to complain. They are not complaining or seeking relief,—certainly not in this suit, to which they are not parties,—but, even if they themselves were complaining of the transfer because they did not agree to it expressly, I should still adhere to the opinion that I expressed at the trial, namely, that when they indorsed the certificates in blank, and delivered them as collateral security to the Fidelity Company to hold as pledged for the loan, the pledgors thus authorized the company to transfer the certificates to a third person, to be held by him in accordance with, but not in opposition to, the terms of the contract of pledge. Hand did hold the shares, as the jury have found, in accordance with the original contract of pledge, and I think, therefore, that the transfer to him was impliedly authorized by the indorsement in blank and the delivery of the shares to the pledgee. A new trial is refused.

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## ST. MATTHEW'S SAV. BANK v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Circuit Court, D. South Carolina. December 6, 1900.)

1. COSTS—TRIAL BEFORE SPECIAL MASTER.

Where an action at law is referred by agreement to a special master, who tries and determines all questions of both law and fact, the proceeding before him is equivalent to a trial by the court or jury, for the purpose of the taxation of costs, under Rev. St. § 824, and the successful party is entitled to a docket fee of $20; but the testimony of witnesses, given orally before the master for the purpose of such trial only, although taken by a stenographer and returned with his report, does not constitute "depositions

taken and admitted in evidence in a cause," for each of which a fee of $2.50 may be taxed.

2. SAME—WITNESS FEES.

The fees of a witness are taxable, where his attendance and examination were required in good faith, although he was not served with a subpœna.

3. SAME—SERVICE OF SUBPŒNAS.

A charge by a sheriff for serving subpœnas in an action in a federal court cannot be taxed as costs where it is not shown that he was acting for the marshal.

On Exceptions by Defendant to the Clerk's Taxation of Costs.

B. A. Hagood, for plaintiff.

Mordecai & Gadsden, for defendant.

SIMONTON, Circuit Judge. This case comes up on a question of costs. These have been taxed by the clerk, and defendant has excepted to the taxation. The case was at law. The cause of action was upon a surety or indemnity bond given to the plaintiff, the St. Matthew's Savings Bank, for the actions and defaults of its cashier, by the defendant, the Fidelity & Casualty Company of New York. Inasmuch as the case involved the examination and vouching of a long and intricate account, it was, by a consent order, referred to Hon. James F. Izlar, as special master, to hear and decide all the issues of law and fact involved therein. The cause was heard before the special master, and each witness was examined before him ore tenus. A stenographer was present, who took in writing the evidence as detailed by the witnesses. This evidence accompanied the report of the special master, made after the hearing. The circuit court treated the findings of the master as if they were a special verdict, and confirmed them. Judgment was then entered for the plaintiff. The case was taken by writ of error to the circuit court of appeals, which affirmed the judgment below.

The plaintiff claimed, and the clerk allowed, a docket fee of $20. The defendant contends that the taxation should be $10, under the provision of section 824, Rev. St., "In cases at law when judgment is rendered without a jury [docket fee] $10.00." But the same section provides, "On a trial before a jury in civil and criminal causes or before referees or on a final hearing in equity or admiralty, a docket fee of $20.00." This case, clearly, was a trial before a referee. The exception is disallowed.

Fifty-eight witnesses were examined before the special master, and their testimony taken, as above stated. For each of these plaintiff has claimed and the clerk has allowed $2.50, under the provision of this section, "For each deposition taken and admitted in evidence $2.50." There is no doubt that when cases both in equity and admiralty have been referred to an examiner, to take and report the testimony, and when, in obedience to such an order, the master, referee, or examiner reports that the testimony has been taken and duly reported for, and used in evidence at, a trial before the court, the reported evidence of each witness has been treated as a deposition, and the fee allowed the attorneys. The Sallie P. Linderman (D. C.) 22 Fed. 557; Rock-Boring Co. v. Sheldon (C. C.) 28 Fed. 217. The question is exhaustively discussed, and the charge allowed, by

Judge Hammond (Jackson, Circuit Judge, concurring) in Ferguson v. Dent (C. C.) 46 Fed. 88. In all of these cases the testimony was taken to be used thereafter in the trial of the case, and was so used. And so they came within the precise words of the statute, "a deposition taken, and admitted in evidence in a cause." But the case at bar was a trial before the special master, and the testimony was taken before him ore tenus, for the purposes of that trial. The language of the statute, properly construed, means depositions taken, and when so taken, after having been so taken, admitted in evidence in a case. The depositions in this case were not so taken. No one would say that when witnesses are examined before the jury or before the court, and their evidence taken by a stenographer, the evidence so taken would entitle the successful party to these costs. Nor will they be allowed when by consent of parties the cause was tried before a special master, and the evidence taken for his decision. The exception is sustained.

The plaintiff has taxed up as costs, disbursements for per diem and mileage of witnesses, $112.20. Defendant objects to this, as none of these witnesses was under subpœna. "A witness does not lose his right to his fees merely because he was not subpœnaed, if attendance and examination were required in good faith." Fost. Fed. Prac. 637; United States v. Sanborn (C. C.) 28 Fed. 299; The Vernon (D. C.) 36 Fed. 113; The Syracuse (C. C.) 36 Fed. 830; Eastman v. Sherry (C. C.) 37 Fed. 844; Sloss Iron & Steel Co. v. South Carolina & G. R. Co., 29 C. C. A. 50, 75 Fed. 106; Hanchett v. Humphrey (C. C.) 93 Fed. 895. In this last case all the cases are reviewed. This exception is overruled.

The last item excepted to is the charge of John H. Dukes, sheriff of Orangeburg county, for serving subpœnas. There is nothing to show that he was acting for the marshal, and the fee bill makes no provision for such a case. The exception is allowed. The clerk will correct the taxation in accord with this opinion.

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## PASSAIC PRINT WORKS v. ELY & WALKER DRY-GOODS CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 14, 1900.)

No 1,410.

1. TORTS—INJURY TO ANOTHER'S BUSINESS—EFFECT OF WRONGFUL INTENT.
The right to offer property for sale, and to fix the price at which it may be bought, is an incident to its ownership, and any loss which a third party may sustain in consequence of the exercise of that right is damnum absque injuria. The right to make such an offer being undoubted, and the offer in itself lawful, it cannot be converted into an actionable wrong by an allegation that it was made with the intent and for the purpose of injuring another owner of similar property by depreciating its market value.

2. SAME.
Plaintiff alleged in its petition that it was a manufacturer of calicoes of certain designated brands and styles, which it sold in large quantities, at stated prices, to jobbers in St. Louis; that defendants, who were jobbers in that city, having on hand a limited quantity of calicoes of such brands and styles, issued circulars to retail dealers, in which they offered to sell

the same, so long as their stock should last, at prices below those asked and received from jobbers by plaintiff; that such action was taken by defendants, as plaintiff was informed and believed, for the purpose of injuring the business of the plaintiff, and not for any legitimate trade purpose of their own; and that the effect of such action was to injure and destroy plaintiff's trade in St. Louis and the country tributary thereto, and to cause other jobbers to cancel their orders to plaintiff, or to compel plaintiff to reduce its prices, thereby causing it loss and damage in a sum stated. *Held*, that such petition did not state a cause of action for the recovery of damages.

8. SAME—ACTIONS—PLEADING.

A petition alleging that defendants, by offering to sell to the retail trade certain goods owned by them, and manufactured by plaintiff, at prices lower than those at which plaintiff sold the same style and brand of goods to jobbers, with the intent and purpose of injuring plaintiff's business, caused jobbers to cancel contracts with plaintiff for the purchase of such goods, is insufficient to state a cause of action for the recovery of damages for maliciously causing plaintiff's customers to break their contracts, where it does not name any of the persons with whom such contracts existed, nor allege that such persons were not privileged to cancel their orders, nor the special damages resulting from the breach of any particular contract.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

This case was determined below on a demurrer to the plaintiff's petition, which was sustained, and a final judgment was entered against the Passaic Print Works, the plaintiff below, it having declined to plead further. The plaintiff's petition contained the following allegations: That the plaintiff was a corporation organized under the laws of the state of New Jersey, and engaged in the manufacture of prints or calicoes at Passaic, in that state. That prior to February 25, 1899, it had been engaged for more than 15 years in the manufacture of prints or calicoes, and by careful management of its business had earned a reputation of manufacturing a high class of such goods. That it sold its goods, through its selling agents, to jobbers or wholesale dealers throughout the United States, who in turn sold the same to the retail trade. That the city of St. Louis, Mo., was one of the markets in which its prints or calicoes were sold at wholesale, and that it had a large and prosperous trade in that city; that among the goods by it manufactured and sold were four brands of calicoes known as "Trouville Mourning Prints," "Central Park Shirtings," "Elmora Fancy Prints," and "Ramona Fancy Prints," all of which were of a kind largely purchased by jobbers in the St. Louis market, being well suited to the retail trade tributary thereto. That its selling agents had fixed the price for said brands of calicoes for the season of 1899 as follows: For the Trouville mourning prints, 3½ cents a yard, less a discount of 5 per cent. and 2 per cent.; for the Central Park shirtings, 3½ cents a yard, less a discount of 5 per cent. and 2 per cent.; for the Elmora fancy prints, 4½ cents per yard, less a discount of 10 per cent. and 2 per cent.; and for the Ramona fancy prints, 4 cents per yard, less a discount of 5 per cent. That at the date aforesaid the blank cloth from which such calicoes were made was selling at 2½ cents per yard, and that the price above specified for the finished product was its price at Passaic, N. J., without the addition of any freight. It was further alleged that prior to February 25, 1899, the plaintiff had received orders for a large amount of the several kinds of prints aforesaid at the prices above specified from several large wholesale dealers doing business in the city of St. Louis, and "that on or about the 25th day of February, 1899, the said defendants (to wit, the Ely & Walker Dry-Goods Company et al.), combining and conspiring among themselves and with others to the plaintiff unknown, and maliciously intending to injure the business of the said plaintiff, and to cause it great loss in money, and to break up and ruin the plaintiff's trade among the jobbers in St. Louis, maliciously caused a circular in the name of the said

defendant corporation to be issued and sent out to the retail trade tributary to St. Louis, which said circular was in words and figures following; that is to say: 'Ely & Walker Dry-Goods Co. We beg to call your attention to the following items at prices that cannot be replaced, and request you to order promptly if interested, to secure first selection of styles. Prices for all items subject to change without notice, and orders accepted only for stock on hand.'" Then followed a long list of various brands of cloth, with a specification of the prices at which the various brands would be sold, and among them the following: "Trouville mourning prints, as long as they last, 3¼; Central Park and Boat Club shirting prints, as long as they last, 2⅞; Elmora and Ramona fancy prints, as long as they last, 3½." It was next averred that the plaintiff had not sold to the defendant corporation or to either of the individual defendants any of the aforesaid prints or calicoes of its manufacture for a period of about one year prior to February 25, 1899; that it had never sold to said defendants any Elmoras or Ramonas; that, if said defendant had any of said last-mentioned prints, it had purchased them at second-hand; that as it was informed and believed the defendants had but a small quantity of such goods to sell, and for that reason qualified its offer to sell by inserting in its circular the words "as long as they last"; and that the price named in said circular for the aforesaid four brands of prints of its manufacture was less than the price charged by the plaintiff for said prints, it having universally charged for said prints for delivery in the spring of 1899 the several prices therefor heretofore specified. It was next averred that the effect of the aforesaid circular was to advertise to the retail trade tributary to the city of St. Louis that the four brands of calicoes aforesaid of the plaintiff's manufacture could be purchased at a less price from the defendant corporation than they could be from other jobbers in the city of St. Louis to whom the plaintiff had sold large quantities thereof, and to cause said other jobbers to either cancel their orders, or to compel the plaintiff to make a rebate on the price of its goods in order that other jobbers might meet the prices so specified in the defendant's circular, and to break up, injure, and destroy the sale and trade in such prints in the St. Louis market and in the country tributary thereto, except at greatly reduced prices. It was also alleged, but on information and belief, that the quotations aforesaid in the defendant's circular were made for the purpose of injuring and destroying the plaintiff's trade in the manner last stated, and that in consequence of the issuance of said circular the plaintiff had lost profits on sales which it otherwise might have made to the amount of $10,000, and had been further damaged by having to change the name of its goods and by having their identity lost to the amount of $20,000, and had also been further damaged by the malicious acts complained of to the amount of $20,000; making its total loss $50,000, for which sum it prayed judgment.

Edwin C. Hoyt (George W. Lubke, Hugo Muench, Frederick B. Van Vorst, Walter T. Rosen, and W. A. Underwood, on the brief), for plaintiff in error.

William B. Thompson (Ford W. Thompson, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The complaint filed in the lower court, the substance of which has been stated, shows by necessary intendment that when the circular of the defendant company was issued it had in stock a limited quantity of the four brands of calico of the plaintiff's manufacture which are therein described. The circular stated, in substance, that the defendant had such calicoes in stock, and the complaint did not deny that fact, but admitted it by averring that "the defendant corporatino had but a small quantity of such goods to sell, and for that rea-

son qualified its offer to sell by inserting in the circular after the name of the goods the words, 'as long as they last.'" Moreover, the owner of property, real or personal, has an undoubted right to sell it and to offer it for sale at whatever price he deems proper, although the effect of such offer may be to depreciate the market value of the commodity which he thus offers, and incidentally to occasion loss to third parties who have the same kind or species of property for sale. The right to offer property for sale, and to fix the price at which it may be bought, is incident to the ownership of property, and the loss which a third party sustains in consequence of the exercise of that right is damnum absque injuria. We are thus confronted with the inquiry whether the motive which influenced the defendant company to offer for sale such calicoes of the plaintiff's manufacture as they had in stock at the price named in its circular, conceding such motive to have been as alleged in the complaint, changed the complexion of the act, and rendered the same unlawful, when, but for the motive of the actor, it would have been clearly lawful. It is common learning that a bad motive—such as an intent to hinder, delay, and defraud creditors, by virtue of St. 13 Eliz. c. 5, and possibly by the rules of the common law—will render a conveyance or transfer of property void which, but for the bad motive, would have been valid. So, also, one who sets the machinery of the law in motion without probable cause, and for the sole purpose of injuring the reputation of another, or subjecting him to loss and expense, is guilty of an unlawful act which would have been lawful but for the improper motive. And one who, by virtue of his situation, has a qualified privilege to make defamatory statements concerning another, may be deprived of the benefit of that privilege by proof that it was not exercised in good faith, but in pursuance of a malicious intent to injure the person concerning whom the defamatory statement or statements were made. Poll. Torts (Webb's Ed.) pp. 331–335, and cases there cited. There is also some authority for saying that one who maliciously (that is, with intent to obtain some personal benefit at another's loss or expense) induces another to break his contract with a third party thereby commits an actionable wrong if special damage is disclosed, although the act done would have been lawful if the wrongful motive had been absent. Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 Q. B. Div. 333; Walker v. Cronin, 107 Mass. 555. And see Poll. Torts (Webb's Ed.) pp. 668–673. Aside from cases of the latter kind, it is a general rule that the bad motive which inspires an act will not change its complexion, and render it unlawful, if otherwise the act was done in the exercise of an undoubted right. Or, as has sometimes been said, "when an act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive." The question as to how far and under what circumstances a bad purpose will render an act actionable which, considered by itself, and without reference to the purpose which prompted it, is lawful, has been so much discussed since the decision in Allen v. Flood [1898] 1 App. Cas. 1, that it would be profitless to indulge in further comment. It has been well observed that it would be dangerous to the peace of society to admit the doc-

trine that any lawful act can be transformed prima facie into an actionable wrong by a simple allegation that the act was inspired by malice or ill will, or by an improper motive. It is wiser, therefore, to exclude any inquiry into the motives of men when their actions are lawful, except in those cases where it is well established that malice is an essential ingredient of the cause of action, or in those cases where, the act done being wrongful, proof of a bad motive will serve to exaggerate the damages.

The case at bar falls within neither of the exceptions to the general rule above stated,—that, if an act is done in the exercise of an undoubted right, and is lawful, the motive of the actor is immaterial. No one can dispute the right of the defendant company to offer for sale goods that it owned and were in its possession, whether the quantity was great or small, for such a price as it deemed proper. This was the outward visible act of which complaint is made, and, being lawful, the law will not hold it to be otherwise because of a secret purpose entertained by the defendant company to inflict loss on the plaintiff by compelling it to reduce the cost of a certain kind of its prints or calicoes.

Nor is the complaint aided in any respect by reference to the law of conspiracy, since the only object that the defendants had in view which the law will consider was the disposition or sale of certain goods which the defendant corporation had the right to sell; and the means employed to accomplish that end, namely, placing them on the market at a reduced cost, were also lawful.

In the brief filed in behalf of the plaintiff in error it is suggested finally that the complaint may be sustained on the ground that it states a good cause of action for maliciously causing certain persons to break or cancel their contracts with the plaintiff, but we think it quite obvious that the complaint was not framed with a view of stating a cause of action of that nature, and that it is insufficient for that purpose. It does not give the name of any person or corporation with whom the plaintiff had a contract for the sale of its prints which was subsequently broken in consequence of the wrongful acts of the defendant. Neither does it show that it had accepted any orders for goods which the jobber was not privileged to cancel at his pleasure. Nor does it allege any special damage incident to the breach of any particular contract. In view of all the allegations which the complaint contains it is manifest, we think, that it was framed with a view of recovering on the broad ground that the issuance of the circular was unlawful and actionable, provided the motive of the defendant company in issuing it was to occasion loss or inconvenience to the plaintiff.

We are of opinion that the complaint did not state a cause of action, as the trial court held, and the judgment below is therefore affirmed.

SANBORN, Circuit Judge (dissenting). I cannot concur in the opinion of the majority in this case because the petition alleges that the defendants, by their advertisement of the goods manufactured by plaintiff, without any legitimate trade purpose, prevented job-

bers from purchasing goods of the plaintiff, and caused those who had agreed to purchase from it to cancel their orders unless the plaintiff would make them a rebate, so that the plaintiff sustained damage in the sum of $19,000. In my opinion, the gravamen of this cause of action is not the malicious intent or purpose of the defendants, but it is their wrongful act of interfering with the plaintiff's business, of preventing sales that it would have made, and of causing the cancellation of orders to, or contracts of purchase from, the plaintiff already made. This act, without any allegation or averment of intent or purpose, was itself wrongful, unless it was done for a justifiable purpose. The act of interfering with and injuring the trade or business of the plaintiff without justifiable cause entitled the plaintiff to damages. It is conceded that, if the defendants had advertised these prints for any legitimate trade purpose, for the purpose of selling them for gain for themselves, for the purpose of converting them into money because they preferred their advertised price to the goods, or for the purpose of competing in trade with the plaintiff, they would have had a justifiable cause for inflicting upon it the damages of which it complains, and these damages would then have been damnum absque injuria. But, if they had advertised them for any of these purposes, this case would have constituted an exception to the general rule of law. The general rule is that whenever one injures a man's business, profession, or occupation he is liable for the damages he inflicts. The exception is that, where the injury is caused by competition in trade or the lawful exercise of a right which the inflictor has, then the injury is justifiable, and no damages can be recovered. But, where such an injury is inflicted, the presumption always is that the rule, and not the exception, applies, and, if the inflictor would justify, he must show that he falls within the exception. The question in this case, therefore, is not whether or not the motive or intent of the defendants will make acts unlawful which were otherwise lawful, but whether or not the intent and purpose of the defendants will justify an otherwise unlawful act, and excuse them from the payment of damages for which, under the general rule of law, they are liable to the plaintiff. It is whether or not the petition shows that they advertised the goods for legitimate trade purposes, so that their acts fell within the exception, which justifies the infliction of damages, and not under the general rule, which requires them to compensate the plaintiff for the injury they have caused. The opinion of the majority assumes that the defendants advertised the prints for a legitimate trade purpose, so that their acts fell within the exception to the general rule. It overlooks the legal presumption that injury to one's business entitles him to compensatory damages, and the plain averment of the petition that the acts of the defendants were not done for any justifiable cause, but were committed for the sole purpose of inflicting upon the plaintiff the injury they caused. The tenth paragraph of the petition reads in this way:

"Tenth. That the effect of issuing the aforesaid circular of the defendant corporation was to advertise to the retail trade throughout the states of Missouri, Arkansas, Kansas, Texas, Illinois, Indiana, Kentucky, Tennessee, Indian

Territory, Colorado, and New Mexico that the goods named and quoted, manufactured by the plaintiff, could be purchased at a less price from the defendant corporation than they could be from the other jobbers in St. Louis, to whom the plaintiff had sold large quantities of said goods, and to thereby cause the said other jobbers in St. Louis to either cancel their orders, or portions thereof, so as aforesaid given to the said plaintiff for such goods, or, as an alternative, to compel the plaintiff to relabel the goods, and to give a rebate on the price, in order that said jobbers might meet the prices so offered by the circular of said defendant corporation, and to thereby break up, injure, and destroy the sales and trade of the said plaintiff in the market of St. Louis and the country tributary thereto, and to make the said other jobbers in St. Louis afraid to deal in the said goods of this plaintiff except at greatly reduced prices, and then in comparatively small quantities; and upon information and belief the plaintiff alleges that the quotations of this plaintiff's said goods in the said circular were made by the said defendants with the end and object in this paragraph stated, and not for any legitimate trade purpose."

Now, no one will dispute the rules of law that the plaintiff in this action had the right to conduct its business of manufacturing and selling prints without the injurious interference of strangers, and that the defendants were subject to the universal rule that they must so use their own property and rights as to inflict no unnecessary injury upon their neighbors. The averments of this petition are that they were not using any of their property or exercising any of their rights for any legitimate trade purpose, but that they were using them for the express purpose of inflicting injury upon the plaintiff, and that they succeeded in imposing the infliction. These allegations seem to me to bring this case under the general rule of law, and to clearly negative the claim that it falls within the exception. They seem to state a good cause of action. The principle upon which this conclusion rests is nowhere better stated than by Chief Justice Holt in the old case of Keeble v. Hickeringill, 11 East, 574, note where the plaintiff recovered damages from the defendant for firing guns on his own land which frightened wild ducks away from the decoy pond of the plaintiff, where the latter was taking them to sell for gain. He said:

"Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases. But if a man doth him damage by using the same employment,—as, if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff,—no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 Hen. IV. p. 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But, suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither, sure that schoolmaster might have an action for the loss of his scholars. 29 Edw. III. p. 18. A man hath a market, to which he hath toll for horses sold. A man is bringing his horse to market to sell. A stranger hinders and obstructs him from going thither to the market. An action lies because it imports damage. Action upon the case lies against one that shall by threats fright away his tenants at will. 9 Hen. VII. pp. 7, 8; 21 Hen. VI. p. 31; 14 Edw. IV. p. 7." 11 East, 576, note.

In the case of Mogul Steamship Co. v. McGregor, 21 Q. B. Div. 544–553, Chief Justice Coleridge said:

"But it is said that the motive of these acts was to ruin the plaintiffs, and that such a motive, it has been held, will render the combination itself wrong-

ful and malicious, and that, if damage has resulted to the plaintiffs, an action will lie. I concede that, if the premises are established, the conclusion follows. It is too late to dispute, if I desired it, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this."

In the same case upon appeal (23 Q. B. Div. 598), all of the judges were of the opinion that, if the acts done in pursuance thereof were shown to have been for the purpose of ruining and destroying the plaintiff's trade, then an action for the damage occasioned could be maintained. Bowen, J., at page 614, says:

"No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden. So is the intentional procurement of a violation of individual rights, contractual or otherwise, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence (Tarleton v. McGawley, Peake, 270), the obstruction of the actors on the stage by a preconcerted hissing (Clifford v. Brandon, 2 Camp. 358; Gregory v. Brunswick, 6 Man. & G. 205), the disturbance of wild fowls in decoys by firing of guns (Carrington v. Taylor, 11 East, 571, and Keeble v. Hickeringill, Id. 574, note), the impeding or threatening servants or workmen (Garret v. Taylor, Cro. Jac. 567), the inducing persons under personal contract to break contracts (Bowen v. Hall, 6 Q. B. Div. 333, and Lumley v. Gye, 2 El. & Bl. 216), all are instances of such forbidden acts."

In Walker v. Cronin, 107 Mass. 555, 562, an action for molesting, obstructing, and hindering the plaintiffs from carrying on their business of the manufacture and sale of boots and shoes by persuading employés to abandon the employment of the plaintiffs, and persons who were about to enter their employment not to do so, the supreme court of Massachusetts sustained the action, and said:

"The general principle is announced in Com. Dig. 'Action on the Case,' A.: 'In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages.' The intentional causing of such loss to another without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong. This proposition seems to be fully sustained by the references in the case of Carew v. Rutherford, 106 Mass. 1, 10, 11."

The court then cites the cases to which reference has already been made, and that class of cases which holds that a man may dig on his own land for water, although he thereby cuts off the supply of water from his neighbor's well, and then says at page 564:

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But, if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to."

The proposition is sustained by respectable authority; it is just, and I believe it is sound,—that an action will lie for depriving a man of custom (that is, of possible contracts), when the result is effected by persuasion as well as when it is accomplished by fraud or force, if the harm is inflicted without justifiable cause, such as

competition in trade. Walker v. Cronin, 107 Mass. 555, 565; Morasse v. Brochu, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524; Hartnett v. Association, 169 Mass. 229, 235, 47 N. E. 1002, 38 L. R. A. 194; Delz v. Winfree, 80 Tex. 400, 405, 16 S. W. 111; Doremus v. Hennessy, 62 Ill. App. 391, 403; Van Horn v. Van Horn, 52 N. J. Law, 284, 20 Atl. 485; Temperton v. Russell, 62 Law J. (Q. B. Div. 1893) 412, 419.

Under the legal principles to which reference has been made, and under the authorities which have been cited, the petition in this case states a good cause of action for interference with and injury to the business of the plaintiff by preventing it from obtaining custom it would otherwise have obtained, without any justifiable cause or excuse, and for this reason the demurrer should have been overruled, and the case sent to trial.

There is another reason why the judgment below should be reversed. It is that the petition sufficiently states a cause of action for maliciously interfering with contracts between jobbers in St. Louis and the plaintiff, and inducing the former to break their contracts to the injury of the latter. The petition alleges that the defendants were jobbers in the city of St. Louis, that they issued the circular, that its effect was "to thereby cause the said other jobbers in St. Louis to either cancel their orders, or portions thereof, so as aforesaid given to the said plaintiff for such goods, or, as an alternative, to compel the plaintiff to relabel the goods, and to give a rebate on the price, in order that said jobbers might meet the prices so offered by the circular of said defendant corporation, and to thereby break up, injure, and destroy the sales and trade of the said plaintiff in the market of St. Louis and the country tributary thereto." Here is a plain allegation that contracts had been made for the sale of these goods to the other jobbers in St. Louis, and that the acts of the defendant corporation induced them to break their contracts, or to compel the plaintiff to lose a portion of the price agreed upon therein as a condition of their performance. Whenever one maliciously interferes in a contract between two parties, and induces one of them to break the contract to the injury of the other, the injured party may maintain an action against the wrongdoer for his damages. Angle v. Railway Co., 151 U. S. 1, 13, 14 Sup. Ct. 240, 38 L. Ed. 55; Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 Q. B. Div. 333, 337; Green v. Button, 2 Cromp., M. & R. 707; Walker v. Cronin, 107 Mass. 555; Benton v. Pratt, 2 Wend. 385; Rice v. Manley, 66 N. Y. 82; Jones v. Stanly, 76 N. C. 355, 356; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; Temperton v. Russell, 62 Law J. (Q. B. Div. 1893) 412, 419. For the reasons which have now been briefly stated, the judgment below should, in my opinion, be reversed, and the defendants should be required to answer the petition.

UNION MUT. LIFE INS. CO. OF PORTLAND, ME., v. PAYNE et al.

(Circuit Court of Appeals, Fifth Circuit. November 20, 1900.)

No. 906.

1. APPEAL—REVIEW—PRESUMPTIONS.

It will be presumed on appeal that special instructions asked were properly refused on the ground that they were covered by the general charge, where the record does not contain all of the general charge, nor show that it contains all that related to the subject matter of the special instructions.

2. LIFE INSURANCE—ACTIONS ON POLICY—BURDEN OF PROOF AS TO SUICIDE.

In an action on a life insurance policy, in which defendant pleads as a defense that the insured committed suicide, which avoided the policy under its terms, the rule that the burden rests upon the defendant to establish such defense affirmatively is not changed by the fact that the proofs of death furnished by the plaintiff stated the cause of death as suicide.

3. SAME—STATEMENT IN PROOFS OF DEATH—ESTOPPEL.

A statement in proofs of death furnished a life insurance company that the insured committed suicide does not estop the plaintiff in an action on the policy as matter of law, the defendant not having been prejudiced thereby, but is merely evidence to be considered and given such weight as the jury think it entitled to in connection with all other evidence on the subject.

4. SAME—CONSTRUCTION OF POLICY—PROVISION AGAINST SELF-DESTRUCTION.

A provision in a policy of life insurance that "self-destruction, sane or insane," is a risk not assumed by the company under the contract, applies only to suicide intentionally committed, and does not include accidental self-killing.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Felix H. Robertson, for plaintiff in error.

Robert R. Hazlewood and Cecil H. Smith, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. On the 11th of July, 1893, the Union Mutual Life Insurance Company of Portland, Me., a corporation duly incorporated under the laws of Maine, issued a policy for $2,000 on the life of James B. Payne. The policy was payable to Myra A. Payne, the wife of the insured. James B. Payne died on December 23, 1893. Myra A. Payne assigned an undivided one-half interest in the policy to R. R. Hazlewood and C. H. Smith. Myra A. Payne and Hazlewood and Smith, citizens of the state of Texas, brought this action on the policy against the Union Mutual Life Insurance Company. The defendants filed an answer denying the averments of the petition, and alleging that the death of James B. Payne was caused by suicide. The answer showed also that the application for the insurance made by James B. Payne and Myra A. Payne contained the following statement: "And that self-destruction, sane or insane, within one year from the date of issue of policy are also risks not assumed by the company in the contract." The application was made a part of the contract of insurance. It was further stated in the answer that Myra A. Payne, in making the proof of the death of the

insured, had made an affidavit that James B. Payne had committed suicide. The plaintiffs, in their replication, averred that, since Myra A. Payne had signed the proof of death, she had learned that the immediate cause of the death of James B. Payne was not suicide, but that he was assassinated, or that his death was the result of an accident, and that when Myra A. Payne signed the proofs of death she was in great trouble and distress on account of the death of her husband, and in feeble health, and that she signed the proofs of death without reading them. The case was tried on these issues. The plaintiffs offered in evidence the policy and the assignment of the undivided one-half interest. Myra A. Payne, as shown by the bill of exceptions, testified as follows:

"'I reside in Waco, Texas. I knew James B. Payne. He was my husband. He is dead. He died in Waco, Texas, on the 23d day of December, 1893.' The witness being shown said insurance policy said she was the person named in said policy as beneficiary, and that the James B. Payne named as the person whose life was insured was her husband. She had by her husband three sons, respectively eleven, thirteen, and nineteen years of age, at death of J. B. Payne. He owned a ranch of one thousand acres in the country near Waco, and just before his death he was making plans to place his oldest son in charge of this ranch. The other two boys were in school. That he was very much devoted to his boys. She and her husband lived happily together, and never had any disagreement. That she never at any time said anything, or heard her husband say anything, or know anything in his life, that indicated any intention on his part to commit suicide, and that he had no reason to do so."

On cross-examination Mrs. Payne said:

"I have testified by depositions twice in this case. After the death of my husband, James B. Payne, Messrs. Jones, Kendall & Sleeper were my attorneys, and they aided me in the conduct of my business." (Being shown an affidavit signed by her, and sworn to before W. M. Sleeper, notary public of McLennan county, Tex., on the 15th of January, 1894, the witness declared the signature to said affidavit to be her genuine signature.) "The W. M. Sleeper who signed the jurat to said affidavit was at that time a member of the firm of Jones, Kendall & Sleeper. The proof of loss or death was prepared under the direction of my attorneys. I was at that time in no condition to attend to my business, and I have no recollection of having signed or sworn to that proof of death."

On redirect examination Mrs. Payne testified:

"On the morning of Mr. Payne's death I went into his bedroom to call Mr. Payne, who was called for by one of the men working for him; and as soon as I got into the room I could tell from the look on his face that he was dead. I screamed, and ran from the room. I did not see any wound or pistol, and I never saw the body afterwards. I do not know of my own knowledge what caused his death; only what others told me."

The defendant company then offered in evidence the application for the insurance policy, signed by the insured, Payne, and his wife. It contained the stipulation as to suicide which has already been quoted. The defendant company then offered in evidence an affidavit or proof of death, signed by Myra A. Payne, dated January 15, 1894, which contained the following questions and answers:

"(11a) Remote cause of death? (a) Nervous depression, aggravated by grippe. (b) When did health of deceased first begin to be affected? (b) About two or three months before his death. (c) Immediate cause of death? (c) Self-destruction. (d) Duration of last illness? (d) About two weeks. (e) Give every particular in relation thereto within your knowledge. (e) Had been unwell for

a month or two. Was attacked by grippe about two weeks before his death. Became melancholy, and, when alone, shot himself. * * * (13a) Did the deceased violate any condition of above-mentioned policy in respect to residence, travel, occupation, dueling, suicide, or violation of law? (a) Not within my knowledge, except suicide, if that be violation."

Depositions of Myra A. Payne were in evidence, in which she testified:

"I was told that the immediate cause of his death was a pistol shot, but I never saw it, and do not know. * * * I was greatly depressed, and cannot say what the affidavit contained. I was not in a frame of mind to know much about anything. All my papers were prepared for me by others, and will have to speak for themselves."

The following is the statement made by Myra A. Payne before the coroner:

"My name is M. A. Payne. I was the wife of the deceased, J. B. Payne. Mr. Payne died in McLennan county, Texas, on the 23d day of December, 1893. He was in his fiftieth year at the time of his death. Deceased had been sick for about two weeks before his death, but on the day before his death and the day preceding that he had been able to go from his house down town, but he remained in town but a few hours each day. He was not ill enough to call a physician. We thought he had la grippe. He was nervous, and complained of feeling bad and having no appetite. On the morning of his death he did not get up to breakfast. He said he did not want any. I heard a noise about half past eight, or earlier, which I thought was the slamming of a door. About an hour afterward, as nearly as I can judge, I went to the room of deceased. I went into the room, and saw deceased on the bed. Before I got to the bed, I discovered that he was dead. He was lying on his back, with a pistol in his right hand, which was lying across his breast. There was a pistol or gunshot wound in the right temple. Deceased seemed very much depressed during the whole two weeks of his illness. The room occupied by deceased was on the second floor. I was in the dining room, on the first floor, at the time I heard the noise which I now think was the explosion of the pistol. I was on the place at the time with my three children, James B. Payne, Mack Payne, and Walter Payne, aged twenty, twelve, and eleven years, respectively, with me. No one else was on the place. Mr. Oscar Armstrong came to see Mr. Payne later, and I went to his room to see if he would see him. I knew nothing of deceased's having a pistol with him until the time of his death.

"[Signed] M. A. Payne."

In reference to this statement Mrs. Payne testified:

"There are some errors in that statement. I did not notice the position of Mr. Payne's hands. I only saw his face. * * * I can't remember much, if anything, that happened at that time. I recognize my signature to the original paper, but I can't remember signing my name to the paper."

The witness Mrs. Payne further testified:

"There are two doors and three windows opening into Mr. Payne's room. One door opens into the upper hall; the other door opens onto the upstairs veranda. Two of the windows open from the second story towards Fifth street. The other window opens on the upstairs gallery. There is only one pair of stairs which leads into the upper hall into which one of the doors of Mr. Payne's room opens. Four doors open into that hall. No stairway from the outside, but a person might pass from the upper hall, through a room adjoining the one in which Mr. Payne's body lay, out onto the upper outside gallery, and then into Mr. Payne's room through the door or the window."

The bill of exceptions states that "other evidence" was introduced, but that it was not "material to these exceptions." There was a verdict and judgment on the policy against the insurance company.

The only questions before the court for decision are raised by the following four assignments of error.

"(1) The court erred in refusing to give the first special charge asked by the defendant, and being as follows, viz.: 'Under ordinary circumstances it is true that, if there be a doubt whether the death of a person assured was the result of accident or of suicide, this doubt must be solved in favor of the theory of accident. But in this particular case the plaintiff Myra A. Payne, having in her proof of death stated to the defendant company that the death of James B. Payne was "self-destruction," it is incumbent on her to satisfy the jury that in this statement she was mistaken, and that death was the result of assassination or accident.'

"(2) The court erred in refusing to give to the jury the second special charge requested by the defendant, being as follows: 'The uncontradicted testimony shows that James B. Payne died on the morning of December 23, 1893, from the effects of a pistol-shot wound which entered his head at the right temple. Among other testimony, there has been introduced before you a certain paper called "Proofs of Death," which the plaintiff Myra A. Payne caused to be delivered to the defendant company in January, 1894. You are instructed that said proofs of death were intended to be acted on by the defendant company, and upon their truth the company had the right to rely; and, unless corrected for mistake, the plaintiffs in this case are bound by the statements made in said proofs of death. Good faith and fair dealing require that the plaintiffs should be bound by the representations deliberately made in the proofs of death until it be shown that such representations were made under a misapprehension of facts, or in ignorance of material matters subsequently ascertained.'

"(3) The court erred in refusing to give to the jury the third special charge asked by the defendant, being as follows, viz.: 'If the jury believe from the testimony that J. B. Payne came to his death by his own act,—shooting himself with a pistol,—and if, when he shot himself, he was either sane or insane, and so did the act intentionally or unintentionally, the plaintiffs, being bound by the condition expressed in the * * * article of "Rights," on the second page of the application, which is a part of the policy sued upon, cannot recover, and you will return a verdict for the defendant.'

"(4) The court erred in its general charge to the jury in giving all that portion in reference to the facts pleaded and relied on by plaintiffs to show that the immediate cause of the death of said James B. Payne was not 'self-destruction,' but that the said James B. Payne was assassinated, or that his death was the result of an accident; and in reference to the statement made by Myra A. Payne to the defendant that the remote cause of the death of J. B. Payne was nervous depression, aggravated by grippe, and that the immediate cause of the death of J. B. Payne was self-destruction, which portion is as follows, viz.: 'You are instructed that, if Mr. Payne's death was the result of a gunshot wound self-inflicted, and intentionally so, that this is a bar to a recovery in this case, and you will find for the defendant. By the term "self-destruction," as used in this contract, is meant where the party intends to take his own life intentionally. It does not cover, in my opinion, a case where death may be caused by the hand of the insured party where the injury is accidental, and not intentionally inflicted. Therefore, in this case, you will determine the question between the parties as to this issue, and determine it from all the evidence offered both on the part of the plaintiff and on the part of the defendant. Was Mr. Payne's death the result of a gunshot wound intentionally inflicted with intent to take his own life? If you find as a matter of fact that it was so inflicted, and with such intent, you will find for the defendant. But if you find from the evidence that it was accidental killing, assassination, or that his death came about from any cause other than a self-inflicted wound, you will find for plaintiff. Plaintiff having introduced her policy and proof of the death of the deceased, James B. Payne, that would prima facie entitle the plaintiff to recover the amount of the policy. And, the defense of self-destruction being interposed by the defendant, it becomes an affirmative defense, and places the burden on defendant to establish by a preponderance of the evidence the defense thus asserted. In other words, the burden of proof rests upon defendant to establish by a preponderance of the

evidence the fact that the exception in the policy applies; that is, that the death of the deceased was the result of a self-inflicted and intentional wound with intent to take his own life. The proofs of loss introduced in this case in which Mrs. Payne stated or is purported to have stated that the death of the deceased was caused by suicide, or words to that effect, upon that you are instructed that you have heard all the evidence in this case. It does not appear that the defendant relied upon these statements, or parted with any right by reason of them, or was misled by them; and therefore it is a question of whether or not Mrs. Payne is bound by these statements. You are instructed that she has the right to introduce proof to show whether or not she stated a fact she knew, or something that she was informed of. You have heard her statement that she saw her husband's dead body, and did not see any wound or pistol, and had seen none when the proofs of loss were filled out and signed by her, and that she has no personal knowledge of the manner of her husband's death. What I mean is that she only gives her information from other parties as to the death being caused by a gunshot wound. If you believe that explanation to be true, and that those were the circumstances under which she made the proof of loss, the fact that the proof of loss contains the statement that he came to his death by suicide would not conclude her in this case. You might consider it simply as a circumstance in the case, in connection with other evidence, in determining the main question of whether it was a self-inflicted and intentionally inflicted wound with the intent to take his life. That is the sole question for your determination, as I view this case. In determining that question you have the right to look at the conditions surrounding the party to ascertain a motive or want of motive. You have the right to consider in the course of human affairs whether a party who is in the enjoyment of wealth, whose business is good, whose marital relations are pleasant, and things of that kind, whether he would intentionally take his own life or not. You have also the right to look at the condition of the man to decide whether such condition did exist, or whether such a state of affairs existed, that he probably or likely took his own life. These are questions that you can consider in arriving at a solution of the question. No person saw the act committed. No one can speak from personal knowledge as to how it occurred, and you are to determine that from the evidence as gleaned from the witnesses by considering the motives that impel people to such an act, and from these matters determine the question of whether it was self-inflicted with intention to take his own life, or whether it was accidental, or the result of assassination. As already stated, if it was intentionally inflicted, it debars recovery, and your verdict will be for defendant. If it was not self-inflicted, and the burden of proof fails to establish to your mind that it was self-inflicted with the intention of taking life, your verdict should be for the plaintiffs.' "

1. The court refused to give charge No. 1 because it was "covered in main charge, so far as applicable to this case." Charge No. 2 was refused, as shown by the bill of exceptions, for the same reason. The entire charge of the court does not appear in the record, nor does it appear from the bill of exceptions that all of the general charge is given, which relates to the matters referred to in the special charges numbered 1 and 2. The statement of the trial judge that the requested charges were embraced in the general charge of the court must be accepted as sufficient reason for the refusal to give them, when the bill of exceptions does not give the entire charge, or show affirmatively that it contains all of that portion of the general charge which relates to the points raised by the special charges asked. Even when the bill of exceptions does not state such reason for refusing to give the charge, it is held that, when the instructions of the court, or part of them, are omitted from the record, it will be presumed that instructions refused were properly covered by other instructions given. To secure a reversal, the bill of exceptions should

be so written as to remove such presumption. 11 Enc. Pl. & Prac. 300; Myers v. Sternheim, 38 C. C. A. 345, 97 Fed. 625. The court, however, was justified in refusing to give charge No. 1 because it improperly stated the law as to the burden of proof. In Association v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160, the issues were very similar to the issues in the case at bar. The supreme court sustained the following charge given by the trial judge:

"The only question upon this proof is, did Edward F. Hall commit suicide? If he did, the policy is void. If he died in some other way,—by accident or assassination,—it would be otherwise. Upon that issue, the burden is upon the defendant to satisfy you by a fair preponderance of proof of the truth of this defense. * * * When the policy of insurance was introduced with evidence or admissions that the premiums had been paid, and proof was given of the death of the assured, the plaintiff, if no further evidence had been produced, would have been entitled to a verdict; but the defendant comes into the court, and asserts that the contract under which the action is brought has not been fulfilled, but has been violated by the assured. Being an affirmative defense, the onus is upon the defendant to satisfy you by evidence which, in your own judgment, outweighs the evidence of the plaintiff, that that defense has been established."

The statement made by Mrs. Payne in the proof of death that the cause of her husband's death was "self-destruction" was before the jury with her evidence given on the trial. She had sworn that she signed the statement without knowledge of its contents, and under circumstances of great distress. She had also stated that her only personal knowledge on the subject was that she saw her husband lying dead on his bed. "I was told," she said, "that the immediate cause of his death was a pistol shot, but I never saw it, and do not know." When she saw her husband's face, she knew he was dead, and "she screamed, and ran from the room. I did not see any wound or pistol, and never saw the body afterwards." The fact that she had signed the contradictory statements did not change the well-established rule as to the burden of proof. The insurance company, as a defense, had pleaded that the insured had committed suicide, and the burden was on the company to prove the defense. The contradictory statements were properly received in evidence, but we do not understand that they changed the rule as to the burden of proof, and "made it incumbent on her to satisfy the jury that in the statement she was mistaken, and that the death was the result of assassination or accident." It was incumbent only on the plaintiffs to prove the death. The burden was on the defendant to show suicide, and the statement of Mrs. Payne in the proofs of death was properly received to prove it, and, in the absence of explanation or contradiction, it might have been held quite sufficient.

2. Charge No. 2 is misleading. The phrase in the charge, "and unless corrected for mistake," would have led the jury to believe that the proof of death was conclusive against the plaintiffs in the action unless it was withdrawn from the files, and amended or corrected. The charge is also erroneous as to the burden of proof. In Association v. Sargent, 142 U. S. 691, 699, 12 Sup. Ct. 335, 35 L. Ed. 1165, the court said:

"But the defendant was not prejudiced by the statements and opinions contained in the proofs of death, and the plaintiff was not estopped thereby, as a

matter of law. When the court was asked to charge the jury that by the introduction of those proofs the burden was shifted, the evidence was all before the jury, and was much more full and complete than that upon which Dr. Jenkins had based his opinion. He himself had been examined as a witness, and had testified as to what he knew or did not know at the time he made his certificate; and all the facts of the case, so far as they were known, had been explained in view of the contents of the proofs of death. It appeared that most of the statements in the certificate of Dr. Jenkins were based on hearsay. The instructions asked for in that respect, therefore, would have been erroneous."

3. The court properly refused to give charge No. 3. The court refused to give it, as shown by the bill of exceptions, "because it precludes recovery even if the deceased accidentally killed himself." The charge is capable of this construction, and, so construed, it would be erroneous. If the charge does not properly bear such construction, and refers only to suicide, then it is fairly included in the parts of the general charge of the court as it appears in the bill of exceptions.

4. The fourth assignment of error excepts to part of the general charge which is set out in the exception. It is excepted to and assigned as error as a whole. The question being presented in that way, if any material proposition contained in it is correct, the exception and assignment cannot prevail. Mississippi Val. Co. v. Pace, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887. But we find nothing in the entire charge as set out that is erroneous. It fairly left the question of suicide to the jury, and it is correct as to the burden of proof. If it be assumed that it is proved that the insured died from the effects of a pistol shot, it must have been caused either by suicide, accident, or assassination. If it occurred by suicide, whether the insured was sane or insane, the plaintiffs could not recover on the policy. If it occurred by accident or by assassination, the defendant is liable on the policy. Accidental or unintentional self-killing does not forfeit a policy for suicide. "Self-destruction," as used in the contract of insurance here in question, means suicide, and does not include accidental self-killing. May, Ins. (2d Ed.) § 207; Breasted v. Trust Co., 59 Am. Dec. 489, and note, § 3. The insurers frame their own contracts, and, when they choose, they may insert express stipulations against accident. "If they prefer, for the purpose of getting custom, to omit such a stipulation, and to leave the matter in doubt, the doubt ought to be resolved against them." Keels v. Association (C. C.) 29 Fed. 201.

None of the assignments of error is well taken. The judgment of the circuit court is affirmed

PARDEE, Circuit Judge, dissents from the conclusion of the court.

## SEABOARD NAT. BANK OF NEW YORK v. SLATER.

(Circuit Court, D. Connecticut. December 11, 1900.)

CORPORATIONS — LIABILITY OF STOCKHOLDERS TO CREDITORS — UNPAID SUBSCRIPTIONS.

A complaint, in a suit by a judgment creditor of an insolvent Nebraska corporation against a stockholder, based on Const. Neb. art. 11, § 4, which makes the original subscriber of stock in a corporation liable to its creditors to the extent of their unpaid subscriptions, and provides that the liability for unpaid subscriptions shall follow the stock, does not state a cause of action, where it shows that the stock held by defendant was not subscribed for, but was issued in payment of a claim which constituted, at least, a pretended consideration, and without any agreement or expectation that it should be further paid for, and was subsequently transferred to defendant; no fraud on his part being alleged.

On Demurrer to Complaint.

Charles A. Clark and Bristol, Stoddard & Bristol, for complainant.
Brandeis, Dunbar & Nutter and Frank T. Brown, for respondent.

TOWNSEND, District Judge. The complaint alleges that the Lincoln Street-Railway Company was a corporation under the laws of Nebraska; that the property of said corporation has been foreclosed by bondholders; that complainant has obtained a judgment in a suit in a state court of Nebraska for $15,000, and that there are other creditors of said corporation; that defendant is a holder and owner of 6,246 shares of common stock of said corporation, each of the par value of $100, none of which was ever paid for; and it prays that the amount due the complainant, and any other creditors who may choose to join with complainant in this suit, may be ascertained, and for a decree that defendant pay such amount due. The mode in which said stock came into the hands of the defendant is alleged at length. Briefly, the statements are that the road of said corporation was constructed and equipped, and its properties purchased and acquired, through the firm of F. W. Little & Co., which charged the corporation $1,000,000 for franchises granted to it, $100,000 for franchise and right of way of the Rapid-Transit Company, a prior corporation, and made other charges for commissions; that 8,000 shares were originally issued to Lee, Higginson & Co., and afterwards got in, nothing having been paid for them; and that the stock of the defendant was transferred to him from F. W. Little & Co., the defendant paying nothing for the shares, and being chargeable with, and having full notice and knowledge of, the rights of the corporation. Defendant demurs, and claims that complainant should first recover judgment at law against the defendant in Connecticut; that said corporation is necessarily a party to the suit; that, before suing here, there must be preliminary proceedings in Nebraska; and that, on the allegations of the complaint, complainant has no equity. The complaint founds defendant's liability upon section 4, art. 11, of the constitution of the state of Nebraska, which is as follows:

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate

property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscriptions, and the liability for the unpaid subscriptions shall follow the stock."

It then adds as follows:

"By means whereof the defendant herein is liable for the full face amount or par value of the shares of common stock of the said Lincoln Street-Railway Company held and owned by him as herein stated and set forth, to the creditors of said corporation, including your orator, complainant herein."

But the complaint nowhere alleges that the stock belonging to the defendant was ever subscribed for, and it sufficiently appears that it was never in fact subscribed for, but was issued without subscription, in payment for, at least, a pretended consideration, and that there was no intent on the part of the corporation, or those receiving the stock, that it ever should be paid for. Defendant has not come within the terms of the constitution of Nebraska which are relied upon. He has never promised to pay for this stock, and there is no allegation of any fraud on his part whereby the creditors of the corporation have been injured, and nothing to show that they have suffered any loss by reason of the issuance of the stock, or that the stock ever had any actual value. The distinction between stock which has and that which has not been subscribed for is sharply drawn in Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; and, on the authority of that case, and of Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, the demurrer is sustained. See, also, Troup v. Horbach, 53 Neb. 795, 74 N. W. 326; Penfield v. Gas Co., 57 Neb. 231, 77 N. W. 672. This conclusion dispenses with the necessity of examining the other points of the demurrer.

## In re WHITENER.

### RODGERS v. RAMSEUR et al.

(Circuit Court of Appeals, Fifth Circuit. November 20, 1900.)

No. 921.

1. Bankruptcy—Jurisdiction of Courts of Bankruptcy.
Under Bankr. Act 1898, a court of bankruptcy has jurisdiction to restrain proceedings in a state court by an adverse claimant to recover possession of property which is in possession of a trustee as part of a bankrupt's estate, and to compel the return of the property where it has been taken from the possession of the trustee in such suit. It also has jurisdiction, under the provisions of section 2, to entertain a petition of intervention by the claimant in the bankruptcy proceedings, and to determine the issues presented thereby.

2. Same—Appeals—Judgment Allowing "Claim."
Under Bankr. Act 1898, no right of appeal exists from any judgment rendered or order made by a court of bankruptcy in the administration of an estate, except the particular judgments enumerated in section 25; and no appeal lies from a judgment entered on a petition of intervention filed by a claimant of property in the hands of a trustee declaring the ownership of the intervener, and ordering restitution of the property, such judgment not being one allowing a "claim," within the meaning of section 25a, subd. 3.

8. SAME—PETITION FOR REVISION.

An appeal taken to the circuit court of appeals from a judgment of a court of bankruptcy, which was not appealable, cannot be treated as a petition in equity for revision in matter of law, under Bankr. Act 1898, § 24b, where the questions presented for review all involve matters of fact.

Appeal from the District Court of the United States for the Eastern District of Texas.

The following general statement of the case is found in the transcript, apparently agreed to by all the counsel representing the various parties in interest:

On the 24th day of April, A. D. 1899, J. C. Whitener, bankrupt, filed his petition in bankruptcy. The schedule made by Whitener disclosed no assets. On the 28th day of April, A. D. 1899, he was duly adjudicated a bankrupt. On the 15th day of May, A. D. 1899, the first meeting of the creditors was held at Texarkana, Tex., in pursuance of notice issued and mailed by the referee to all the creditors of said bankrupt, and published in the Gate City News, the paper designated for publication of notices in bankruptcy, at which meeting creditors of the said bankrupt proved up and filed their claims, examined the bankrupt, and appointed Rollin W. Rodgers, of Texarkana, Tex., as trustee in bankruptcy of said estate, and the said Rodgers was duly qualified as said trustee. On the 26th day of May, A. D. 1899, the creditors of said bankrupt filed their contest of Schedule B filed by said bankrupt, and a motion for a subpœna for witnesses and documents, and to commit for contempt. On the 6th day of June, A. D. 1899, this cause came on for hearing, in pursuance of notice, said hearing being on petition of contesting creditors contesting the schedule filed by the bankrupt herein. A motion to commit for contempt, and the application of said creditors for an order of court commanding the said J. C. Whitener, the bankrupt, to deliver over to the said Rollin W. Rodgers, trustee, all of certain real and personal property alleged in creditors' petition to be in the possession of the said J. C. Whitener, and the property of the said J. C. Whitener, at and before the time he filed his petition in bankruptcy. In his answer to the creditors' petition, the said J. C. Whitener alleged that the property in controversy was owned by one P. S. Ramseur, and that he (the said Whitener) was holding the same as agent of the said Ramseur. The property in controversy is described as follows, to wit: Lots No. 4, 5, and 6, in block No. 12; lot No. 2, in block No. 25; also one-seventh of lot No. 7, in block No. 12, being 25 feet off of the east end of the said lot next to the alley,—all situated in the city of Texarkana, Bowie county, Tex., together with all the appurtenances and improvements thereon; also all the livery stock belonging to the stable now conducted by the said R. W. Rodgers as trustee herein, including all horses and other animals, carriages, buggies, and other vehicles, and all harness, moneys, and personal properties of every kind pertaining to the said livery-stable business, including all books and book accounts connected therewith; also the undertaker's establishment now in the possession of said Rodgers, as trustee herein, situated in Texarkana, Tex., including all coffins, hearses, teams, and property of every description, including money, books, and book accounts appertaining thereto,—all of which said property at the time of said hearing was in possession of the said Whitener. After hearing the testimony of witnesses, it was ordered that a further hearing be postponed to make additional parties. On the 24th day of June, A. D. 1899, the said contesting creditors filed their motion to make P. S. Ramseur, of Lamar county, and the People's Building, Loan & Savings Association of Syracuse, N. Y., parties to this suit, and the 6th day of July, 1899, was set for the day for hearing said contest, said hearing to be had at Texarkana, Tex. On the 6th day of July, A. D. 1899, the cause came on further to be heard, and it appearing to the court that the said P. S. Ramseur and the said People's Building, Loan & Savings Association had not been served with process making them parties to this suit, and upon hearing further testimony and argument of counsel, it was ordered by the court that the said J. C. Whitener, bankrupt, should immediately deliver all of the said property to the said Rollin W. Rodgers, trustee. In compliance with said order of the referee, the said J. C. Whitener delivered to the said Rodgers all

of the property above described. And it was further ordered that a further hearing of this cause be postponed to complete service on the said P. S. Ramseur and the said People's Building, Loan & Savings Association. On the 15th day of August, A. D. 1899, the said association filed their answer in said cause, and their motion to have R. L. Dalby, liquidating agent of the Interstate National Bank of Texarkana, made a party to this suit. On the 5th day of September, A. D. 1899, P. S. Ramseur filed his answer in this cause, setting up claim of title and right of possession to all of the said described property, and praying for an order of court that the said Rollin W. Rodgers, trustee, deliver over into the possession of the said P. S. Ramseur all of the said property; also came the said R. L. Dalby, liquidating agent of the said Interstate National Bank of Texarkana, and filed his answer, setting up claim of title and right of possession to all of the real estate above described. On the 28th day of September this cause came on for hearing before the referee, Texarkana, Tex., and judgment of the court was rendered in favor of the said Rollin W. Rodgers, as against the said P. S. Ramseur; and, on application of the said P. S. Ramseur and the said Rollin W. Rodgers for questions to be certified to the judge, the said questions were certified. Upon a hearing of the said certified questions by the judge, the case was referred back to the referee, to be administered in accordance with the provisions of the acts of congress relating to bankruptcy, dismissing as to said Ramseur. On the 7th day of October, A. D. 1899, a writ of sequestration was issued out of the district court of Bowie county, Tex., at the suit of the said P. S. Ramseur, as plaintiff, against the said R. W. Rodgers, trustee, and the sureties on his bond as trustee, and A. F. Shapleigh Hardware Company, one of the creditors of said bankrupt. By virtue of said writ of sequestration, T. S. Edwards, sheriff of Bowie county, Tex., took possession and control of all the said property out of the possession and control of said Rollin W. Rodgers, trustee. On the 8th day of October, A. D. 1899, the said Rollin W. Rodgers, trustee, filed in the district court of the United States for the Eastern district of Texas his application for an order of court enjoining and restraining the said T. S. Edwards and said Ramseur, their agents, attorneys, and deputies, from further interference with the said trustee's possession of the said property, which said prayer was granted by the Honorable D. E. Bryant, judge of said court, and in compliance with said order the said property was delivered back into the possession of the said trustee. On the 16th day of October, 1899, the said P. S. Ramseur filed his petition of intervention in this cause, making himself a voluntary party to this suit. On the 17th day of November this cause came on finally to be heard before the referee at Texarkana, Tex., and judgment was rendered in favor of Rollin W. Rodgers, trustee, against P. S. Ramseur, intervener, and the Interstate National Bank of Texarkana, and in favor of the People's Building, Loan & Savings Association of Syracuse, N. Y., for the sum of $5,459.01, together with all costs of suit, and an order foreclosing their deed of trust lien on the real property as heretofore described, and an order directing said R. W. Rodgers to sell the said real property, and appropriate the proceeds of said sale to the payment of said lien. On the 22d day of December, A. D. 1899, Rollin W. Rodgers, trustee, filed his exceptions to the allowance to the claim of the People's Building, Loan & Savings Association, and his application to certify questions to the judge. On the 28th day of December, A. D. 1899, P. S. Ramseur, intervener, filed his application to have questions certified to the judge.

On the intervention of Ramseur, the referee found and certified the following as facts to the district court: "On the 26th day of December, 1893, J. C. Whitener owned the property in controversy, but on the last-mentioned date assigned the same by deed of trust to S. B. Andrews, assignee. J. C. Whitener, the bankrupt, on December 26, 1893, made an assignment under the general assignment laws of Texas, conveying all of said property to one S. B. Andrews, as assignee. S. B. Andrews qualified under the state law as assignee, and took possession of the property in controversy. On the 26th day of December, A. D. 1893, J. C. Whitener, the bankrupt, made a deed of assignment, naming S. B. Andrews as assignee, by which deed of assignment the property in controversy was transferred to S. B. Andrews. Before the assignment was made, S. B. Andrews was a resident of the state of Arkansas, and was cashier of the First National Bank, and changed his residence to Texas two or three days

before the deed of assignment was made, at the request of the said J. C. Whitener, that he, the said Andrews, might qualify as assignee. Before the said assignment was made there was an understanding and agreement between the said J. C. Whitener and S. B. Andrews to the effect that Whitener would make Andrews assignee, and that Andrews would hold the property as assignee, until arrangements could be made by Whitener by which he (Whitener) could get possession and control of the said property. This agreement was carried out between Whitener and Andrews, P. S. Ramseur being the party or person agreed upon to become the purchaser for Whitener. Ramseur is the half-brother of Whitener. On the 12th day of February, Andrews transferred, by bill of sale, the undertaker's business and all the stock connected therewith, and the book and book accounts of said business, for which Ramseur gave his various promissory notes, with the understanding between himself and Andrews and Whitener that the property should be immediately turned over to Whitener, and that Whitener should pay off the said notes and conduct the said undertaker's business. On the 20th day of February, Andrews transferred by deed all of the real property heretofore described in controversy, for which Ramseur gave his note for two hundred and fifty dollars, at which time it was understood and agreed between the said Ramseur and Whitener that he, the said Whitener, should take possession of the said property and pay the said notes. On the 1st day of June, A. D. 1894, Andrews transferred by bill of sale the livery stock of horses, wagons, buggies, harness, etc., as described, the property in controversy; for which he (the said Ramseur) gave his notes for three thousand dollars, payable at different times; and that he (the said Whitener) should take possession and control of the said property, and pay off the said notes,—all of which agreements between Ramseur and Whitener were carried out by Whitener. No consideration was paid by Ramseur for the said property, or any part thereof, except his promissory notes, which said notes were to be, and in fact were, paid by the said Whitener. All of the transactions between Andrews and Ramseur, including negotiation and sale of the said property, were conducted and consummated or participated in by Whitener, and between Andrews and Whitener. Ramseur allowed Whitener the use of his (Ramseur's) name, that he (Whitener) might become the purchaser of all of the said property, Ramseur being solvent and Whitener insolvent. All of the said transactions were in performance of the original agreement entered into between Whitener and Andrews, and were for the purpose of defrauding the creditors of Whitener, and to enable Whitener to get possession of all of the said property, and appropriate it to his own use and benefit, and avoid the payment of his honest debts. From the date of the said transfers from Andrews to Ramseur, the said Whitener has had continuous possession of all of the said property transferred, exercised full ownership and control of same, appropriated the rents and profits arising therefrom to his own use and benefit, and has used and enjoyed the same as his own, until he was commanded, by an order issued out of this court, to turn over and deliver the same to the said Rollin W. Rodgers, trustee. Prior to the said assignment from Whitener to Andrews, the said Whitener sent out a large quantity of merchandise from his hardware stock, a portion of which was returned to him after the said transfer from Andrews to Ramseur (Whitener). A large quantity of barbed wire was sent to the address of P. S. Ramseur, Hooks, Tex., which was afterwards returned to Whitener after the said sale from Andrews to Ramseur. The running account between Whitener and Ramseur, beginning before the said assignment, continued during the said assignment, while Andrews was assignee, and after the said transfer from Andrews to Ramseur. Ramseur has never at any time received any of the rents or profits from the real estate or livery stable or undertaker's business, but the same had been appropriated by Whitener."

And the referee also reported the following conclusions of law and fact: "P. S. Ramseur has never at any time had any interest in the said property, or any part thereof, except such title as he acquired through the deed and bills of sale from Andrews to Ramseur. He has never had any real interest in the said property, except such interest as accrued by reason of his holding the legal title to said property in trust for the said Whitener. The statute of limitation does not apply in this case, under the facts proven. The whole

transaction was fraudulent, and, if Ramseur ever acquired any title to the property in controversy, he held the same in trust for J. C. Whitener. As intervener in this case, P. S. Ramseur is bound by the record of the case made prior to the filing of his petition in intervention, and he cannot reopen the evidence to interpose objections to the same."

The intervener, Ramseur, excepted to the findings of the referee, and brought the matter before the district court, the judge of which, after citing the case, found the facts to be as follows: "That on the 26th day of December, 1893, the bankrupt, J. C. Whitener, owned and was in possession of a hardware store, an undertaking establishment, and a livery stable in Texarkana, in Bowie county, Tex., and the real estate situated in said county and state now in controversy in this cause; and on said date made a general assignment of all his property to S. B. Andrews, as assignee, for the benefit of all his creditors, under the general assignment laws of the state of Texas. Said S. B. Andrews immediately accepted the trust, and qualified by taking the oath, and making a bond, in accordance with the provisions of said laws. After qualifying, said S. B. Andrews immediately took possession of all of the property and assets of the estate of said J. C. Whitener, and proceeded to administer said estate. Thereafter, on the 12th day of February, 1894, he sold and delivered to intervener, P. S. Ramseur, the entire hardware and undertaker's business and stock for the sum of seven thousand five hundred forty and $^{77}/_{100}$ dollars, this being fifty per cent. of the invoice value, and on the same day he sold intervener the notes and book accounts belonging to said business for the sum of one thousand dollars. The real estate belonging to the estate of said J. C. Whitener was valued at $6,000, and was incumbered by mortgages to the extent of $5,500, and the said Andrews, on the 20th day of February, 1894, sold, and by deed of conveyance transferred, to intervener all of said real estate, for the consideration of two hundred and fifty dollars, and the assumption of the payment by intervener of said mortgages. On the 1st day of June, 1894, said S. B. Andrews sold and delivered to intervener the livery-stable business and stock, including vehicles, horses, harness, etc., for the sum of three thousand dollars. The prices paid by intervener were adequate and fair. Intervener, at the time of these purchases, was solvent, worth between seventy-five and one hundred thousand dollars, and in paying for said property executed and delivered to said S. B. Andrews his promissory notes. Said notes were all paid, and the money went into the hands of said Andrews, as assignee of the estate of J. C. Whitener. Said S. B. Andrews offered all of said property for sale upon the open market, and his sale to intervener was bona fide and passed a good title. Said purchases were made by intervener in good faith, and for a good and valuable consideration, and he has openly claimed and held the same, and exercised ownership and control of the same continuously since its purchase. Intervener, by these purchases, acquired a good title to all of said property, and has continuously held the same, except that on the —— day of ——, 1896, he sold all of the hardware business and stock to one J. E. Benjamin. There was no collusive agreement or arrangement between S. B. Andrews, J. C. Whitener, and intervener, P. S. Ramseur, that said intervener should be the purchaser of said property, and there was no fraud upon the part of intervener in the purchase of any of said property, and no intention upon his part in the purchase of said property to defraud any of the creditors of said J. C. Whitener, or to purchase said property and hold the same in his name for said J. C. Whitener, and since his purchase of same he has not held it in his name in trust for said J. C. Whitener. After his purchase of said property, intervener placed said J. C. Whitener in possession of said property to run it under his direction as his agent, and agreed to and did allow said Whitener the sum of seventy-five and one hundred dollars per month as wages to live on. Intervener had large business interests at different towns and cities, and conducted his business at these different places through agents, and did not give his entire personal attention to his business at any particular place. He made frequent visits to Texarkana, and personally inspected and inquired into his business and property there, and had it rendered for taxes, and caused the taxes to be paid. He resided at Dekalb, thirty-three miles from Texarkana, where he had large interest in the Dekalb Lumber Company, a sawmill plant. His bookkeeper at Texarkana frequently sent to

him at Dekalb statements of the condition of the business at Texarkana. He found that his hardware business at Texarkana was losing money, and sold it in 1896 to J. E. Benjamin, the consideration being $3,500, of which the sum of $1,900 went to pay off notes given by intervener for the purchase of the property from Andrews, and held by the bank, and the balance was paid on indebtedness of said hardware business. He received no profits from his other business at Texarkana. At the time the trustee took possession of this property, it was in the possession of said J. C. Whitener as agent for intervener. The claims of the creditors represented by the trustee are for debts created by said J. C. Whitener prior to his assignment to S. B. Andrews. None of them accepted under the assignment made by said Whitener to Andrews, but have never questioned intervener's title to the property sold and conveyed to him by Andrews, as assignee of Whitener's estate, until after the filing of a petition in bankruptcy and in said bankruptcy proceeding."

The district judge thereupon gave judgment in favor of Ramseur against the trustee for all the property claimed by the intervener, for all rents and profits of the same during the time in trustee's possession, ordered a writ of restitution, and that the trustee should pay all the costs out of the estate of the bankrupt in his hands; to all of which the trustee at the time duly excepted, and thereafter sued out this appeal, assigning 33 specific errors in finding the facts of the case, and 8 errors of mixed law and fact.

A motion is made to dismiss this appeal upon the grounds (1) that the judgment sought to be reviewed is not such a judgment or decree as may be appealed from under the provisions of the bankrupt act; and (2) that the appeal bond in this case, if one is required to be filed, was filed after the time had expired, as fixed by law, in which an appeal bond may be filed in causes of this character. As to the appeal and bond, the facts are that the judgment was rendered on the 27th day of January, 1900. On February 3d, an appeal and supersedeas were allowed to the trustee without bond. On February 7th, the appellee applied for execution of the judgment, which application was heard on the 14th day of February, 1900, when the court ordered that the order theretofore made, suspending and superseding the execution of said judgment without an appeal bond, be set aside, and the following was entered: "The supersedeas appeal bond of the said R. W. Rodgers is now fixed at the sum of $7,500, should he desire to prosecute his appeal and suspend said execution; should he desire to appeal without suspending the execution of said judgment, then his appeal bond is fixed at the sum of $500. It is further ordered that he make said bond and present it to me for approval on or before the 24th day of February, 1900, and in default of this it is ordered that the clerk of this court issue all necessary process to enforce said judgment." The supersedeas appeal bond, under this last order, was made on the 21st day of February, 1900, and it appears to have been approved and ordered filed as of date February 24, 1900.

W. T. Hudgins and Oscar D. Scott, for appellant.
E. B. Kruttschnitt and John J. King, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). As the property, the ownership of which is in dispute, was in the possession of the trustee in bankruptcy as a part of bankrupt's property to be duly administered, the district court had jurisdiction to issue an injunction restraining the proceedings under a sequestration issued from the district court of Bowie county, Tex., at the suit of Ramseur, plaintiff, against Rodgers, trustee, and to compel the return of the property to the trustee. See White v. Schloerb (decided in the supreme court May 28, 1900) 20 Sup. Ct. 1007, 44 L. Ed. 1183. The property being in the custody of the district court sitting in bankruptcy, that court had jurisdiction to entertain the intervention

filed by Ramseur, claiming the property, and to hear and determine the issues presented by the intervention, not only on general principles (see Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625), but under the specific provisions of section 2 of the bankruptcy act of 1898, as follows:

"That the courts of bankruptcy as hereinbefore defined, viz. the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the district of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to * * * (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided: * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

The jurisdiction of the district court, as thus granted, is unquestionably bankruptcy jurisdiction, and not general jurisdiction to hear and determine controversies between adverse parties. The right to appeal from the decision of the district court in bankruptcy proceedings is given in the bankrupt law of 1898 (section 25), in the following cases: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over.

The property in dispute was not surrendered by the bankrupt. It came into the possession of the bankruptcy court on an order of the referee declaring it to be a part of the bankrupt's estate, and the proceeding below was a suit to recover the property from the trustee as property that belonged to the plaintiff, and not to the bankrupt's estate, and the judgment of the court is one declaring the plaintiff's ownership, and ordering a restitution of the property, with costs.

The question presented on the motion to dismiss is whether this judgment of restitution is a judgment allowing or rejecting a debt or claim of $500 or over. It is not contended that it is a debt, but it is contended that it is a claim, within the meaning of the statute. The word "claim," as used in the above connection,—"debt or claim of $500 or over,"—seems to mean a moneyed demand, the same as "debt," and was used, not to enlarge, but to render certain. The word "debt," as defined in the first section of the statute, includes any debt, demand, or claim provable in bankruptcy. The word "claim," although frequently used in the bankruptcy act, is not specifically defined; but section 57 of the act is entitled, "The Proof and Allowance of Claims," and the word as therein used in every instance refers to, and means only, a moneyed demand. Paragraph "k" of the section is to the effect that claims which have been allowed may

be reconsidered for cause, and reallowed or rejected, in whole or in part, according to the equities of the case, before, but not after, the estate has been closed. To give the word "claim" the broad meaning contended for would be to practically enlarge the statute so as to give the right of appeal in every disputed claim involving $500 or over occurring in the administration of the bankrupt's estate; for all contests therein, including questions of discharge of the bankrupt and selling property, can easily be shown to be claims, within the broad meaning of the word "claim,"—a demand or supposed right. The proceeding in the court below was a proceeding in the administration of the bankrupt's estate, and was in no proper sense a proceeding to allow or reject a debt or claim against the bankrupt's estate, and we are inclined to the opinion that, in matters of administration in the bankruptcy court, outside of the question of bankruptcy vel non, the discharge of the bankrupt, and the allowance of debts or demands over $500, no appeal is allowed or contemplated by the bankruptcy law of 1898.

It is, however, contended that, if no right of appeal exists, then the application for an appeal, as perfected in this case, may be treated as a petition in equity to revise, under paragraph "b," § 24, to the effect that the several circuit courts of appeals shall have jurisdiction in equity, either interlocutory or otherwise, to superintend or revise in matters of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction; such power to be exercised on due notice and petition by any party aggrieved. Judge McCormick, speaking for this court in Re Abraham, 35 C. C. A. 608, 609, 93 Fed. 783, 784, said:

"The right of appeal, as given by the statute, can neither be enlarged nor restricted by the district court or by this court. The regulation of appeals is a regulation of jurisdiction. It was not without purpose, therefore, that the exercise of the superintending jurisdiction of this court is not placed by the act under specific regulations and restrictions, like the proceeding by appeal or writ of error. It seems clear to us, from a consideration of the various provisions of the act, and particularly of the clause conferring, superintending, and revising jurisdiction on this court, that it was the intent of congress that the exercise of such jurisdiction could be easily invoked by any party aggrieved, and should be freely exerted by the circuit court of appeals, without the hindrance of technical trammels. In analogy to the rule prescribed for allowing appeals, and to the practice in allowing writs of error in cases at law, the petition for revision may be presented to, and allowed by, a judge of the court of bankruptcy, or any one of the judges of this court. It should, with reasonable clearness, show the action of the court which it seeks to have revised in matter of law, and reasonable notice thereof should be given to the adverse party. The appeal prayed for, allowed, and perfected in this case, bringing up, as it does, the record of the pleadings, which present all the facts, either verified by the petitioning creditors, whom the appellee represents, and cannot be allowed to dispute, or averred by Bernheimer, and admitted by the demurrer, showing all of the action of the judge thereon, including the last order from which the appeal was taken, may embrace more than it was necessary to put into a petition for revision; but it clearly does embrace a sufficient statement of the facts and action of the court thereon sought to be revised in matter of law. No question has been raised, or can be raised, as to the sufficiency of the notice. It is apparent from the proceedings that the appeal was prayed for and allowed in open court, in the presence of all the parties or their attorneys, at the very instant that the judgment sought to be revised was announced. They thus had, or must be charged with, due notice. We conclude

that the motion to dismiss the proceedings in this court should not be granted. We could, did we deem it necessary, permit the party aggrieved now to file his petition for the revision he seeks, and, upon due or reasonable notice thereof being given to all parties entitled thereto, proceed thereon in the exercise of our jurisdiction. We have not deemed it necessary or meet in this case to have resort to that course, but have proceeded to consider the case on its merits, in like manner as if a formal petition had been presented and due notice thereof given. We may not feel justified in exercising our discretion to the same extent in all cases which may be brought to us in the future. The proceedings in this case in the district court were had before the general orders in bankruptcy took effect, or had been widely published, and become generally known to parties or counsel, or the judges of the inferior courts. The provisions of the act with reference to appeals to this court, and to obtaining the superintendence and revision it may exercise, are, in a measure, new, and precedents under the former law, if they were uniform (which they are not), could not be safely followed."

If, following this precedent, we should be disposed to treat the appeal herein as a petition in equity, the following difficulty presents itself: Under the express provisions of the statute, on a petition in equity to revise proceedings, only questions of law can be considered in the appellate court, and on this appeal the questions presented all involve matters of fact; no specific questions of law, as ruled by the district court, being assigned as erroneous. It seems clear that this court has no jurisdiction in this case, either on appeal or on a petition to revise. The appeal is dismissed.

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UNITED STATES v. LUNG HONG.

(District Court, N. D. Ohio, W. D. May 5, 1900.)

No. 1,146.

DEPORTATION OF CHINESE—BURDEN OF PROOF—MERCHANTS.

The burden rests upon a Chinaman arrested for deportation, as being unlawfully within the United States, to prove that he belongs to one of the privileged classes named in the statute; and when he claims to be a merchant he must show a fixed place of business, and such frequent sales of merchandise as entitle him to be considered a merchant, within the ordinary meaning of the term, or an actual and substantial interest in some firm of such merchants.

Proceeding for Deportation of Defendant as a Chinese Laborer.

Robert Tucker, Asst. U. S. Atty.

J. M. & W. F. Brown, for defendant.

RICKS, District Judge. This is a proceeding on the part of the United States to have Lung Hong, a Chinaman, removed from the country on the ground that he was unlawfully found here. The facts are, briefly stated, that on the 13th day of January, 1900, he was found in a Chinese laundry at Lima, Ohio. At the time he was so found, he was laboring in the laundry, and, according to a stipulation agreed to between the parties, he had been laboring in this laundry for six months or more, and was, therefore, within the meaning of the statute, a common laborer. The defense made is that he came within the privileged classes named in the several Chinese exclusion acts, and that he was a merchant doing business at No.

321 South Clark street, in the city of Chicago, Ill. The whole case turns upon the question of fact whether or not this defendant was a merchant in the city of Chicago, and was, therefore, one of the privileged class named in the acts of congress. The courts have repeatedly held that, in order to avail himself of this defense, it is necessary for the Chinaman to show an actual substantial interest in some firm, if he pretends to have been a partner in the merchandising business, or, if he was a dealer in his own name, that he must have a fixed location, where his wares are kept or sold, and such frequent sales of merchandise as entitle him to be considered as a merchant, within the ordinary meaning of that term. The evidence relied upon to show that the defendant was a merchant is based largely upon the deposition of Dr. Wilder, who now lives at Sharon Springs, Kan. This doctor, at the time he lived in Chicago, was patronized largely by Chinese, and says he remembers this store, and remembers seeing the defendant about the premises, and that he was told that he was a merchant, and one of the firm. It seems from the testimony that this firm was rather elastic in its nature, in so far as the number of partners was concerned. There were frequent fluctuations in the number of partners, and in the extent to which the partners participated in the dealing. I think, under the strict ruling of the courts, that the defendant cannot be said to have been a merchant, having a fixed, substantial interest in the firm, which was indicated either by his own name appearing in the partnership firm name, or by some other evidence of interest such as is ordinarily found among partners doing business in this country. Counsel for the defendant insists that the burden of showing that the defendant was not a merchant is upon the government, but the holding of the courts is exactly to the contrary. Judge Severens' opinion, cited by counsel for the government, it seems to me, is conclusive of this question. He says that, although it is contrary to the legal rule, the presumption of innocence does not follow the defendant, but that the burden rests upon him to make out his defense, and that this must necessarily be so if the government expects to protect itself and its citizens from an influx of these people. It is easier for them to prove an affirmative than it is for the government to prove the negative. There was no attempt, therefore, on the part of the government to prove affirmatively that the defendant was not a merchant, but it relied upon the fact that the defendant had failed to make out that he belonged to the privileged class, and in this I think the government is correct. Therefore, without further reviewing the facts or the acts of congress, I find the defendant is unlawfully within this country, and, under the act, must be deported to his own country. An order will be drawn accordingly, and the marshal will execute it as provided by law.

## WINKLER et al. v. STUDEBAKER BROS. MFG. CO.

(Circuit Court, S. D. New York. November 28, 1900.)

PATENTS—SUIT FOR INFRINGEMENT—TITLE OF PLAINTIFF.

Where a part owner of a patent died intestate, and his estate was administered, and the administratrix discharged without having made any disposition of his interest in the patent, the title acquired thereto by an assignment from his next of kin, who, under the laws of the state, succeeded to the ownership of the personal estate not required for the payment of debts, is sufficient to support a suit for infringement of the patent.

In Equity. Suit for infringement of patent. On demurrer to bill.

The demurrer is aimed at a supposed defective link in the chain of complainants' title. The letters patent in question were granted May 7, 1895, to the complainant Fred Winkler and Lenhart Winkler. Lenhart Winkler died, intestate, November 10, 1896. He was a resident of Indiana. His widow Mary Winkler and his minor child Edward Winkler were his only heirs at law and next of kin. Mary Winkler was duly appointed administratrix March 17, 1897. On the 24th of February, 1899, she was discharged and the estate was declared settled and fully administered. In February, 1899, Mary Winkler was appointed guardian of the said Edward Winkler, and on the 26th of June, 1899, personally, and as guardian of Edward Winkler, with the approval of the court, she conveyed in writing to the complainants Fred Winkler and Charles Winkler all the right, title and interest which she possessed in and to the said letters patent. On the 21st of August, 1899, Fred and Charles Winkler conveyed to William Knoblock an undivided one-third interest in the patent. The point is made that the title of the complainants, other than Fred Winkler, is defective because they have not acquired the title of Mary Winkler as administratrix. Although she was discharged by the order of the court, her letters revoked, her bond canceled and the estate declared fully and finally settled, it is insisted that the title to the patent is suspended somewhere, although counsel have neglected to give the court any information by which its present locality can be ascertained.

H. A. Heyn (Bond, Adams, Pickard & Jackson, of counsel), for complainants.

Kenyon & Kenyon (William Houston Kenyon, of counsel), for defendant.

COXE, District Judge. Although the situation is in some respects a novel one it is thought that the title can be sustained upon the principles enunciated in Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609, and Machine Co. v. Featherstone, 147 U. S. 209, 13 Sup. Ct. 283, 37 L. Ed. 138. Under the statute law of Indiana the patent belonged to the widow and infant son of Lenhart Winkler; they were his sole heirs and next of kin. There were no creditors, of course, when the estate was settled and the administratrix was discharged. There was no living person who had the slightest interest in the intestate's share of the patent except his son and widow. No title is now outstanding which can be asserted in hostility to theirs. No such title can hereafter be acquired. Under the Indiana law, if there be no debts and no administration, personal property vests by operation of law in the next of kin. Robertson v. Robertson, 120 Ind. 333, 22 N. E. 310. This patent—like the patent in Sessions v. Romadka—was not administered and passed

by operation of law to those legally entitled to it. In the Sessions Case the patent passed under the provisions of the bankruptcy act to the assignee. The assignee did nothing regarding the patent and was discharged. The bankrupt thereafter assigned the patent, and the title thus acquired was sustained. The court, at page 39, 145 U. S., page 801, 12 Sup. Ct., and page 613, 36 L. Ed., says:

"Had the existence of this patent been concealed by the bankrupt, or the assignee had discovered it subsequently,—after his discharge,—and desired to take possession of it for the benefit of the estate, it is possible the bankruptcy court might reopen the case and vacate the discharge for that purpose. Clark v. Clark, 17 How. 315, 15 L. Ed. 77. But it does not lie in the mouth of an alleged infringer to set up the right of the assignee as against a title from the bankrupt acquired with the consent of such assignee."

The facts of the Sessions Case differ from those of the case at bar, —this is always true,—but the objection to the title was more substantial than the objection here for the reason that the creditors of the bankrupt had been deprived of a valuable asset. The court, however, regarded it as a situation where a common-sense view of the law should prevail over a refined and academic view and where an outstanding interest so attenuated and nebulous that nothing approaching a title could ever be deduced therefrom, should not, at the suggestion of a wrongdoer, be permitted to imperil if not destroy a valuable patent. The complainants hold every tangible existing interest in the patent. There is nothing outstanding which by any possibility can be made the basis of another attack upon the defendant. The complainants represent every one who now has or who ever had a vestige of interest in the patent. The case differs from the cases relied on by the defendant in that no title is outstanding in an administrator subject to the rights of creditors. There are no creditors, there is no administrator and it is not easy to see how one can now be appointed. The title to the patent is not extinct. The widow and the infant son were the only persons who had a right to it and their right was unqualified and exclusive.

The demurrer is overruled and the cause should proceed pursuant to the stipulation between the parties.

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NATIONAL FOLDING-BOX & PAPER CO. v. GAIR.

(Circuit Court, E. D. New York. December 6, 1899.)

Supplemental opinion. For original opinion, see 97 Fed. 813.

Walter D. Edmonds, for complainant.
Edwin H. Brown, for defendant.

THOMAS, District Judge. Upon the argument of the above case on the merits the attention of the court was directed sparingly, if at all, to the boxes manufactured by the defendant, which are now claimed to be involved in the accounting. Defendant's box, with interlocking turned-in portions, with the usual end piece appertaining to the box, which is covered by complainant's patent, seems to fall within claim 1. The reason for this is explicitly set forth in letters

patent No. 519,451, issued to the defendant subsequently to the patent in suit. In such letters the inventor, after describing his box, states that:

"When the box is set up the two parts, GG' [the turned-in portions], at each end of the box are hooked together, and the tongues on the overlapping flaps are thrust into the crescent-shaped slots, and the ends of the box thereby double locked together, substantially as specified."

It is quite obvious from this (the defendant's) language that he uses the complainant's device as an additional lock for his box, and the violation of the complainant's rights thus arising is not diminished by the fact that the defendant also interlocks the turned-in portions.

More doubt arises respecting the class of boxes where the end piece has a single tongue entering a single aperture existing alone in one of the turned-in portions. Wilson unquestionably provided that the end piece might have a single tongue, but did he limit the engagement of that tongue to an aperture or opening existing in both turned-in portions? In other words, did the patentee voluntarily confine himself to a box whose turned-in portions each contained an aperture, or some part of an aperture? The language certainly sustains such contention. The patentee has also placed his own construction upon the claim by the language used by him in the subsequent specification filed by him. This specification pertains to letters patent No. 292,606. After reciting the embarrassments arising from the use of two tongues in small boxes, the specification states:

"The object of my present invention or improvement is, in addition to the objects set forth in my letters patent above referred to, the production of a box of the kind referred to, which can be expeditiously put together or formed, and without liability of wrinkling, spoiling, or soiling the paper stock of which it is composed; and, to these main ends and objects, my invention consists in cutting or forming the turned-in end portion of the box or lid so that when brought to their proper upright positions a part of one shall overlap a part of the other, and so that there shall be formed by the two at some locality between their top and bottom edges a single space or opening, adapted to receive the folded-over-and-down tongue, all as will be hereinafter more fully explained."

There is no reason for seeking a construction of the claim which is apparently denied to it by the patentee in subsequent applications. The complainant's contention that claim 1 covers, without limitation, any "loose-lever clutch," so that Wilson's subsequent application is only for an improvement, is not adopted. The necessity for the later letters is not understood, if the inventor had under his first letters the right to use the single tongue for which the second letters provided. It is obviously fair to take a patentee at his word, and the application of this rule brings into the accounting the class of boxes similar to that known as "Defendant's Box," and excludes from the accounting boxes similar to defendant's Exhibit 3, where a single tongue of the end piece engages alone an aperture in one of the turned-in portions.

## WELLER et al. v. HANAUR et al.

(Circuit Court, E. D. Pennsylvania. December 11, 1900.)

No. 84.

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PARTIES.
A federal court is without jurisdiction of a suit by two plaintiffs, one of whom is a citizen of a state and the other of a territory, against citizens of another state; and where the facts appear in the record the objection may be taken at any stage of the proceedings.

2. SAME—AMENDMENT AFTER TRIAL—CHANGE OF PARTIES.
An amendment of the record cannot be allowed after trial to confer jurisdiction which did not in fact exist at the time the suit was commenced or tried; as by striking from the record in a suit in a federal court the name of a plaintiff, whose citizenship deprived the court of jurisdiction, upon an assignment of his interest in the cause of action to his co-plaintiff after the trial.

On Motion by Defendants for Judgment on Reserved Point, and Motion by Plaintiffs to Amend Record.

C. Wilfred Conard, for plaintiffs.

Ira J. Williams, for defendants.

J. B. McPHERSON, District Judge. The declaration avers, and the testimony at the trial proved, that one of the plaintiffs was a citizen of Oklahoma territory at the time the suit was brought, the other plaintiff being a citizen of Missouri, and the defendants being citizens of Pennsylvania. This raises a question of jurisdiction, and upon this ground alone the defendants were entitled to binding instructions in their favor; and, as their point requesting such instructions was reserved, they are now entitled to judgment notwithstanding the verdict against them. No argument is needed to establish the proposition that a citizen of a territory cannot sue a citizen of a state in the federal courts. There are many decisions to this effect, of which one or two may be cited: City of New Orleans v. Winter, 1 Wheat. 91, 4 L. Ed. 44; Hooe v. Jamieson, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049. It is also beyond dispute that, where there are more plaintiffs than one, each must be capable of suing in the federal courts, or the necessary jurisdiction does not exist. The present suit, therefore, was brought in the wrong tribunal; and, as the defective jurisdiction appears in the record, it is the duty of the court to sustain the defendants' objection, and dismiss the suit at any stage of the proceedings.

Conceding the correctness of this position, the plaintiffs seek to cure the defect by amendment. They produce an assignment executed since the trial by the citizen of Oklahoma, transferring his interest in the suit to the citizen of Missouri, and consenting that the suit should be brought and continued by the latter individually. Upon this assignment they found a motion to amend the record by striking out the name of the citizen of Oklahoma as a party plaintiff, and by further amending so that the plaintiff may now be described as "J. H. Weller, a citizen of the state of Missouri, who was with Robert T. Weller, late trading as Weller Bros." It is clear

that the motion must be denied, and I think that only one objection need be noticed. This is an attempt by a subsequent act of a party to confer a jurisdiction that did not exist at the date of the suit, and such an attempt certainly cannot succeed. Courts exercise the power of amendment liberally, but it has never been used for such a purpose as this. Where jurisdiction actually exists, an erroneous or defective statement of jurisdictional facts may, no doubt, be corrected so as to show the truth; but that is very different from what is now proposed. This motion is intended, not to show the truth, but to make the record declare what is not true, namely, that the suit was brought originally by one plaintiff alone, and that the court had thus acquired a jurisdiction which confessedly it has never yet had. Jurisdiction cannot be given by such an act of a party so as to have a retroactive effect, and put life into what has hitherto been void. I do not consider the objection that one partner could not sue in his separate name upon a cause of action that had accrued to the partnership.

The motion to amend is denied. Judgment will be entered on the reserved point in favor of the defendants notwithstanding the verdict, but without prejudice to the right of the plaintiffs to bring another suit in a court having proper jurisdiction.

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PELLETT v. GREAT NORTHERN RY. CO. et al.

(Circuit Court, D. Washington, E. D. December 4, 1900.)

REMOVAL OF CAUSES—COSTS ON REMAND.

Under the judiciary act of March 3, 1875 (section 5), which provides that when a circuit court remands a case it "shall make such order as to costs as shall be just," such court has jurisdiction to award statutory costs in favor of a plaintiff, including the attorney's docket fee prescribed by Rev. St. § 824, although the cause was remanded for the reason that the court was without jurisdiction to entertain it.

Action at law against the Great Northern Railway Company and two of its servants, as defendants, to recover damages for having caused the death of the plaintiff's husband by negligence. After the case had been remanded to the state court in which it was commenced, the plaintiff filed a cost bill, and petitioned this court to render a judgment in her favor for costs, including the following items: Clerk's fees, $4; attorney's docket fee of $25; typewriting 24 folios pleadings, motions, etc., at 10 cents per folio, $2.40. Petition granted to the extent of allowing the statutory docket fee and clerk's fee.

Lewis & Lewis, for plaintiff.

Will H. Thompson and M. J. Gordon, for defendants.

HANFORD, District Judge. This case was remanded to the state court in which it was commenced, on motion of the plaintiff, for the reason that it is not a case of which this court has jurisdiction, and at first blush it would seem to be inconsistent for the plaintiff to invoke its jurisdiction by asking this court to render a judgment in her favor for costs. Ordinarily, a court which has not jurisdiction

to determine the rights of the parties as to the main controversy between them is simply bound to let them alone, and to refuse its process for the benefit of either. Inglee v. Coolidge, 2 Wheat. 363, 4 L. Ed. 261; McIver v. Wattles, 9 Wheat. 650, 6 L. Ed. 182; Strader v. Graham, 18 How. 602, 15 L. Ed. 464; Hornthal v. Collector, 9 Wall. 560, 19 L. Ed. 650; Pentlarge v. Kirby (C. C.) 20 Fed. 898. The decision in this case, however, must be made with reference to the fifth section of the act of congress of March 3, 1875 (1 Supp. Rev. St. [2d Ed.] 83, 84), which provides that when a United States circuit court remands a case it "must make such order as to costs as shall be just." In a decision by Judge Baker, concurred in by Judge Woods (Smith v. Telegraph Co. [C. C.] 81 Fed. 242), it was held that this statute does not confer authority to render a judgment for costs, including an attorney's docket fee, and the attention of the court appears to have been especially directed to an earlier decision, to the opposite effect, by Judge Brown, in the case of Josslyn v. Philips (C. C.) 27 Fed. 481. See, also, 18 Enc. Pl. & Prac. 381.

In view of the conflicting decisions above referred to, I have examined other authorities bearing upon the question, and have reached a conclusion in accord with Judge Brown's decision. The statute, in plain words and without any restriction whatever, requires the court, when a case is remanded, to make such order as to costs as shall be just. When a party brings an action into court, his adversary is subjected to inconvenience and expense, and has the right to have the professional services of an attorney to appear for him and defend his rights. Since the law requires the court, in the exercise of its discretion, to consider the justice of the case, when an attorney has appeared, and prevailed to the extent of securing an order relieving his client from all obligation to appear further, I can perceive no reason for refusing to allow such costs, including an attorney's fee, as by the laws of the United States may be taxed in other cases. In actual practice, the courts of highest authority have given effect to this statute by expressly commanding the circuit courts to remand nonremovable cases, and give judgments for costs against the parties held to be in fault for removing them. Torrence v. Shedd, 144 U. S. 527–538, 12 Sup. Ct. 726, 36 L. Ed. 528; Martin v. Snyder, 148 U. S. 663, 664, 13 Sup. Ct. 706, 37 L. Ed. 602; Mattingly v. Railroad Co., 158 U. S. 53–57, 15 Sup. Ct. 725, 39 L. Ed. 894; Craswell v. Belanger, 6 C. C. A. 1, 56 Fed. 529.

This being an action at law, and there having been no jury trial, and no depositions having been taken, the only costs which the plaintiff is entitled to recover are the statutory fees of the clerk for services performed at the instance of plaintiff, and a docket fee of $10, prescribed by section 824, Rev. St. U. S. Additional compensation for typewriting motions, pleadings, and notices is not allowed. The rules require each party to make a cash deposit on account of clerk's fees at the time of entering an appearance. The clerk will retain sufficient of the money advanced by the defendants to pay his fees for services performed at their instance, and it is not necessary to include such fees in the judgment. A judgment for costs will be entered in accordance with this opinion.

## CORWINE et al. v. THOMPSON NAT. BANK OF PUTNAM et al.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1900.)

No. 797.

1. FRAUDULENT CONVEYANCES—DEED TO CHILDREN—VALIDITY.
   Deeds executed by one who was largely indebted as indorser of notes of a corporation in which he was a stockholder, conveying property to his children, for a consideration which was not inadequate, and which was fully paid by taking up such of the obligations upon which the father was indorser as he directed, are not fraudulent as to other creditors of the grantor, where preferences were permitted by the laws of the state, nor are they rendered fraudulent by the fact that after their delivery they were withheld from record, by one to whom they were intrusted to be recorded, in the interests of the corporation, to enable it to secure renewals of other notes or new loans on the credit of the grantor as indorser, where such withholding was not in pursuance of any agreement between the parties, and was without the direction or knowledge of the grantees.

2. SAME—WITHHOLDING DEED FROM RECORD—FRAUDULENT ACTS OF AGENT.
   A grantee of land conveyed to her by her father for an adequate consideration authorized her husband to act for her in the transaction. The father was an indorser in a large amount for an insolvent corporation in which both he and the grantee's husband were interested. The conveyance, together with others made at the same time to other children, included practically all the grantor's property, and the consideration received therefor was applied in payment of certain of the notes on which he was liable. After the delivery of the deeds they were intrusted to a third person to be recorded, but at the instance of the grantee's husband he withheld them from record for several months, during which time the husband, by concealing the fact of the conveyances from the creditors of the corporation, secured further renewals of its notes, as well as new loans upon the indorsement of the grantor. *Held* that, as against those who were so induced to renew their notes or to make loans on the faith of the indorser's solvency, such grantee was estopped by the acts of her agent to claim title to the property, and as to such creditors the deed to her was void.

3. SAME—UNDIVIDED INTEREST IN LANDS—IMPROVEMENTS MADE BY CO-TENANT.
   Where a daughter, who owned an undivided three-fourths interest in certain lands, the other one-fourth being owned by her father, had made valuable improvements on such lands, and a conveyance to her by her father of his one-fourth interest was held void as against his creditors, she is entitled to an allowance for the enhanced value of such interest by reason of her improvements.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Previous to March 12, 1894, John W. Corwine was the owner of an undivided one-fourth interest in certain tracts of valuable land in Pike and Ross counties, Ohio, all of which together contained about 4,000 acres. The other undivided three-fourths were owned, one-fourth by his wife, and two-fourths by his children, in fee. Some years before the date named he had become actively concerned and largely interested in the National Cotton Seed Oil & Huller Company, a corporation whose nominal capital was $1,000,000. Its plant was located at Memphis, Tenn., but most of its financial concerns were conducted, or at least attended to, in the vicinity of Pike county, Ohio; Corwine being active in its affairs, and his son-in-law, John W. Barger, being one of its directors, its secretary, and the chairman of its financial committee. The company had been a very large borrower of money, and some of its stockholders, including Corwine, had become involved as sureties therefor, to the extent of quite $200,000, which was unpaid in March, 1894. In the prog-

ress of these affairs, and as an inducement to the negotiation of the loans and the renewal of the notes given for the money borrowed, Corwine had placed in the hands of Barger, and through him in the hands of certain brokers and loan agents, a statement of his financial condition, showing in the earlier one that he was worth probably as much as $150,000, and in the last one that he was worth $100,000. Others of the sureties on the paper had pursued the same course. The statement of Corwine was renewed from time to time, the last one being dated November 8, 1893. C. N. Lindley was, in most instances, the loan agent of the company through whom the loans were negotiated, and this statement was transmitted to him by Barger, the chairman of the company's financial committee. A few shares of the company's stock had been transferred by Corwine to Barger in trust to enable the latter to become a director in the company, and to look after Corwine's interests therein. Certain of the holders of the paper, in the course of these transactions, became urgent for the payment of the amounts due them, and in March, 1894, with the concurrence, and probably under the advice, of Barger, Corwine stated to his children, the appellants in this case, that he would be compelled to sell his property, because his creditors were pressing, and he thereupon proposed to the appellants to sell to them his interest in the lands alluded to. At this time, as already indicated, they owned an undivided one-half interest in the lands in possession, and would most probably soon be entitled to another undivided one-fourth, which then belonged to their mother, who was known to have made a will in their favor. She was at the time dangerously sick, and died on the 24th of April, 1894. Her will, duly admitted to probate, disposed of her property as had been expected. The proposition of Corwine to sell was agreed to by his children, and the purchase money was stipulated to be paid by taking up or providing for certain of the debts for which Corwine was bound as surety. The purchase money consideration ultimately amounted to $35,515. Separate deeds were executed and delivered by Corwine to his four children, namely, the appellants, Keziah D. Barger, Mary W. Lee, Rachel M. Foster, and James D. Corwine. By agreements, previously consummated, there had been a division made of the land as between the children themselves, and deeds of partition had fixed the different tracts of the land so far as they were concerned, although the undivided one-fourth interest of the father had in no way been set apart to him. Upon the portions of the land which fell to the children in this partition each of them had, some years previously to March, 1894, erected valuable improvements, at a cost to each of probably $10,000. The deeds executed by the father were made and dated March 12, 1894, and were then delivered by him to the grantees, respectively. The entire consideration was soon afterwards paid in full by the children, in about equal proportions, and the sum thus paid was actually applied to the payment of the debts upon which the father was bound, in the manner indicated. All of the deeds were sooner or later placed in the hands of W. B. Lee, the husband of one of the appellants, for record, and soon afterwards he sent those to Mrs. Lee and Mrs. Barger to the proper officer in Ross county for that purpose, but before it was done, under the urgent advice of John W. Barger, they were recalled from the office upon a telegram from Lee. The others, at the request of Barger, were also withheld from record. None of the deeds were recorded until after a fire, which occurred on November 7, 1894, had destroyed the plant of the National Cotton Seed Oil & Huller Company at Memphis, and left it without credit, and probably without any property of value, except some insurance, although it owned some patents for inventions, which excited some expectations in the more sanguine of its stockholders. The deeds were all put to record November 10, 1894, soon after knowledge of the fire had reached the grantees, and upon Barger's suggestion. Meantime several new loans had been negotiated on behalf of the company, upon notes secured by John W. Corwine and others as sureties, and certain others of the notes theretofore given had been renewed. John W. Barger had aided in bringing this about. While Barger had full information of the amount of John W. Corwine's liabilities, it does not appear from the testimony that any of Corwine's children knew anything about his indebtedness, except to the extent that the purchase money paid by them for the land had provided for or extinguished it, and there is some ground for the supposition that Corwine in-

tended in the course he pursued to provide for his aliquot share of the debts upon which he was surety jointly with others. He, however, died June 22, 1895, before the issues in this suit had been made up, and did not testify.

The bill of complaint attacked the good faith of the several conveyances of John W. Corwine to his children. It charged that the consideration for each conveyance, if paid at all, was grossly inadequate; that the conveyances were made to cheat, hinder, and delay the creditors of John W. Corwine, and that they were concealed and withheld from the records for the fraudulent purpose of giving to John W. Corwine a fictitious credit, and were designed and intended to be the means of defrauding the complainant,—all of which was expressly denied in the answers of the defendants. The prayer of the bill was to the effect that the deeds might be set aside, and the lands be subjected to the payment of the complainant's debts.

The court below sustained the complainant's views of the transactions, pronounced the deeds to be fraudulent, and decreed a sale of the one undivided one-fourth interest of John W. Corwine in all of the said lands, unless within a time named in the judgment the appellants should pay the complainant's debt and those of certain other creditors, who, in various ways, had intervened or become parties to these proceedings. 89 Fed. 774, 95 Fed. 54. No provision, however, was made in the decree for any equitable allowance for the improvements. To reverse that judgment this appeal has been prosecuted by the children of John W. Corwine.

George K. Nash, Miller Outcalt, and J. B. Foraker, for appellants.

Albert Douglas and J. W. Mooney, for appellees.

Before LURTON and SEVERENS, Circuit Judges, and EVANS. District Judge.

EVANS, District Judge, after stating the facts, delivered the opinion of the court.

Upon the case as presented by the record, several questions of great importance to the parties arise, and each has received the very careful consideration of the court.

1. The evidence has failed to satisfy us that the consideration for the conveyances from John W. Corwine to his children was inadequate. It seems to the court upon the testimony that, under the conditions then existing, the consideration paid for this undivided interest in the land was not inadequate at all, and certainly not so grossly so as thereby to taint any of the conveyances with fraud. The children of the grantor probably paid more than could have been obtained for this undivided interest from any other purchaser at that time and under all the circumstances then surrounding the parties. Nor can we doubt that the consideration was in good faith paid to the full extent agreed upon. It is equally certain that the entire sum thus paid was actually devoted to the satisfaction of debts upon which John W. Corwine was bound as surety for the National Cotton Seed Oil & Huller Company. These facts make it obvious that though there was a manifest preference of certain creditors, which is permitted by the laws of Ohio, there was no actual fraud in the transaction, although it occurred between a father and his children,—a fact which always calls for the careful scrutiny of the court. The close examination of the testimony which we have given in this case has led us to the conclusion just stated.

2. It is also clear from the testimony that, whatever the cause of the delay, there was no agreement nor understanding between the

grantor and any one of the grantees that the deeds should be withheld from record. There appears to be no evidence to show that John W. Corwine, in making these conveyances to his children, entertained any purpose to hinder, delay, or defraud his creditors, and certainly there is no testimony to show that any of his children knew of such intention if he had it, nor that any one of them intended to aid him in such purpose. So far as the evidence manifests the intention of John W. Corwine at all, it shows that he intended, not to defraud but to prefer some of his creditors, to the exclusion of others, which, as we have seen, it was lawful for him to do under the laws of the state of Ohio. Cross v. Carstens, 49 Ohio St. 548, 31 N. E. 506. His children purchased and paid for his property, and thus enabled him to consummate this purpose. The absence of knowledge upon the part of his children of a fraudulent purpose of the father, coupled with the fact that a valuable consideration was in good faith paid by them for the land, makes it quite clear, upon the authorities, that at least three of the appellants should not be required to surrender to Corwine's creditors the lands they had purchased and paid for, and the value of which they had already seen fully devoted to the payment of his debts as far as it would go. Jones v. Simpson, 116 U. S. 609, 6 Sup. Ct. 538, 29 L. Ed. 742; Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552; Bamberger v. Schoolfield, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374. This being so, and especially in view of section 4134 of the Ohio Statutes, and the authorities presently to be noticed, the mere withholding from the records by W. B. Lee, at the instance of John W. Barger, of the several deeds to Mary W. Lee, Rachel M. Foster, and James D. Corwine, without their knowledge or direction, was not, in our opinion, a fraud upon any creditor of John W. Corwine. The title of Corwine to the land passed to those grantees upon the delivery of the deeds. They did not authorize John W. Barger to represent them, and in fact he did not represent them, nor act for them, when, for purposes of his own, and probably those of the corporation he represented, he induced W. B. Lee to withdraw from the recorder's office of Ross county, before their registration, the deeds to Mrs. Barger and Mrs. Lee, which had been sent there for record, nor when he induced Lee, for like reasons, to withhold from the records the deeds to the lands in Pike county. No creditor was thereafter induced, either by Mrs. Lee, Mrs. Foster, or James D. Corwine, or by any one acting for them, to loan money or to renew notes theretofore given or indorsed by their father. They had purchased and paid for their father's interest in the lands, the deeds therefor had been executed and delivered to them, and unless they withheld them from the records, and actively concealed them for the purpose of giving to their father a fictitious credit, and unless that purpose was so carried into effect as thereby to induce some of the complainants or cross-complainants to loan money or disadvantageously to change their condition respecting some debt or right against Corwine, then no party to this suit has any reason to complain because their deeds were not put to record. There is no proof of any such purpose, or of any such conduct upon the part of either of these three appellees,

nor of any one authorized to act for them. It therefore results that the judgment of the circuit court against the appellants Mary W. Lee, Rachel M. Foster, and James D. Corwine, and adjudging the conveyances to them, respectively, to be fraudulent and void, was erroneous, and that instead of such judgment being rendered the bill of complaint and the cross bills against them should have been dismissed.

3. We have been constrained, however, to reach a different conclusion respecting the appeal of Mrs. Barger, not because of any wrongful conduct or acts of her own, but for the reason that she must be considered to have delegated to her husband, John W. Barger, power and authority to act for her respecting the deed and all that pertained to it, and he so exercised that authority as to give to the complainant and the cross complainants, as creditors of her father, an equitable claim to the interest in the land which the latter conveyed to her, which must be treated as superior to her own rights therein.

Section 4134 of the Ohio Statutes is in the following language:

"All other deeds and instruments of writing for the conveyance or incumbrance of any lands, tenements or hereditaments, executed agreeable to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record the same shall be deemed fraudulent, so far as relates to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of such former deed or instrument."

It cannot be doubted that it is the purpose of this statute to require that deeds to land shall be recorded, but no time is fixed by the section within which it must be done. It is expressly provided, however, that until the deed is so recorded it shall be deemed fraudulent, so far as it relates to a subsequent bona fide purchaser who has no knowledge of the former deed. But not only upon its face, but upon the familiar maxim, "Expressio unius est exclusio alterius," this protective purpose of the statute is limited to subsequent bona fide purchasers only. It is not in terms extended to creditors. And the supreme court of Ohio, in its decisions construing this statute, have left no doubt upon the subject. Stewart v. Hopkins, 30 Ohio St. 502; Irvin's Lessees v. Smith, 17 Ohio, 226. As none of the complainants or cross complainants are subsequent bona fide purchasers, they would be entitled to no relief in this case were it not for certain equitable principles which operate upon the ground of estoppel, and which have found an authoritative expression in the opinion of the supreme court of the United States in the case of Blennerhasset v. Sherman, 105 U. S. 100, 26 L. Ed. 1080. It was there held that a mortgagee who knows of the insolvency of the mortgagor, and who, for the purpose of giving the former a fictitious credit, actively conceals the mortgage, does not put it upon the records, and who represents the mortgagor as having a large estate and unlimited credit, does such acts as render the mortgage void as against the creditors of the mortgagor to whom the representations were made. We think this principle undoubtedly applies to a sale as well as to a mortgage, and particularly where the representations operate as an in-

ducement to lend money or to suspend legal remedies by the renewal of notes which cover previous loans. We entertain no doubt that the principles then announced by the supreme court must control our judgment upon the appeal of Mrs. Barger, if the facts are such as to bring this case within their operation, and we proceed to inquire whether that is so.

The testimony leaves no doubt in the minds of the court upon the following propositions of fact, namely, that Mrs. Barger, then in great distress by the bedside of her mother, who was soon to die, delegated authority to her husband, John W. Barger, to act for her in all matters pertaining to the entire transaction; that he did act for her, and that by his urgent solicitation W. B. Lee was induced to telegraph to the recorder of Ross county for the return of the deeds sent there to be recorded, and before it was done; that he did this as soon as he was informed that Lee had sent them for that purpose, and shortly after the deeds were executed; that, by equally urgent and timely solicitation, he induced Lee to keep from the records the deeds to the lands in Pike county; that previous to the making of the deeds he, as representative of Corwine and of the corporation the failing fortunes of which he was trying to sustain, was fully aware of the extent and nature of the liabilities of John W. Corwine as surety of the National Cotton Seed Oil & Huller Company, and of the utter inability of both that concern and of Corwine to discharge them; that after he had induced Lee to keep the deeds from the records he knowingly left in the loan agent Lindley's hands the authority to represent, and the means of representing, to the then existing creditors of Corwine, and to others who soon afterwards became such, that Corwine was solvent, supporting and fortifying it by the previous written statement of Corwine as to his property; that in this way Barger obtained, or assisted in obtaining, new loans for the company, upon which Corwine was accepted as surety, and the renewal of certain outstanding notes, upon which he was likewise bound, all after the deeds were, to Barger's knowledge, delivered to the grantees; that Barger did not in any way make known the fact of these conveyances either to Lindley or to the parties with whom he was dealing, but, on the contrary, that Barger, after the deeds were made, assured the agent of appellees, Rockhold, Brown & Co., that the notes they were expecting to buy were perfectly good, although he knew that they largely relied upon the financial ability of John W. Corwine to make them so. It also seems to be certain that Barger did these things for the sole purpose of enabling his corporation, principally upon the credit of Corwine, to continue to obtain new loans or renewals of the character mentioned, and that these influences operated until the chance to get such favors was destroyed by the burning of the plant of the corporation on November 7, 1894. He then very promptly advised the recording of all the deeds, and it was done at once.

Upon the evidence it seems manifest that Barger availed himself of the authority delegated to him by his wife to obtain a fictitious credit for John W. Corwine by representing him to be perfectly

good, and by actively concealing the deed to her, and by procuring the withholding from the records, not only of that deed, but of the others. For this, however innocent she may in fact be (and there is no proof that she knew anything about it), Mrs. Barger is so far responsible for the acts of her husband, acting as her agent, as to be prevented and estopped from claiming the interest in the land conveyed to her by her father as against the complainants and cross complainants, whatever may, as between the latter, be hereafter determined to be their respective priorities in right. The deed to Mrs. Barger must, upon the grounds stated, be held to be void as to Corwine's creditors, and we think the facts upon which this result depends have been established by the proof with all the clearness demanded by the rules laid down in the case of Brant v. Iron Co., 93 U. S. 336, 23 L. Ed. 927. The creditors of John W. Corwine, having been induced to do what they did by means of the conduct of the agent of Mrs. Barger, have a better right to the protection of the court than she has, not only upon grounds of estoppel, but also upon the familiar principle that where one of two innocent persons must suffer that one shall suffer who furnished the opportunity for inflicting the injury.

Other questions have been raised and argued, but, while we have examined them, we do not deem it needful to discuss them in this opinion.

We conclude that the judgment of the circuit court against Keziah D. Barger was proper, with this exception: Inasmuch as the deed to her was void as to appellees, the judgment should have directed the ascertainment of the enhancement of the value of the interest of John W. Corwine in the land by reason of the lasting improvements put thereon by her, and should have directed that any sale under the judgment of the interest in the land conveyed to her by him should be subject to a charge in her favor of one-fourth of the enhancement of the value of said interest as thus ascertained. As to her, the judgment should be and is modified to that extent, but it is otherwise affirmed. Except to the extent indicated as to appellant Keziah D. Barger, the judgment of the circuit court is reversed, with costs, and remanded, with directions to dismiss the bill and cross bills as against the appellants Mary W. Lee, Rachel M. Foster, and James D. Corwine, and otherwise to proceed pursuant to this opinion. As between appellant Keziah D. Barger and the appellees, no costs are adjudged.

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## McNAMARA et al. v. HOME LAND & CATTLE CO. et al.

(Circuit Court, D. Montana. December 10, 1900.)

1. REFERENCE—EXCEPTIONS TO FINDINGS OF REFEREE.

Where a cause is, by consent of parties, referred to a master to hear the testimony, and report findings of fact and conclusions of law thereon, exceptions to any part of his report should be submitted in the first instance to the master for his consideration and action, and the court will not consider exceptions taken for the first time after the master has filed his report, and which involve a review of all the evidence taken.

2. SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF STOCK—BREACH.

Defendant contracted to sell and deliver to complainants its herd of cattle in Montana at a uniform price per head. The contract stipulated that 9,000 head should be of a certain class and age, and that for any shortage in that number not delivered before a fixed date defendant should pay complainants $20 per head. A few days before the expiration of such time defendant was making a delivery under the contract, and after delivering a part of the number on hand demanded payment therefor before making further delivery. Complainants refused to make such payment, except on allowance of the $20 per head for the shortage under the 9,000 delivery, and defendant thereupon refused to make any further delivery. At that time defendant had delivered less than 7,200 head of the 9,000, and did not have the cattle to complete the delivery of the 9,000, nor intend to do so, which fact was known to complainants. Defendant had also assigned the money to be received under the contract to a bank in Missouri, and immediately upon payment such money passed out of its possession or control. *Held* that, under such circumstances, complainants were justified in their action, and were not guilty of a breach of the contract which precluded them from enforcing specific performance as to the stock remaining undelivered.

3. SAME—JURISDICTION OF EQUITY—ADEQUATE REMEDY AT LAW.

A Missouri corporation, doing business in the state of Montana, which has not sufficient assets in that state with which to respond in damages for the breach of a contract for the sale of personal property, may be treated as insolvent in that state, for the purpose of holding that an action at law for breach of the contract is an inadequate remedy, and of supporting a suit in equity for a specific performance of the contract, as the complainant should not be compelled to resort to a foreign jurisdiction to collect any judgment he might recover.

In Equity. Suit for specific performance of a contract for the sale of stock.

H. G. McIntire and Wm. Wallace, Jr., for plaintiffs.

Cullen, Day & Cullen, J. W. Strevell, and F. C. Sharp, for defendants.

KNOWLES, District Judge. This suit was originally brought by the plaintiffs against the defendants in the district court of the Tenth judicial district of the state of Montana, in and for the county of Valley, and by a proper petition and proceedings was removed by the defendants into this court. The Home Land & Cattle Company is a corporation organized under the laws of the state of Missouri. The case was brought to compel the specific performance of a contract for the sale and delivery of certain personal property, described in the bill herein, and situated within the state of Montana. The issues having been framed and joined, the case was, upon the request and with the consent of all the parties, referred by the court to Hon. Henry N. Blake, as a master, to hear the testimony and proofs of the respective parties, and report the same to the court, together with his findings of fact and conclusions of law thereon, according to the rules and practice of this court in such cases made and provided. Thereafter the master heard the testimony and proofs of the parties, and reported the same to this court, together with his findings of fact and conclusions of law thereon. The complainants, upon the coming in of the master's report, filed certain exceptions to the same as to the insufficiency thereof with regard

to all the facts found; the complainants contending that the master had not found all the facts upon all of the evidence adduced before him. Seven exceptions were specifically made and taken by the complainants, who also moved that the cause be again referred to the master, with directions to make additional findings. The defendants also made and filed certain exceptions to the findings of fact reported by the master, said exceptions being eight in number. The defendants also excepted to the conclusions of law drawn by the master from the facts found. These exceptions on the part of both parties were not presented to the master for his consideration, but were filed in this court in the first instance, and after the coming in of the master's report. The consideration of these exceptions by the court would require it to review all of the evidence in the case, and determine whether the findings of the master were justified and supported by it.

The cause was, by consent of all the parties, referred to the Honorable Henry N. Blake, as a master, not only to hear the testimony, but to make findings of fact and conclusions of law thereon. The plain and manifest object of the reference so made was to lighten the labors of the court, and avoid rehearing the whole case upon the evidence. The exceptions of the parties to the report, or any part thereof, should have been first submitted to the master for his consideration and action, so that he might know in what particular his report was objectionable, and to enable him to correct his errors and reconsider his opinion. I think this matter of the consideration of these exceptions by the court in the first instance comes fully and fairly within the rule and the principles laid down in the following cases: Story v. Livingston, 13 Pet. 359, 10 L. Ed. 200; Kimberly v. Arms, 129 U. S. 524, 9 Sup. Ct. 355, 32 L. Ed. 764; Railroad Co. v. Gordon, 151 U. S. 290, 14 Sup. Ct. 343, 38 L. Ed. 164; Manufacturing Co. v. Camp, 15 C. C. A. 226, 68 Fed. 68; and a large number of other cases cited therein.

If the practice as thus established were different, or as counsel for defendant insist that it should be, then there would and could be nothing gained by a reference of an equity cause to a master, and that useful and efficient adjunct and officer of the courts of equity would be functus officio. The exceptions of all the parties are overruled, and the master's report is confirmed.

The court being bound by these findings of the master, the question is presented as to whether, considering the merits of the case, the complainants are entitled to a decree of specific performance. The merits of the cause have been sufficiently and extensively argued by the respective counsel for the parties herein, and the court feels called upon to determine the same. From the findings of the master, it fully appears that the defendant the Home Land & Cattle Company, a Missouri corporation, contracted to sell and deliver to the complainants its herd of cattle in Montana, estimated to be 30,000 head, more or less, for the agreed price of $25 per head. As part of the contract it was stipulated that 9,000 head of 3 year old steers and spayed cows of 4 years old and upwards should be delivered to the complainants as a part of this herd, and should the de-

fendant the Home Land & Cattle Company fail to deliver to complainants this number of steers and spayed heifers by November 1, 1897, said defendant should pay to complainants $20 per head for all such as should fall below said number of 9,000. This contract is made a part of the report, and is marked "Exhibit A." The master finds, among his conclusions of law, that the paragraph marked "9th," of the terms and conditions of said contract (Exhibit A), is a material part thereof, and that complainants relied upon the guaranty and agreement therein contained. This conclusion seems to be justified from an inspection of the contract and the findings of fact made by the master. The master also finds that the complainants depended upon the deliveries of the cattle mentioned in said contract (Exhibit A) to furnish cattle under beef contracts to the government Indian reservations. The master further found as follows:

"That the complainants have received under said contract (Exhibit A), from the defendant the Home Land & Cattle Company, 7,135 steers of the age of 3 years and up, and spayed heifers of the ages of 4 years and up, of the 9,000 steers and heifers specified in the ninth clause of the terms and conditions of the said contract (Exhibit A), and that 1,865 of said steers and heifers have not been delivered to the complainants under said contract by said defendants or either of them." See finding No. 9.

The master also found:

"That upon the 18th day of October, 1897, the Home Land & Cattle Company notified the complainants, by a telegram, that it would deliver to them upon the 21st instant (October), at Oswego, in the state of Montana, 820 steers, 631 stock cattle, and 500 head of horses (see Exhibit C), and that the defendant the Home Land & Cattle Company, upon the 21st and 22d days of October, 1897, delivered to the complainants 933 head, consisting of 820 steers and some stock cattle, to the value of the sum of $23,325.00; that the defendant the Home Land & Cattle Company was then prepared to deliver to the complainants, under said contract (Exhibit A), 457 head of stock cattle, and 500 head of horses, but refused to deliver the same or any part thereof unless the complainants first delivered to said defendants a draft for said sum of $23,325.00 in payment for said 933 head; that the complainants then refused to deliver to the defendants, or either of them, a draft for said sum, or any other sum, but offered to pay for said cattle and horses upon their delivery, provided that said defendants, or either of them, would pay to the complainants the amount due for the shortage in the number of said steers and spayed heifers, of $20.00 per head: that the complainants then presented to the defendants a statement of the accounts between the parties, including said claim for shortage, and tendered the defendants the sum of $9,675.00 in full payment of said 933 head, and said 457 head of stock cattle, and said 500 horses and 113 strays, to wit:

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|---|---|
| 933 head, at $25.00 | $23,325 00 |
| 457 head, at $25.00 | 11,425 00 |
| 113 head of strays, at $25.00 | 2,825 00 |
| 500 head of horses, at $20.00 | 10,000 00 |
| | $47,575 00 |
| Shortage, 1,895 head, at $20.00 | 37,900 00 |
| Balance due defendants | $ 9,675 00 |

"And the said defendants refused to accept said tender of the sum of $9,675.00, or settle said claims of the complainants on account of the shortage, and refused to deliver to the complainants the said horses, or said herd of said 457 head of stock cattle. That the defendant the Home Land & Cattle Company finished its round-up for the season of 1897 upon the 22d day of October,

1897, and had not made any preparation for, and did not intend to make any further deliveries under, the said contract (Exhibit A), on or before the first day of November, 1897. That the defendant the Home Land & Cattle Company did not have upon its range in said state of Montana, on the 22d day of October, 1897, any number exceeding 300 head of said steers, of the ages of three years and up, and spayed heifers of the ages of four years and up, and that the plaintiffs then knew that the defendant the Home Land & Cattle Company could not deliver said 9,000 head of steers and heifers specified in said contract (Exhibit A), and claimed that the shortage therein would be 1,895 head."

It is claimed by the defendants that because of complainants' refusal to pay the said sum of $23,235 for cattle delivered that complainants committed a breach of the contract in regard to the sale and delivery of said property, and defendant the Home Land & Cattle Company was not required to deliver said 457 head of said stock cattle, and the 500 head of horses, under the terms thereof. It appears, however, that the defendant had not the ability and did not intend to comply with that contract itself, and deliver the full amount of 9,000 head of steers 3 years old and up, and spayed heifers 4 years old and up; that it had completed its round-up and gathering of cattle for that season, and that it did not have the 1,865 head of that class of cattle, nor more than 232 head of the same, and that this was known to the complainants on the 22d day of October, 1897; that said defendant the Home Land & Cattle Company would not comply with its contract, and make good the above shortage. Under these circumstances, were the complainants required to pay this sum of $23,235 before they could demand the delivery of said 457 head of stock cattle and the 500 head of horses which the defendant the Home Land & Cattle Company had in its possession and was prepared to deliver?

It appears from the findings of the master that, outside of this 457 head of stock cattle and 500 head of horses, the aforesaid defendant had, upon the range in Montana, 433 head of cattle classified as follows: 232 steers, 165 cows, 42 bulls, and 4 heifers; the 67 calves mentioned in the findings being for the most part calves of 1897. It further appears from the findings of the master that all money to be paid on these cattle had been assigned to the defendant the National Bank of Commerce of St. Louis, Mo., and that the same would pass out of the control of the defendant the Home Land & Cattle Company as soon as paid. This contract was not what is termed a "severable contract." It was not specified how many cattle were to be delivered at any one time, other than in train-load lots. It was contemplated that all of the steers and spayed heifers should be delivered by the 1st day of November, 1897. The case of Cherry Val. Iron Works v. Florence Iron River Co., 12 C. C. A. 306, 64 Fed. 575, and the cases cited therein, fully support the doctrine that the contract under consideration here is not a severable contract. The defendant the Home Land & Cattle Company did not demand a rescission of the contract on the ground or account of the failure to pay this money, and it is difficult to see how it could well have been rescinded under the circumstances presented. This was a large transaction. Complainants had received some 16,-

000 head of cattle, and paid therefor to the defendants $400,000. I do not think, under these circumstances, that the complainants were required, as a matter of law or equity, to pay over this sum of $23,235 before asking for the delivery of the stock cattle mentioned in the bill. It should be noted that the Home Land & Cattle Company really had no right to demand the payment of the money. The money had been assigned to the National Bank of Commerce. The National Bank of Commerce had no right to the cattle the delivery of which was withheld. It was not proper, therefore, for the cattle company to demand this payment of money to another when it did not intend and had not the ability to comply with its contract, when the result of this payment would render the complainants unable to recover in this jurisdiction the compensation provided for in the contract for the failure to deliver the full number of 9,000 head of steers and spayed heifers.

It is evident that this construction of the contract contended for on the part of the said cattle company would force the complainants to seek redress for said cattle company's breach of this contract in the state of Missouri, and that the complainants could not have done so with any assurance of obtaining complete redress in Montana. It is an important consideration in this case as to whether sufficient equities have been presented to justify this court in awarding specific performance of this contract. The master has found that the cattle company is solvent. He has found, however, that the property of said company chiefly consists of an indebtedness due it from the St. Louis Stamping Company, a Missouri corporation, and doing business in that state. What the nature of this indebtedness is, and how it is evidenced, does not appear. When such indebtedness becomes due is also a matter not in evidence, or determined by the findings of the master. A party should not, under the circumstances presented by this case, be compelled to seek a foreign jurisdiction to collect damages for the breach of a contract when he has in his own hands the means of remunerating himself therefor. Johnson v. Brooks, 93 N. Y. 343. In the case of Clark v. Flint, 33 Am. Dec. 733, it is held that, where the remedy at law would be against a person actually insolvent, such legal remedy would not be adequate, and would be a ground for equitable jurisdiction. In 22 Am. & Eng. Enc. Law, p. 992, it is stated that the insolvency of a defendant is a ground for equitable relief, where the specific performance of a contract for the sale of chattels is presented. As far as the defendant the Home Land & Cattle Company is concerned, I think it may be treated as if insolvent in Montana. It had not the means wherewith to liquidate complainants' claims on account of the deficiency of the cattle above mentioned, if complainants paid to the defendant bank the amount due for the last delivery of cattle made to them. The cattle gathered by the defendant the Home Land & Cattle Company in the year 1898 were upon the range, and scattered, and it would seem unjust to require a creditor to hunt them up in order to render them subject to his demand.

With this view of the law and the facts presented in this case, I have reached the conclusion that sufficient equities are presented to entitle complainants to the relief prayed for in their bill. It is therefore ordered that complainants have a decree for the specific performance of this contract as to the cattle and horses described in the bill.

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## EARLE v. ROGERS et al.

(Circuit Court, E. D. Pennsylvania. December 11, 1900.)

No. 13, April Term, 1899.

NATIONAL BANKS—LIABILITY FOR ASSESSMENTS—CONSTRUCTION OF WILL.

A testator directed by his will that a daughter's share in his estate should remain in the hands of his executors, and be invested by them, and the income paid to the daughter during her life, and at her death the part of the estate so "held in reserve" by the executors should revert to the general estate. The executors set apart as a portion of the daughter's share certain shares of stock in a national bank held by the testator, and caused the same to be transferred on the books of the bank to themselves as "trustees." *Held*, that the legal title to such shares devolved upon them as executors, and they had no power to devest themselves of such title by any transfer, and that an action to recover an assessment on the stock was properly brought against them as executors, and especially where the assessment was not made until after the daughter's death.

On Motions for Judgment Non Obstante Veredicto and for a New Trial.

Asa W. Waters and Charles Biddle, for plaintiff.

Henry T. Dechert, for defendants.

DALLAS, Circuit Judge. This action was brought to recover the amount due upon 10 shares of stock of an insolvent national bank under an assessment duly made by the comptroller of the currency. The plaintiff is the receiver of the bank, and the defendants are Talbot M. Rogers and Roland C. Rogers, executors of the will of Joseph T. Rogers, deceased. The defense is that the defendants should have been sued as trustees of Anna R. Ewing under the will of said Joseph T. Rogers, and not as executors. In other words, it is insisted that the liability sought to be enforced is that of a particular trust estate, and not of the testator's general estate. The shares in question stood in the name of the decedent at the time of his death, and it is necessarily conceded that when a stockholder in a national bank dies his administrator or executor ordinarily succeeds to his title to, rights in, and liability upon the shares which he held; but it is contended that this rule is not applicable in the present case, because the will of Joseph T. Rogers made a disposition of these shares, which, it is claimed, vested the title to them in the defendants, not as executors, but as trustees; and that they, in their capacity as executors, had in fact transferred them to themselves as "trustees." The use of the word "trustees" in making the trans-

fer above mentioned was sufficient notice to the creditors of the bank that the transferees were not owners of the stock in their own right; but it could not and did not determine for whom or for what estate they held it. Neither was the receiver concluded by it. Its only effect was to put him upon inquiry; and if on investigation it appeared that the title, notwithstanding the transfer, really remained in them as executors, the suit was properly brought against them as such. Consequently, we are brought to consider that portion of the will of Joseph T. Rogers which it is contended took these shares out of the estate which, as executors, the defendants had in charge. The clause relied upon is:

"That part of my estate which shall, on final settlement, be found to be coming to my daughter, Anna R. Ewing, to remain in the hands of my executors, to be invested in stocks, bonds, or lands, to the best advantage, for her benefit, she to draw the interest and dividends as long as she lives, and at her death this part of her estate held in reserve by my executors to revert back to my estate; she having only a life estate in what was held in reserve by my executors."

It is here expressly provided that the part of the testator's estate referred to should remain in the hands of the "executors,"—be "held in reserve" by them,—and that the daughter named would be entitled to the interest and dividends only. She was not given the right of possession and the legal title, but only the benefits to be derived from the payment of dividends; and these she was to receive, not through a trustee, but from the executors. The stock was to remain in their hands, and the legal title to it, which was devolved upon them as executors, they could not effectually transfer to themselves, or to any other persons, as trustees. Blackmore v. Woodward, 18 C. C. A. 57, 71 Fed. 321; Tourtelot v. Finke (C. C.) 87 Fed. 840. But even if the defendants could be said to have held this stock at any time as trustees, they certainly did not so hold it when the assessment of the comptroller was made on March 28, 1898; for Anna R. Ewing had died upon January 8, 1898, and then, if not before, they certainly held it as executors, and this by title which vested in them at the time of the testator's death, and which they cannot, in this action, repudiate or disclaim. The case does not materially differ from that which would have been presented if Joseph T. Rogers had been living, and had held the stock in his own name (Rev. St. § 5152), but subject to a legal obligation to pay over the dividends to Anna R. Ewing during her life; and it seems to me to be clear that in such case Joseph T. Rogers, and not the estate of Anna R. Ewing, would be liable upon an assessment made after her death. For the reasons I have indicated, I am of opinion that the defendants were rightly sued as executors, and therefore the defendants' motions for judgment non obstante verdicto and for a new trial are denied.

## FLINT & P. M. R. CO. v. McPHERSON.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1900.)

No. 850.

PLEADING—VARIANCE—WAIVER OF OBJECTION.

Under the liberal provisions of the Ohio Code which apply to actions at law in the federal courts, where a case has been fairly submitted to the jury upon the evidence introduced without objection, the judgment will not be reversed because such evidence is at variance with the allegations of the pleadings, which might have been amended to conform thereto as of right had seasonable objection been made.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

After dark on the evening of the 19th day of February, 1898, at Sanford, Mich., the plaintiff below, while in the discharge of his duties as a brakeman for defendant, fell or was knocked from one of its trains against a pile of wood which had been placed close to the track of the railroad for shipment. The plaintiff was an experienced brakeman, and had been in the defendant's employment as such on one of its freight trains for some months. The pile of wood was about 105 feet long, and extended along the north siding of the defendant's road at Sanford, and within less than 6 feet from the north rail. The engine had been detached from its train, and had come onto this siding for the purpose of taking out a loaded car which stood thereon some distance beyond two other cars on the same track; and the plaintiff, having opened the switch to let the engine on the siding, assisted in coupling the cars which stood at various distances from the switch, and, when all were coupled, had got upon the one of them nearest to the engine, which then moved towards the main track. Ladders for ascending and descending were located at each end of the car, and on the left-hand side of the end as the car was approached. This well-established and now admitted fact located the ladder on the rear of the car at a place different from where the plaintiff stated it to be in his pleadings. The night was dark, and the snow was falling. When the engine proceeded to move off the siding with the three cars thus attached to it, the plaintiff, with his lantern, being, as stated, on the top of the car nearest to the engine, started to get off in order to throw the switch, as was his duty, and in attempting to descend the ladder, in some way, which he could not with entire clearness explain, fell or was knocked off. Some of the sticks of wood projected a considerable distance beyond the face of the pile, and thus probably came within less than eight inches of a car passing over the track. McPherson was thrown against the woodpile, and from thence towards the train, where one arm, falling under the cars, was so nearly cut off as to require amputation. The plaintiff had seen the woodpile several times in passing through Sanford on the train on the main track, but had never observed it closely, and did not know its exact distance from the rails. The rules of the defendant company required that wood for shipment should not be piled nearer to the track than six feet from the rail, but the station agent had permitted in this instance a violation of that rule. No one except the plaintiff saw the accident, and his memory was—perhaps naturally—much confused by the rapid and unfortunate succession of dangerous events in which he was injured. At the trial below there was a verdict and judgment for the plaintiff, and the railroad company has brought the case here.

Robert Tucker, for plaintiff in error.

Frank A. Quail, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge, after stating the facts, delivered the opinion of the court.

Although there has been an elaborate argument in this case of quite a large number of assignments of error, a very careful consideration of them and of the whole record leads us to the conclusion that only one phase of the case need be considered in this opinion. It is that in which the plaintiff in error complains that the court below erred in its charge to the jury in permitting them to determine whether the injury to the plaintiff was the result of extending or protruding his body beyond the edge of the car when he was attempting to get off of it on his way to the switch, and whether his body was thereby brought in contact with any of the sticks of the wood which had been piled in dangerous proximity to the track. It is insisted that the learned judge, in charging the jury, erroneously assumed that there was evidence to support the language he used in this connection. It is also insisted that there was no proof, and no claim by the plaintiff in his pleading, that the accident occurred in that manner; and that it was impossible, notwithstanding the plaintiff's statement in his pleading to that effect, that the ladder by which he descended was on the right side of the rear end of the car. It is true that the plaintiff could not very clearly state the exact manner in which the injury occurred, but this is not surprising under the circumstances, and the jury evidently concluded that the accident occurred in the way indicated. We do not think that this case, upon the record, can be determined upon such technical niceties as the plaintiff in error invokes. We think, on the contrary, that the evidence admitted of the construction allowed to be given to it by the charge, and that the court left it to the jury so to construe the evidence if they chose. There was no error in this, as the determination of the question was left entirely with them. Indeed, the court below, in its charge, seems very clearly to have submitted to the jury all the questions raised by the evidence. Under the very liberal practice in Ohio (to which the statute required the circuit court to conform) we think that, although the testimony, which was in fact admitted, took a wider, and possibly a different, range than the pleadings, in strictness, might have warranted, still that, under the authority of cases like Hoffman v. Gordon, 15 Ohio St. 218, it was not improper to leave the case to their determination upon the evidence actually before them. In that case it was said:

"The evident object of the Code is to vest in the court a discretion, where it can be done without surprise or injury, to try the case upon the evidence, outside of the pleadings; and, if objection be made, to allow the pleadings to be conformed to the evidence at once, and without terms. When a trial is so had, without objection, we are only carrying out the spirit of the Code by refusing to reverse the proceedings on account of the variance. Had this evidence been objected to when offered, it is quite apparent that the plaintiff would have asked and obtained unconditional leave to amend. To allow the defendant, after he has suffered the evidence to go to the jury without objection, to reverse the judgment on that account, would be manifestly unjust to the other party."

The testimony clearly shows that the ladder was on the left, and not on the right, side of the rear end of the car, but there was no objection to the introduction of this testimony upon the ground of variance or otherwise, and the case afterwards proceeded with this fact established.

It seems to the court that there is nothing which calls for special observation upon the other assignments, although we have carefully examined them all. The one we have noticed not being well taken, the judgment is affirmed.

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## BALTIMORE & O. R. CO. v. CAMP.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1900.)

No. 829.

1. PLEADING—VARIANCE—NEW MATTER OF DEFENSE.
Under the provision of Rev. St. Ohio, § 5070, that the answer shall contain "a statement of any new matter constituting a defense," a railroad company sued for damages for a personal injury to an employé cannot prove in bar of the action a contract by which plaintiff was required to elect whether he would receive indemnity for his injuries from a fund created for that purpose or proceed against the company for damages, and that he elected to take benefits from the fund, and in fact received payments therefrom, where such defense is not pleaded, and on objection by plaintiff to the evidence there is no offer to amend.

2. MASTER AND SERVANT—ACTION FOR PERSONAL INJURY—QUESTIONS OF FACT.
Whether the engineer of a freight train complied with a rule of the company requiring him to apply for and to get orders or a clearance card before leaving a particular station, where he applied for and received orders three-quarters of an hour before leaving the station, and acted upon such orders without making further application, is a question of fact depending upon the circumstances of the particular case, and he cannot be said to have been guilty of a violation of such rule as a matter of law.

3. SAME—INSTRUCTIONS.
In an action by the engineer of a train against the railroad company to recover damages for an injury received in a collision alleged to have been due to the negligence of the train dispatcher, an instruction was properly refused which not only took from the jury the question of whether plaintiff was guilty of a violation of the rules, which was one of fact, but which further authorized a verdict for defendant upon a finding that the conductor had violated the rules, although the jury might further find that the negligence of the train dispatcher, either independently or concurrently with that of the conductor, was the proximate cause of the injury.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

J. H. Collins, for plaintiff in error.

S. M. Hunter, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. This case has heretofore been twice before this court. The facts out of which the action arose have been fully stated in previous opinions, reported, the first, in 13 C. C. A. 233, 65 Fed. 952, 31 U. S. App. 213, and the second in 26 C. C. A. 626,

81 Fed. 807, 54 U. S. App. 110. After a third trial, which also resulted in a verdict and judgment for the plaintiff, the railroad company has again brought the case here, and has made various assignments of error. Some of these raise the question of whether there was evidence sufficient to authorize the submission of the case to the jury at all; others, the question of whether the pleadings should have been amended; and others, whether the court below should have granted a new trial,—but these (especially in view of our previous decisions) are so obviously insufficient to warrant a reversal that we need not further allude to them. Indeed, among the specifications of error there appear to be only three which seem to require any detailed treatment.

1. The court below refused to permit the plaintiff in error to prove that at the time of the injury to Camp there was an existing contract between him and the railroad company, whereby, upon certain payments of dues, an indemnity fund had been created for the employés of the railroad company, out of which, in case of injury, Camp, as an employé, might, at his option, elect either to take indemnity for his injuries out of this fund, or else to claim it from the company itself, but which did not permit him to do both; and the court further refused to permit the introduction of evidence tending to show that after the injury, and before the action was brought, Camp had elected to take, and had in fact received, payment of certain installments, pursuant to the contract, out of this indemnity fund; and which facts, it is contended, the court should have permitted the railroad company to prove in bar of Camp's right to recover in this suit. The plaintiff below objected to the introduction of this testimony, and each part of it; and to the refusal of the court to permit it to go to the jury the railroad company excepted, and this ruling of the court is the basis of the second error assigned.

Section 5070 of the Revised Statutes of Ohio provides:

"The answer shall contain: 1. A general or specific denial of each material allegation of the petition controverted by the defendant. 2. A statement of any new matter constituting a defense, counterclaim or set-off, in ordinary and concise language."

An examination of the pleadings in the case will show that there was no averment in the answer of any new matter constituting a defense to which the proposed evidence was in any way applicable. There was, therefore, no issue upon the subject, and no averment in the answer to which the proposed evidence would be relevant, and the court cannot doubt that its rejection by the trial court was entirely proper. Whatever degree of liberality may have been reached in the practice in Ohio, the plaintiff was still entitled to insist upon his rights under the section of the statute just copied, that any new matter constituting a defense should be stated in the answer, to the end that he might have notice of it in time to meet it. The testimony having been objected to when offered, the general rule still is that there must be allegation as well as proof; and, there being no allegation in this case, and no offer to amend the pleading, the proof offered was not pertinent. We are of opinion, therefore, that this assignment of error is not well taken.

2. The eighth specification of error, No. 3, is based upon the refusal of the court to charge the jury as follows:

"The rules of the company introduced in evidence provide: 'All conductors and enginemen must go to telegraph offices at Bellaire, Zanesville, Newark, Chicago Junction, Sandusky, and Shawnee, and ask for orders, before leaving these stations. The application for orders, as above, will be made by the use of "Blank A." Conductors and enginemen must get orders or clearance card. "Blank B," before leaving above stations.' If the plaintiff and the conductor of the train which they were running did not comply with the conditions of this rule, and started their train east in disregard of the same, when the compliance with its terms would have enabled the train dispatcher to have given the order to the plaintiff and the conductor at Newark, instead of Black Hand, then, and in that case, the plaintiff has no right to complain, because the passing and hold orders were sent to Black Hand instead of Newark. Going to the office three-quarters of an hour before leaving, and not afterwards, would not be a compliance with this rule."

The rules of the railroad company, as disclosed by the testimony of defendant, provide as stated in the proposed instruction; but the proof was very clear that Camp did, at 10 o'clock and 4 minutes a. m., at Newark, ask for and get "orders," though not a formal "clearance card." The rule, however, as appears upon its face, did not require that both should be obtained. The orders were that the train of which Camp was the engineer should proceed east from Newark, and this involved the passing of express passenger train No. 47 between Newark and Black Hand. This train was, as his other orders showed, running 3 hours and 10 minutes late, and the only passing place was Clay Lick, where his orders also required him to pass a freight train, which of itself would take about 15 minutes. These orders were received at a time which, when construed in connection with the standing rule of the company, which required a freight train, such as Camp's, to reach a meeting station and get on a side track at least 10 minutes before the time for the arrival of the passenger train, made it necessary, as the time was too short, in his judgment, to reach Clay Lick soon enough to obey this rule, that Camp's train should not start until after the passenger train had not only reached Clay Lick, but had come into Newark, a distance of about six miles. But, notwithstanding these facts, the court was asked, in the proposed instruction, to charge the jury conclusively, and as matter of law, "that going to the office three-quarters of an hour before leaving, and not afterwards, would not be a compliance with this rule." To this we cannot agree. Nor can we agree to the contention that it was essential to have a "clearance card" as well as "orders." Whether an instruction upon this subject, properly phrased, might not have been well given to the jury in such manner as to leave the question of fact to them to say whether Camp, in what he did, was obeying the orders and rules binding upon him in the then present conditions and emergency, might be an interesting question if presented; but it is not presented, and in the form proposed by the railroad company the instruction was not sound, and should not have been given, because it told the jury absolutely, and without qualification or condition, although he then got his orders, that Camp's going to the office three-quarters of an hour before leaving, and not afterwards, would not be a compliance with the rule. That conclusion might depend, and did

depend, upon the circumstances as the jury might find them to exist. An instruction proposed by a party must be correct in every substantial and important particular before it is error to refuse it as a whole. We think this assignment is not well taken.

3. The thirteenth specification under assignment of error No. 3 is in this language:

> "The following is rule 530, introduced in evidence in this case: 'Conductors and enginemen are positively prohibited from going to meals, or delaying their trains for any purpose after receiving orders which allow them to proceed, without asking for and obtaining express permission to do so from the superintendent. When such permission is received, the conductor must report when he is ready to go, and ask if any further orders.' It appears from the evidence in this case that this rule was not complied with by Camp and the conductor of the train which he was running, and, if they left East Newark in violation of this rule, Camp has no right to complain, because he did not receive his orders at the East Newark office."

This request to charge, when critically considered with reference to the rule of the company which is embodied in it, not only took from the jury the right to determine whether the rule had been complied with or not, but would clearly leave it to the jury to say that, if the conductor failed at East Newark to report when he was ready to go, and to ask if there were further orders, Camp, the engineer of the train, could not recover, notwithstanding the jury might find that, entirely independently of this collateral act of another, to wit, the conductor, the train dispatcher, acting as the company itself, had been guilty of that negligence respecting orders and proceedings for safety at Black Hand, which had in fact, and independently of all other causes, brought about the injury to Camp. This would leave Camp without the right to recover if the conductor had failed to inquire for orders, notwithstanding it might be the fact that this failure of the conductor had no sort of contributory relation to the subsequent neglect of the company itself, which brought about the disaster. The record leaves no doubt that there was evidence tending to show that the proximate cause of the collision at Black Hand, in which Camp was injured, was the neglect of the train dispatcher at Newark to see that the precautions which the rules of the company required had been taken at Black Hand to notify Camp's train of the orders for holding it there, which had been issued about the time his train had left Newark, and of which he had no notice. It was manifestly the duty of this officer, the train dispatcher, who was not a fellow servant of Camp, to see that the necessary orders were enforced for the purpose of notifying Camp of the new and extremely important condition of things. The train dispatcher was required by the rules to see that the telegraph operator at Black Hand so responded to his orders as to show him that all signals were out, and that torpedoes had been put on both rails at Black Hand. Nothing of the sort was done. Camp's train was not stopped, nor notified there of the orders; and the jury doubtless concluded that this particular neglect of the train dispatcher was the cause of the injury. It is insisted, however, that, if Camp had gone again for orders before leaving Newark or East Newark, he might possibly have heard of them, and the injury might have been avoided; and that his neglect

in this regard contributed to the injury. But, if we assume that rule 530 applied to Camp so as to make it his duty to report to the train dispatcher, and ask for further orders, still the question as to whether his failure to do so proximately contributed to the subsequent collision would have presented a question for the jury under the circumstances of this case, and it would have been error to assume as matter of law that such alleged negligence did so contribute. The jury might have found that it was the duty of the train dispatcher to give notice of the meeting point whether or not Camp or the conductor had again asked for orders, and that it was all the more imperiously essential as he knew that Camp was without information of the orders, and at the greatest hazard, unless notified. The orders for Black Hand were probably given after Camp's train had left Newark, and certainly without his knowledge. He had no information of this new situation, although upon knowledge of it might depend his safety or his life. There was nothing in the plaintiff's own testimony which so certainly established contributory negligence upon his part as to make it proper in any jurisdiction, much less in this, to direct a verdict against him; and, dealing with the exact questions raised by this assignment of error, we hold that it was not improper to refuse to charge the jury in the language proposed by counsel for the railroad company. It did not accurately state the law applicable to the case, whether the plea of contributory negligence has or has not been made by the pleadings. This is all the more clearly and emphatically true inasmuch as the rule on its face required the conductor alone, and not the engineer, to ask for further orders when ready to leave; and at most, if the conductor's negligence in not doing so contributed to Camp's injury, it was a case of the negligence of a fellow servant concurring with that of the master, and will not relieve the latter from liability. Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; 1 Shear. & R. Neg. § 188. There was no error in refusing this request to instruct the jury.

4. The able and perspicuous charge of the learned judge at the trial seems to the court to have left no doubt upon the minds of the jury as to the issue they were to try. It is manifest that in the clearest possible way, and with all proper limitations, the jury were told that, if the collision was the result of negligence upon the part of the telegraph operator at Black Hand, the plaintiff could not recover, because he was a fellow servant; but that, if the cause of the injury was the neglect of the train dispatcher in the respects to which we have alluded, then that Camp would have the right to recover, because the negligence of the train dispatcher was the negligence of the company itself. They were distinctly told that in the one case Camp might recover, but that in the other he could not. At all events, the issue which the jury was to try was clearly and intelligently presented.

We have carefully examined, not only the charge itself, but the propositions to charge offered by the counsel for the railroad company, and, in our opinion, the charge itself contains no error. It is also our opinion that the propositions offered by the defendant, so far as they were correct, were embraced in the charge of the court,

and that, so far as they were refused by the court, they were not correct statements of the law applicable to the case. It results from these views that the judgment of the court below should be, and it is, affirmed.

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WILSON v. CITY OF READING.

(Circuit Court, E. D. Pennsylvania. December 11, 1900.)

No. 16.

PLEADING—ACTION AGAINST MUNICIPAL CORPORATION—SUFFICIENCY OF DECLARATION.

In an action against a municipal corporation, an allegation in the declaration that a fraudulent oral representation complained of was made by "the defendant" is sufficient, and the plaintiff is not required, either under the common-law rules or the Pennsylvania procedure act of 1887, to set out the name of the agent through whom it was made.

On Demurrer to Declaration.

John G. Johnson, for plaintiff.

Wm. J. Rourke and Richard C. Dale, for defendant.

J. B. McPHERSON, District Judge. Confessedly, this demurrer would not be good against a declaration that is to be judged by the rules of pleading at common law. Under these rules it would be sufficient to charge that "the defendant" committed the act now complained of, although the defendant is a municipal corporation, and the act in question is a fraudulent oral representation. To add, as this declaration does, that the representation was made by "a duly-authorized agent" of the city, would be regarded as a superfluous averment, and no court would require that the agent's name should also be pleaded. It is argued, however, that the Pennsylvania procedure act of 1887 has so far relaxed the common-law rule that the courts should now compel the name of the agent to be inserted in the declaration. I cannot accept this argument as valid. The only language in the act that is now relevant is that the declaration must consist of "a concise statement of the plaintiff's demand," and I do not think that this can fairly be so construed as to require the declaration to contain more than it was required to contain before the act was passed. Certainly, as it seems to me, it does not require, or, indeed, permit, the pleader to set out his evidence.

The demurrer is overruled.

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HALLETT v. NEW ENGLAND ROLLER-GRATE CO.

(Circuit Court, D. Massachusetts. December 4, 1900.)

No. 883.

1. CORPORATIONS—SUBSCRIBER TO STOCK—MISTAKE AS TO FOREIGN LAWS.

The rule that a subscriber to the stock of a corporation of a foreign state is presumed to assent to the laws of such state governing the corporation is not so rigid as to debar him from relief against the corporation, when no interests of creditors or the public intervene, where by reason of the issuance of the stock to him for less than its par value the certificate

is void under such laws, of which fact he was ignorant, and he therefore received no consideration for the money paid.

2. SAME—ISSUANCE OF STOCK IN VIOLATION OF STATUTE—RIGHT OF PURCHASER.

Pub. St. N. H. 1891, c. 149, § 9, which prohibits a corporation from disposing of its stock, with a stated exception, at less than its par value, and chapter 273, § 11, which provides that, if any corporations issue certificates of stock without receiving full payment at the par value of the shares, such certificates shall be void, and the officers who shall take part in such issuance shall be subject to fine and imprisonment, are not to be regarded so much as declaring any general public policy, as establishing regulations governing corporations for the protection of their stockholders and creditors; and, while an action to enforce an executory contract in violation of such provisions cannot be maintained, the penalties which follow their violation where the contract has been executed are only those prescribed by the statute itself. A nonresident who purchases and pays for stock in a corporation of the state at less than its par value, and receives a certificate therefor, in good faith and in ignorance of such provisions, is not precluded by the statute from maintaining an action to recover the money paid, after his certificate has been declared void by the courts.

3. SAME—ACTION BY SUBSCRIBER TO RECOVER MONEY PAID—LACHES.

Plaintiff purchased and paid for stock in a corporation of another state, which was issued to him at a price below its par value in violation of the laws of such state, and the certificate was some years afterwards declared void by its courts. *Held*, that while plaintiff's ignorance of the statutes, as those of a foreign state, gave him the right to rescind the purchase as having been made under a mistake of fact, if such right was promptly asserted, he was bound to use reasonable diligence to ascertain the law governing his relations to the corporation, and a delay of eight years before demanding a return of the money paid constituted such laches as would bar him from exercising his option to rescind, and would defeat an action at law for its recovery.

At Law. Action to recover money paid

Williams & Copeland, for plaintiff.

I. R. Clark, for defendant.

PUTNAM, Circuit Judge. The defendant is a corporation organized under the laws of New Hampshire. The plaintiff resides in Massachusetts. On April 8, 1891, he entered into a contract with the defendant, covering several matters, to which I need not refer at length, save only as to one. He agreed to contribute $3,000 to the stock of the defendant corporation, at $6 per share. The par of the stock was $10 per share. This sum he paid, through its proper representative, into the treasury of the corporation at or about the date of the contract; and in return the corporation issued him its certificate for 500 shares, on the face of the certificate nonassessable. The purpose of the parties, undoubtedly, was to issue 500 shares of stock, free from assessments, in return for $3,000, being a deficiency from the par of the stock of $2,000.

All these transactions were at Boston, in Massachusetts, and at that time the plaintiff was a resident of Massachusetts; and, according to well-settled rules, he was not holden generally to know the laws of a foreign state. For this purpose, New Hampshire was a foreign state. So far as he and this transaction are concerned, the general rule is that a mistake as to the laws of New Hampshire would be a mistake of fact, from which he would be entitled to relief, the same as from any ordinary mistake. It is true that it is now well settled

that a person who takes shares of stock issued by a corporation, although of a foreign state, is presumed to assent to the law of the corporation in the state where the corporation was organized. For certain purposes he is bound to know that law. This presumption and obligation are not so rigid as to lead necessarily to unjust results. They relate more particularly to such matters as affect the relations of a corporation to its creditors, and to certain other matters in which individuals or the public have a special interest. They do not go so far as to entitle this defendant to retain the money of the plaintiff, obtained under a transaction occurring in Massachusetts, at a time when the plaintiff was a resident of Massachusetts, for which, by reason of ignorance on his part of the laws of New Hampshire, the consideration fails, leaving the corporation in possession of the plaintiff's money without having given any equivalent for the same, or for any part thereof, so long as no interests intervene except those of the corporation and the plaintiff. In the present case it is not shown that the creditors of the corporation, or the state, or the public have any interest in the question under consideration; so that, so far as this part of the case is concerned, the issue is whether, under the circumstances stated, as between the plaintiff and the corporation, no other person being interested, the corporation, having received the plaintiff's money, and having given certificates of stock in return therefor which are of no value to the plaintiff, can hold what it has received.

Pub. St. N. H. 1891, c. 149, § 9, provides that no corporation shall dispose of any of the shares of its capital stock at a price less than the par value thereof, with an exception not involved here. Chapter 273, § 11, provides that, if a corporation issues certificates when the par value of the shares represented by the certificates has not fully been paid into its treasury, all such certificates shall be void, and the directors, officers, or other agents of the corporation who shall take part in the issue of any such certificates shall be fined or imprisoned, or both. The statute, by its letter, declares only the certificates void, yet there can be no question that, so far as obtaining any valuable interest is concerned, this whole transaction was void; so that the plaintiff has not received what can be regarded as anything substantial in return for his $3,000.

In December, 1898, in Kimball v. Grate Co., 69 N. H. 485, 45 Atl. 253, the supreme court of New Hampshire explicitly, and on an issue made, declared the precise certificates involved in this suit void, and determined that the holder of them was not entitled to vote at any meeting of the corporation. Previous to this decision the plaintiff had sold this stock to two gentlemen by the name of Rider. One of the Riders, in testifying in this case, admits sufficient to charge them with knowledge of the fact that the stock was issued to the plaintiff at $6 per share, and that the par was $10. Nevertheless the Riders were nonresidents of New Hampshire, and the transaction between them and the plaintiff took place in Massachusetts; so that the Riders were entitled to be regarded as acting under a mistake of fact. Meanwhile, however, each of the Riders had been elected and acted as directors of the corporation, and they had received on this stock

one dividend of $500, which they still retain. Promptly after the decision in Kimball v. Grate Co., the Riders demanded of the plaintiff that he should cancel the transaction and return the amount which they paid him for the stock. The plaintiff was not bound to await litigation, as he was clearly holden to cancel the transaction; and he did so, and repaid the Riders by his note, which, so far as this case is concerned, is to be regarded as cash. Meanwhile the stock had become mixed in with other stock, and certificates had issued covering both; but the Riders, before this suit was begun, delivered the entire mass of certificates to the plaintiff, with authorization to him to have retransferred to him the 500 shares involved. On request made therefor by the plaintiff before this suit was commenced, the treasurer of the corporation refused to do this, on the ground that he and the corporation were under an injunction with reference thereto. Consequently the certificates which include the 500 shares have been deposited in the registry of this court during this trial, and are here impounded; and the Riders during the trial indorsed them all in blank, and have expressly consented that the court shall make such disposition of the 500 shares involved in this suit as its result may require.

Prior to bringing this suit no tender was made to the corporation, except as above stated. As the 500 shares are practically worthless, no tender was required; and it is sufficient that the certificates have been brought into court, and may be surrendered to the corporation, so that the corporation may thus be protected against any possible estoppel by reason of their being outstanding in the hands of innocent parties. These facts reinstate the plaintiff to the same position as though he had never disposed of the stock and clear the way of all preliminary questions.

The defendant maintains that the issue of the stock was against the declared public policy of New Hampshire, and that therefore no action can be maintained in any way arising out of it. In regard to this particular the plaintiff is undoubtedly chargeable, as a stock holder, with the operation of the laws of New Hampshire in a suit in the district of Massachusetts, or in the courts of the state of Massachusetts, precisely as he, or a resident of New Hampshire, would be in a suit brought in the district of New Hampshire, or in the courts of that state. We do not withdraw our determination that, in order that the plaintiff should have a right merely to rescind the transaction, and merely to recover the amount he paid for the stock, it should be held that ignorance on his part of the laws of New Hampshire may amount to a mistake of fact for certain purposes. So far as such ignorance amounts to mistake of fact, and is important with reference to relief against mistakes, it must have the same effect in all tribunals of every jurisdiction; but neither this mistake nor any other will permit any court anywhere to ignore the public policy of New Hampshire when it comes to actually enforcing the rights of the parties with reference to a corporation organized by that state.

There is, of course, a mass of authorities which would seem to sustain the defendant's position, so far as it rests on the question of

public policy depending on the statute referred to. Some of these are explained in Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347. That case, however, does not go to the extent claimed by the defendant, as will appear by the expressions at the foot of page 57, 103 U. S., and page 350, 26 L. Ed., and the top of page 58, 103 U. S., and page 350, 26 L. Ed. The court did not determine that there was any question of public policy involved, but it proceeded to dispose of the case on the hypothesis that there might be.

The better view of the law is that, there being no moral turpitude involved, a plaintiff ought not to be the entire loser, and a defendant the entire gainer, out of a prohibited transaction. The provisions of the Public Statutes of New Hampshire must be regarded not so much as declaring any general public policy as establishing regulations pertaining to corporations, intended for the protection of their stockholders and creditors. They come in like the regulations of the statutes of the United States affecting national banking associations, which, as is now well settled, do not always impair contracts which have been executed in violation of them. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Thompson v. Bank, 146 U. S. 240, 13 Sup. Ct. 66, 36 L. Ed. 956. There is nothing from which it can be justly inferred that it is the intention of the statutes of New Hampshire to give a corporation receiving payment of less than the par of its stock the benefit of the entire amount thus received, to the detriment of the party who pays it, whether a nonresident or not, without any moral turpitude on his part, or without any real intention to defraud. The entire penalties intended to be imposed are those we have stated; that is, that the party making the payment shall fail to be recognized as a stockholder, and the certificates be declared void, and that the officers of the corporation shall be subject to punishment. In this respect the case is substantially like that of the overcertification of checks, referred to in Thompson v. Bank, at page 250, 146 U. S., page 69, 13 Sup. Ct., and page 960, 36 L. Ed., where the court said that the very fact that a statute is enacted punishing criminally an officer, clerk, or agent, improperly certifying a check, shows that the law intended to impose only the penalties specifically named in it. In the absence of some great public injury to be prevented, or of moral turpitude, the just rule is that a prohibition by a statute intends to impose no penalties beyond what the statute expressly enacts, although, of course, no court will give aid in directly carrying out a transaction which the law forbids.

There is a broad distinction between a suit which seeks to enforce a contract prohibited by statute, while it is entirely executory, and one arising out of a condition of things, where one party or the other has had the full advantage to be derived therefrom. For example, the supreme court would undoubtedly refuse to enforce a wholly unexecuted contract which contemplated a loan by a national banking association based on real-estate security, while in Bank v. Matthews, already referred to, it enforced such a loan, including a foreclosure of the borrower's mortgage, after the borrower had received the funds which his note represented. So in the case at bar the fact that this court would have refused to have caused to be executed the contract

of April 8, 1891, while it was entirely executory, would not prevent us from doing justice with reference to the $3,000 paid in pursuance thereof.

These suggestions also dispose of the proposition made by the defendant growing out of the fact that the contract of April 8, 1891, contained a stipulation for services to be rendered by the plaintiff for an annual salary; and some other stipulations. Under some circumstances, some of these stipulations would be contrary to public policy. Whether they are so or not in the present case does not clearly appear. In any event, they are not so involved with the plaintiff's claim in suit, which is only for a refund of the $3,000 as money had and received by the defendant under a mistake, that they cannot be severed from it, and that severing them could do injustice to the defendant.

Even if the case were not fully covered by the principles of the decision of the supreme court with reference to statutory enactments relating to national banking associations, it would come within the mild rules of Pullman's Palace-Car Co. v. Central Transp. Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108, and of Aldrich v. Bank, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611, in which the court refused to allow defendants to retain the value of what they had received in violation of regulations affecting corporations, rather than within McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117, where the entire transaction involved moral turpitude and an intended fraud on the public. In Aldrich v. Bank, at page 636, 176 U. S., page 505, 20 Sup. Ct., and page 618, 44 L. Ed., the court laid down the broad rule that there is nothing in the acts of congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing. Looking at the similar question, of rescission, and of recovering only what the defendant corporation received without giving any consideration therefor, the question of mistake of fact which we have considered does not seem important, in connection with the rules of Pullman's Palace-Car Co. v. Central Transp. Co. and of Aldrich v. Bank, except so far as it relieves the plaintiff from every suggestion of moral guilt, and of any intent to defeat the laws of New Hampshire. We therefore conclude that the plaintiff had fundamentally a right to recover from the defendant the $3,000 paid into its treasury, on surrendering the certificates which he received in exchange therefor.

The difficulty in the way of this suit arises from the delay between the transaction of April 8, 1891, and the time of making a claim for a refund. We must recognize the fact that, during that period, the condition of the defendant corporation may have essentially changed. For aught we know, the shares of the defendant corporation may now be of nominal value, so that, if we should allow the plaintiff to recover the entire $3,000, an injustice might be done the defendant, perhaps equal to that which would have been done the plaintiff if he had promptly sought to rescind the transaction and recovery had been refused him. Natural equity forbids that, after a lapse of so many years, a transaction shall be rescinded without taking into account the possibility of the changed condition of both parties to it.

While the plaintiff's ignorance of the statutes of New Hampshire in April, 1891, is to be excused as a mistake of fact, he was, nevertheless, bound to use some diligence in ascertaining what his relations were to the defendant corporation. Laches, although not so operative at law as in equity, cannot be disregarded when there has been a reasonable possibility of a substantial change in the status during a protracted delay. It is a rule of the common law that a party seeking to rescind a contract must do so within a reasonable time. In the present case, the time which has elapsed must be held unreasonable, and the fact that the matter as to which the plaintiff failed in ascertaining his rights relates to the statutes of a foreign state governing the defendant corporation, cannot be accepted by the law to excuse this delay. In this particular case the wisdom of this rule is illustrated by the fact that meanwhile those in privity with the plaintiff have received a considerable dividend on the shares in issue, and also presumably by virtue of this holding of stock, have acted as its officers and aided to control its affairs. We refer to this, however, not as fundamentally affecting the question, but as illustrating the justice of the rule which we are compelled to apply. The rule was distinctly recognized in American Tube-Works v. Boston Mach. Co., 139 Mass. 5, 29 N. E. 63, and it was affirmed in Banigan v. Bard, 134 U. S. 291, 295, 10 Sup. Ct. 565, 33 L. Ed. 932. So far as it refers to cancellations of stock, it ordinarily is applied with reference to the rights of creditors, but in Banigan v. Bard it is laid down as a universal rule. Under the circumstances, we must hold that the plaintiff has omitted for an unreasonable time to effectuate the rescission which must supply the basis for the present action, and that in view of his delay he has lost his right to recover the amount paid for the 500 shares of stock, which is the only right which could ever accrue to him at common law.

This, of course, would not interfere with his remedy at equity, which probably still remains. The mistake in the case at bar is one of the class against which equity could undoubtedly grant relief; and while equity would be prohibited by the plaintiff's laches, even more than the common law, from allowing him to rescind, yet it could do justice according to the existing circumstances. After proper prior proceedings by the present plaintiff, equity might aid him to demand certificates of stock equal at par to the amount which he paid into the treasury of the defendant corporation, or to demand new certificates for the 500 shares on his making good the deficiency. The common law can only enforce contracts as the parties have made them, or rescind them. It cannot make new contracts; and, while equity cannot directly impose on parties engagements which they have not entered into, although it may rectify errors contrary to substantial intent, yet it can lay such terms on one party or the other as may be necessary to effectuate equitable results.

There must be judgment for the defendant.

## WARD v. JOSLIN.

(Circuit Court of Appeals, First Circuit. December 6, 1900.)

No. 340.

1. CORPORATIONS—POWER TO MAKE GUARANTY—KANSAS STATUTES.

There is nothing in the statutes or decisions of Kansas, with reference to loan and trust companies organized under Comp. Laws 1885, c. 23, which changes, as to such companies, the general rule that a corporation cannot guaranty a liability unless it is created in the ordinary course of its business, or brings a guaranty by such a company within that rule, unless the company received the proceeds of the paper guarantied.

2. SAME—STOCKHOLDERS' LIABILITY—KANSAS STATUTES.

The provision of Comp. Laws Kan. 1885, c. 23, § 32, which authorizes a judgment creditor of a corporation, when execution has been returned unsatisfied, to proceed by action to charge the stockholders with the amount of his judgment, must be construed in connection with the further provision of the same act (section 44), which makes stockholders liable for "debts unpaid" of the corporation, and the provision of the state constitution (article 12, § 2), for the enforcement of which the statute was enacted, and which secures "dues" from corporations by an additional stockholders' liability; and judgment creditors of a corporation can maintain actions to charge stockholders for the amounts of their judgments only where such judgments are for "debts" or "dues" of the corporation.

3. SAME—CONSTRUCTION OF CONSTITUTION—"DUES" OF CORPORATIONS.

The word "dues," as used in Const. Kan. art. 12, § 2, which provides that "dues from corporations" shall be secured by individual liability of the stockholders, is a comprehensive term, which includes all contractual liabilities of the corporation; but, under the rule of equitable construction applicable to constitutional provisions, such term cannot be construed, as against a stockholder, to include a contract which was ultra vires, although, under the local rule, the corporation itself may be estopped, by receiving the benefit of the contract, from pleading in defense to an action thereon.

4. SAME—ACTION AGAINST STOCKHOLDER—CONCLUSIVENESS OF JUDGMENT AGAINST CORPORATION.

Under the law of Kansas, as established by decisions that a corporation which has received the benefit of a contract is estopped to contest it on the ground that it was ultra vires, a judgment against a corporation is not conclusive upon a stockholder in an action to charge him with individual liability in such sense as to preclude him from showing the nature of the original claim, and that the contract sued on was ultra vires, and hence not of the class for which he is liable.

5. APPEAL—QUESTIONS NOT PRESENTED TO LOWER COURT—MOTION FOR NEW TRIAL.

A motion for new trial, offering further proof on a material matter, will not induce an appellate court to reverse the judgment to enable the trial court to take further proceedings, where the record does not show that the motion was acted on by the trial court, or brought to its attention.

In Error to the Circuit Court of the United States for the District of New Hampshire.

William Reed Bigelow (E. L. Waterman and Pulsifer & Alexander, on the brief), for plaintiff in error.

John S. H. Frink (Hiram Blake, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. This suit was brought by a creditor of a Kansas corporation, known as the "Western Investment Loan & Trust Company," organized on February 25, 1888, against a stockholder in that corporation, for a claim against it which had gone into judgment and remains unsatisfied. The case was tried in the circuit court by the presiding judge, a jury having been duly waived according to the statute. Among other findings of the court appears the following:

"I find as matter of fact, upon the evidence contained in the record and upon the arguments, that Ward's claim against the trust company was upon a guaranty, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company."

The judgment below was for the defendant. 100 Fed. 676. Thereupon the plaintiff took out this writ of error. Therefore we will describe the parties merely as plaintiff and defendant.

The underlying provision with reference to the liability of stockholders in Kansas corporations is found in Const. art. 12, § 2, as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

The finding of the court below, which we have cited, uses "guaranty" in the singular, but there were several guaranties, all of the same tenor, given at the same time, and bearing date of May 9, 1889. At that time the General Statutes of Kansas of 1889 had not come into force, and we look for the law to the Compiled Laws of Kansas of 1885. Chapter 23, § 5, enacts for what purposes corporations may be formed, with the rest the following:

"Thirty-eighth. The organization of loan and trust companies: provided, that nothing in this act shall be construed to authorize such loan and trust companies to sell real estate held as security, except in the manner provided by law.

"Thirty-ninth. The accumulation and loan of funds, the erection of buildings, and the purchase and sale of real estate for the benefit of its members."

Section 11, among other powers of corporations, grants the following:

"Sixth, to make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock. Seventh, to enter into any obligation or contract essential to the transaction of its ordinary affairs."

The statute speaks of the "charter," which, after all, is merely the articles of association, as the statutes provide for incorporation by such articles, and for no other method. The corporation in this case was thus organized. The articles enumerate the purposes for which the corporation was formed, and, with the rest, "to transact the business of a loan and trust company." The by-laws create a loan committee with certain powers, but the power of guarantying is not expressed. The court below found that the directors had au-

thorized the president and secretary to guaranty the payment of securities negotiated by the company, but there seems to have been no by-law on the topic. There is nothing in the statutes of Kansas, nor in the decisions of its courts, defining the powers of a "loan and trust" company; neither has there been cited any other statute or decision defining the powers of corporations of that character.

Banking corporations are authorized by the laws of Kansas. They are empowered to buy and sell exchange, and to discount negotiable paper. Nowhere is any express permission given them to rediscount their own notes, or to sell them, or to give any guaranty, and, in these respects, banking corporations and "loan and trust" companies stand on the same footing. There is nothing in the statutes expressly vesting either power in either.

In this condition of legislation, Commercial Bank v. Cheshire Provident Inst., 59 Kan. 361, 53 Pac. 131 (decided in 1898), with reference to a banking corporation, said (at page 364, 59 Kan., and page 132, 53 Pac.):

"The record before us does not contain any of the evidence offered at the trial. The general finding resolves all doubt as to the facts against the plaintiff in error. We must therefore presume that the guaranty was executed for a valuable consideration, by the duly-authorized officers of the bank, and in due course of business. The claim that a banking institution dealing in commercial paper is without authority to bind itself by a guaranty thereof has nothing to commend it to especial favor. It is true that in this case the paper itself does not indicate that the Commercial Bank ever owned it. Nevertheless it may have received the proceeds, and the guaranty may have been made strictly in the interest of the bank."

The judgment of the court below, holding the bank liable on its guaranty of a certain promissory note, was affirmed; but it is necessary to distinguish this case from that at bar in one particular. It appears, at page 362, 59 Kan., and page 131, 53 Pac., that the parties went to trial on the facts without regard to the pleadings, and the general finding, referred to at page 364, 59 Kan., and page 132, 53 Pac., imported into the record enough to sustain the judgment on appeal.

The result is that it cannot be determined that there is anything in the laws of Kansas, with reference to "loan and trust" companies, which infringes the general rule that a corporation cannot guaranty a liability unless it is created in the ordinary course of its business, and nothing to show that a guaranty by a "loan and trust" company of any paper is thus created, unless, to use the language of Commercial Bank v. Cheshire Provident Inst., it received the proceeds of the paper which it guarantied. This is within the common rule that banking institutions may guaranty paper owned by them when they negotiate it, as several times stated by the supreme court. In the absence of any statutes or judicial decisions in reference thereto, there seems to be no escape from the proposition that what were the powers of this corporation with reference to the guaranties on which the judgment against it was rendered was, within the limitations of this case, a question of local usage, and therefore of fact, to be determined by the court below. Within this observation falls the question whether or not there were any by-laws which extended

the powers of the corporation to the execution of these guaranties. The court below does not follow the express language of its opinion that the guaranties were ultra vires, when it comes to state its findings, but it must be taken to have made an equivalent finding, because it said that they were not "within the reasonable and proper scope of the business as contemplated by the parties."

Only disjointed provisions are found in the Compiled Laws of Kansas of 1885, fixing the liability of stockholders. Chapter 23 provides, in section 44, that, on dissolution, suits may be brought against stockholders for "debts unpaid"; and section 46 reads as follows: "No stockholder shall be liable to pay debts of a corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him." Section 32 enacts generally that when an execution has been issued against a corporation, and property cannot be found on which to levy it, execution may go against any of the stockholders, "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The plaintiff claims that, by virtue of the last provision, his right against a stockholder was perfect whenever he had an execution against the corporation, no matter from what the judgment against it arose; and in support thereof he cites Grund v. Tucker, 5 Kan. 70. That suit was based on an act of 1863, and some expressions in the opinion would seem to sustain the plaintiff's proposition. Nevertheless, the opinion as a whole does not support him, but it relies on the provision of the act of 1863, to the effect that stockholders are liable for "all debts and responsibilities of the corporation." The court observes that a judgment creates a responsibility, which cannot be contravened. This peculiar expression disappeared from subsequent revisions. In view of the rule that statutes are to be construed in pari materia, section 32 must be restricted to cases where the stockholder's liability is elsewhere established, by either the constitution or the statutes, and these are limited to "debts unpaid" and "dues," and it cannot justly be claimed that "debts unpaid" is a broader expression than "dues."

It is maintained by the defendant that even the word "dues," as used in the constitution, has a narrow construction. This is erroneous. In Whitman v. Bank, 176 U. S. 559, 562, 20 Sup. Ct. 477, 44 L. Ed. 587, the opinion states that it includes all contractual obligations. We refer, also, to Bouv. Law Dict. "Due," showing that the word may signify "what ought to be paid,—what may be demanded"; and to Judge Story's observation in Carver v. Manufacturing Co., 2 Story, 432, 449, Fed. Cas. No. 2,485, on the words "debts" and "dues," that "dues" is broader than "debts."

The only decisions of the courts in Kansas which we have found bearing in any way on this case are the following:

In Railroad Co. v. Fletcher, 35 Kan. 236, 10 Pac. 596 (decided in 1886), the court held that, if the Atchison Company had authority under any circumstances to guaranty bonds, the guaranty of the particular bonds then in issue would be binding in the hands of parties purchasing them in good faith and without notice; but, on

the pleadings in the original suit in the case at bar, the present plaintiff had notice, because the guaranties of the corporation were a part of the transaction of his obtaining the notes. In Town Co. v. Morris, 43 Kan. 282, 284, 23 Pac. 569 (decided in 1890), the court laid down the following broad rule:

"While an executory contract made by a corporation without authority cannot be enforced, yet where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned."

This was a suit, not for the value of the stock of merchandise in question, but for its agreed purchase money. This was allowed to be recovered, notwithstanding the defense of ultra vires. The case is referred to in Railroad Co. v. Johnson, 58 Kan. 175, 183, 48 Pac. 847, decided in 1897, and the opinion repeats what we have quoted. Although this rule is not accepted by the supreme court, which holds that ordinarily, in cases of contracts ultra vires, nothing can be recovered except on a quantum meruit, yet it touches, in this suit, a local question, to be determined by local decisions.

The next question is not whether the judgment against the corporation can be impeached, but whether it can be examined for the purpose of showing the nature of the original claim, and thus for the purpose of ascertaining whether the claim was of the class for which stockholders are liable. In suits brought by judgment creditors to set aside alleged fraudulent conveyances, this is permitted. Bump, Fraud. Conv. (3d Ed.) 576; Wait, Fraud. Conv. (3d Ed.) § 270. Of course, with reference to that class of suits, there is often a doubt as to the extent to which the examination may be made; for example, whether or not the statute of limitations can be set up, although not relied on in the original suit. This, however, concerns only the application of the rule, and does not render its existence doubtful. Its underlying reasons reach suits against stockholders. They are so applied in Cook, Stock, Stockh. & Corp. Law (4th Ed.) § 224, where it is said, in substance, that the judgment is conclusive as to the amount and validity of the creditor's claim, but that it may be shown that the claim comes within some class for which stockholders are not liable.

The supreme court has, at various times, spoken of the conclusiveness of judgments against corporations in suits to enforce the liability of stockholders; and it has used very decisive language sustaining that conclusiveness, especially in proceedings under the Kansas constitution. Bank v. Farnum, 176 U. S. 640, 643, 644, 20 Sup. Ct. 506, 44 L. Ed. 619. No case, however, has come before that court where it has had occasion to lay down more than the general rule to which we have referred; so that it has never passed on the question how far the original judgment may be opened, if at all, for the purpose of showing that the claim was not one of the class for which the stockholder is liable. More especially has it never passed on the question whether or not it is open to a stockholder to show that the contract on which a judgment against a corporation was obtained was incurred ultra vires, and that, therefore, the judgment is not enforceable against him.

This defense would seem not to be open to a stockholder in jurisdictions or with reference to judgments where the rule of the supreme court applies, that ultra vires is a complete defense in the original action on a contract which is itself ultra vires; because, in such cases, the question is not whether there are two classes of liabilities, one for which the stockholder is liable and one for which he is not, but whether there is any liability at all on the part of the corporation. But in Kansas we have seen that ultra vires is not always a defense to a suit on a contract, and this, not on the ground that the contract was originally valid, but on that of estoppel. Therefore, under the circumstances, the question is not whether this original judgment is valid, but whether it was for a claim of a class for which stockholders are liable; in other words, whether the stockholders can be holden for an ultra vires contract merely because the corporation is estopped from contesting it.

Not only has the circuit court found that the guaranties sued were ultra vires, but the question of ultra vires arises on the face of the judgment against the corporation. We have, on the face of the declaration, claims for purely independent guaranties, made by a corporation on securities not negotiated by it, supplemented by such findings by the circuit court as preclude the possibility that there were any facts, as, for example, by-laws not pleaded, or any other facts not disclosed by the declaration, which could relieve the nature of the transaction.

In this connection, it should be observed that the plaintiff refers to certain cases by virtue of which he maintains that there is a presumption that the guaranties were within the powers of the corporation, and of its officers who executed them. These, however, only sustain the rule stated in Southern Exp. Co. v. Western N. C. R. Co., 99 U. S. 191, 199, 25 L. Ed. 319, and concern merely the question of presumption, and the necessity of offering proof before a defense is made. They have no relation to a conclusive presumption, nor any pertinency when the true facts of the case are reached, as they are at bar.

This brings us to the crucial question in the case; that is, whether the Kansas constitution and statutes reach that which is created only by estoppel, connected with and arising out of ultra vires acts of a corporation. It is well settled that, while the liability of stockholders is in one sense statutory, yet it is contractual in its nature. This was stated in Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007, and restated in Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587, and in Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619. The general rule is that, so long as a matter continues executory in any part, ultra vires is a defense through to the end. It has also been stated by the supreme court, and reiterated in Bank v. Hawkins, at page 371, 174 U. S., page 742, 19 Sup. Ct., page 1011, 43 L. Ed., that one ground on which the doctrine of ultra vires rests is "the interest of the stockholders not to be subject to risks which they have never undertaken." To reject in the case at bar the defense of ultra vires, set up by a stockholder, is to shut our eyes to this underlying equity.

Inasmuch as constitutional provisions are to be construed in an equitable manner and for broad purposes, it was well urged by the circuit court that an ultra vires guaranty is not within the equity of the article of the Kansas constitution holding stockholders liable for the dues of corporations. We have already seen that the word "dues" is not limited to debts, but includes all contractual obligations, and this, of course, covers guaranties and other contingent liabilities. We have also already seen that it may be broad enough to cover "what ought to be paid; what may be demanded." Whether in the Kansas constitution it covers anything except "contractual obligations" was left undetermined in Whitman v. Bank, 176 U. S. 559, 562, 20 Sup. Ct. 477, 44 L. Ed. 587. Of course, if the word "dues" must always be construed to cover everything which "ought to be paid" or which "may be demanded," it would cover everything which arises by estoppel; but, in view of the equities to which we have referred, especially the underlying equity of the doctrine of ultra vires stated by the supreme court, it ought not to have the effect of holding a stockholder for what is ultra vires in all cases where the corporation may be holden therefor by estoppel. It is necessary to express this carefully, because matters may arise from estoppel which are justly and properly "dues" in any fair sense of the word, but where the doctrine of ultra vires applies there is no true liability. Whatever liability there may be, according to the laws of Kansas, arises from a fiction which estops the corporation from denying that there are dues, even though there were none in truth. A declaration stating the facts would be, in substance, that the corporation had assumed to enter into a contract which was ultra vires, and that there was no contract, but that, the transaction having been on one part executed, the corporation is estopped from asserting the truth. Now, fictions of law are not allowed to be used to the extent of doing substantial injustice, and especially such fictions have no place in the proper construction of constitutional provisions. In regard to such, the functions of a judge are "to ascertain the spirit of the fundamental law, and so to carry it out as to avoid a sacrifice of those interests which it is designed to protect." Sedg. St. & Const. Law (2d Ed.) 417. On the whole, the reasonable and equitable construction of the Kansas constitutional provision applicable here is that it does not reach what, in fact, were not liabilities of a corporation, and are held to be such only because the corporation was estopped from setting up the truth in reference to them.

In reaching these conclusions, we have not found it necessary to refer to Schrader v. Bank, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. Ed. 564, relied on by the defendant, because its application to this case is questionable. Neither have we found it necessary to refer to the rule so often stated, to the effect that enactments imposing liabilities on officers and stockholders are to be strictly construed, in connection with the rule in Kansas that this insistence of the common law shall not be applicable to any general statutes. Gen. St. 1889, par. 7281. We have only endeavored, in ascertaining what is the effect of the constitution and laws of Kansas, to seek a just and reasonable interpretation.

A single point remains to be considered. It appears that the plaintiff made a motion for a new trial, offering proof to show that the notes guarantied by the corporation were, in fact, its notes, and were negotiated by it at the time the guaranties were made, and that their nominal owner held them as its trustee. We do not perceive that any action was taken on this motion, and the record does not show that it was brought to the attention of the court. Whether or not the suggestion which it contains affords an opportunity for the plaintiff to seek further remedy is, perhaps, not before us. There seems to be no doubt that, in a plain case of injustice, an appellate tribunal may reverse the judgment of the court below, to enable it to take further proceedings, for the purpose of working out the real rights of the parties, although this is rarely done. Estho v. Lear, 7 Pet. 130, 8 L. Ed. 632; Ballard v. Searls, 130 U. S. 50, 9 Sup. Ct. 418, 32 L. Ed. 846; In re Gamewell Co., 20 C. C. A. 111, 73 Fed. 908, 912, decided by this court. The record here does not authorize such relief. If the plaintiff has any remedy in connection with this new matter, it is for him to consider whether it could be obtained by asking of this court leave to file in the circuit court an application in review of the proceedings. In re Gamewell Co., supra. Inasmuch as the new matter which the plaintiff offered apparently contradicts the legal intendment of the declaration in the suit against the corporation, as we have already said, it may be especially doubtful whether, in any event, he could have any remedy in any direction.

The judgment of the circuit court is affirmed, with costs to defendant in error.

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## In re RHODES.

(District Court, W. D. Pennsylvania. November 5, 1900.)

No. 81.

BANKRUPTCY—TIME FOR PROVING CLAIMS.

A creditor of a bankrupt cannot prove his claim after the expiration of the year to which such proof is limited by Bankr. Act 1898, § 57n, because during such time he was asserting and litigating the validity of a preference which precluded him from making his proof.

In Bankruptcy.

W. W. Wishart, for claimant.

BUFFINGTON, District Judge. In this case the adjudication took place December 20, 1898. The debt was not proven until March 9, 1900. The referee rejected such claim. Two grounds are now urged in support of his ruling: First, that the claim was not proved within a year of adjudication; second, that the claimant did not surrender his preference. Section 57n of the bankrupt act provides, "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication." This was not done, and not only so, but the creditor then occupied a position where he could not prove his claim; for he was asserting and litigating a hostile claim, based on an alleged lawful preference. Such adverse claim

of preference cannot be regarded as the equivalent of a proof of claim. The forms provided show a regular proof is contemplated, the time limit shows the purpose of congress to secure a speedy closing of estates, and the act provides an opportunity for creditors to object on such regular proof being made, and a hearing of such objections. The claimant in this case voluntarily placed himself in a relation to the estate in which he could not prove his claim within the year. The referee rightly rejected his subsequently proved claim. To have done otherwise would have ignored the express time limit of the act.

## In re KALDENBERG.

(District Court, S. D. New York. December 5, 1900.)

BANKRUPTCY—CLAIMS—SUFFICIENCY OF PROOF.

The testimony of an agent that he presented a bill for goods, on behalf of his principal, to a bankrupt, who admitted its correctness, and promised to pay it, is not alone sufficient to establish a claim therefor against the estate of the bankrupt, where the latter denies both the purchase of the goods, and the promise to pay, and the circumstances tend to corroborate him, rather than the claimant.

In Bankruptcy.

H. B. Kinghorn, for bankrupt.

Fluegelman & Bach, for Vassas Freres.

BROWN, District Judge. Some further testimony has been taken in this case, and upon all the evidence I do not think that the claim of Vassas Freres for goods alleged to have been sold and delivered to the bankrupt in 1894, to the amount of 652 francs, or $130, is sufficiently established. The debt is denied by the bankrupt, and there is no evidence to sustain it except the statement of one witness, Mr. Robinson, who in 1896 was the agent of Vassas Freres, that the bankrupt at that time promised to pay it. This alleged promise is not supported by any corroborating circumstance. Robinson knew nothing about the goods themselves or any order, sale or delivery of them. He was not in the employ of Vassas Freres until more than a year after the alleged sale, and on his examination he stated that he had no personal knowledge of the transaction. The credit to be given him in contradiction of the bankrupt's statements is somewhat shaken by the fact that notwithstanding his present testimony that he had no personal knowledge of the transaction, the witness, in a complaint in an action brought a few months before this testimony against the bankrupt in the city court of this city by Vassas Freres to recover this same debt, made the verification to the complaint, in which he swore "that the facts therein stated are within the personal knowledge of deponent." Among the statements in the same complaint was the further statement that the bankrupt at the time of the alleged sale, namely, on February 19, 1894, was trading under the firm name and style of F. J. Kaldenberg & Co., whereas the other proof shows that that concern had gone into the hands of a receiver

10 months previous. The bankrupt testified that since that time he had been in no business except as clerk; that at about the time of the alleged sale he had been sick and at the hospital for several months; that he himself knew nothing whatsoever in regard to the goods and had never promised to pay for them. From his testimony concerning his conversation with Mr. Duchon it would also seem that the goods had been sent as samples in furtherance of desired trade, and in view of the fact that the complaint above referred to states that the defendant was trading under the name of F. J. Kaldenberg & Co., there would seem to be little doubt that no goods were sent except to the company.

On the part of the creditor there is absolutely no proof of any order or request for the goods or of the receipt of them by any one or of their amount or value. The proof shows that the bankrupt before the appointment of the receiver had some independent private business of his own and he was subsequently clerk for the Kaldenberg Pipe Company, which also bought some goods of Vassas Freres, which the bankrupt testified were paid for. There was a paper called by Robinson a bill of the goods, but apparently only a leaf from a letter press copy book, page "491," forming part of a letter. It contained only the bankrupt's name and certain items amounting to 652.94 francs, and it was offered in evidence as a copy of a bill of the goods delivered by Robinson to the bankrupt. This paper was rejected at the time it was offered, but was afterwards apparently admitted. There is nothing in the record on the subject afterwards to justify its admission. It however proves nothing. It does not purport to be either an invoice or a bill. It bears date New York September 17th without any year, it has no signature, no "Dr.," and does not purport to charge any one. If it was a letter, it is certainly incomplete. The complaint states that the sale was on February 19, 1894, while this paper has only the date September 17th. In his first statement of his conversation, Robinson says Kaldenberg said the bill did not belong to him, but he would pay it; in his second version he says Kaldenberg said the bill did belong to him personally and he would pay it. He did pay, Robinson says, a company bill, but not this one, because he had no money. But the company was under a receivership, and paid only 2 per cent. dividend. Nothing would seem more improbable than that Kaldenberg should pay the bill of a defunct company and leave his own unpaid.

In Law v. Merrills, 6 Wend. 268, 277, the chancellor observes:

"Evidence to establish a fact by the confession of the party, should always be scrutinized and received with caution as it is the most dangerous evidence that can be admitted in a court of justice and the most liable to abuse." 1 Greenl. Ev. § 200; Borland v. Zittlosen (D. C.) 27 Fed. 131, 134.

Now that parties are witnesses on their own behalf, contradictions as to such conversations are of daily occurrence, and the distrust of such evidence when denied and uncorroborated is none the less. The fact that Kaldenberg was not in business for himself after the company's failure in 1893, and was in the hospital for some months as he states, coupled with Kaldenberg's explicit denial of this alleged debt, and the failure of Vassas Freres to prove

any request or order for the goods, or any copy of any contemporaneous invoice, bill, or letter, satisfies me that whatever Mr. Robinson may have thought or understood, there was never any individual debt of the bankrupt for these goods, and that the claim should be rejected.

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## In re ST. JOHN.

(District Court, N. D. New York. November 28, 1900.)

No. 1,614.

BANKRUPTCY—ASSETS—VESTED REMAINDER.

Where a will bequeathed a sum to trustees, with directions to apply the income for the benefit of a daughter of the testator during her life, the principal on her death to be divided between her children if she should leave any surviving her, and, if not, between the testator's two sons, who were named, the interest taken by the sons in the trust fund, under the statutes of New York, as construed by its courts, was a vested remainder, which was alienable; and, on the bankruptcy of one of the sons while the life estate was still outstanding, his interest in the fund passed to his trustee, as assets, under Bankr. Act 1898, § 70a, cl. 5.

In Bankruptcy. Appeal from an order of the referee directing sale of asset.

The following is the opinion of Referee R. A. Gunnison:

This matter comes up on the petition of Thomas J. Mangan, Esq., the trustee herein, asking "to be allowed and authorized to make sale by auction" of a certain alleged asset of the bankrupt. Upon this petition an order was made, directing the creditors and all persons in interest to show cause before me on the 16th day of April, 1900, why the prayer of the petitioner should not be granted. On the return day of the order, the bankrupt appeared by attorney and filed an answer to the petition of the trustee, denying certain allegations in said petition. A statement of facts was finally agreed upon. The arguments were heard and briefs filed.

Some years prior to the adjudication of Nelson A. St. John as a bankrupt, Vincent St. John died, leaving a daughter, Julia Cronin, and two sons, Lewis E. St. John and Nelson A. St. John, this bankrupt, him surviving. The will of Vincent St. John, the father of this bankrupt, contained, among other provisions, the following: "Third. I give, bequeath, and devise unto my executors hereinafter named the sum of $10,000 in trust, to be safely invested in either United States bonds, or bonds of the state of New York or of the city of Binghamton, or upon bonds secured by mortgages which are first liens upon improved real estate lying in the state of New York, worth double the amount so invested, besides buildings, bearing lawful interest, payable annually or semiannually; and the interest or income derived from such investment (or such portions of such income as they shall deem necessary for her maintenance and support) they shall pay over semiannually to my daughter, Julia. I also devise and bequeath to my said executors in trust, the sum of $500, which I direct them to apply for the sole use and benefit of my said daughter, Julia, in such manner and at such times as they, in their discretion, may deem proper and necessary. At the decease of my said daughter, leaving a child or children her surviving, I give said sum of $10,000 and any unexpended balance herein bequeathed, for the benefit of my said daughter Julia, to such child or children in equal shares. In case of the decease of my said daughter, Julia, leaving no child or children, I give and bequeath said sum of $10,000 and said unexpended balance before mentioned, if any, to my two sons, Lewis E. St. John and Nelson A. St. John, share and share alike."

It is contended by the trustee herein that under the last sentence of the third clause of the will of Vincent St. John, deceased, quoted above, Nelson A.

St. John, this bankrupt, took an interest in the said $10,000 of his father's estate, which by section 70, subd. "a," cl. 5, Bankr. Act 1898, became, on his adjudication as a bankrupt, a part of his estate in bankruptcy, and as such the title thereto passed to the trustee of said estate upon the appointment and qualification of said trustee. In other words, the trustee claims that the bankrupt's interest under that sentence is an estate alienable under the statutes of the state of New York, whether the interest of said St. John be a vested or a contingent remainder. On the other hand, the bankrupt contends that, under said sentence and clause of his father's will, whatever interest may have come to him was not alienable; that his interest therein is a contingent remainder, dependent upon two contingencies: (1) As to whether his sister, Julia Cronin, the beneficiary under the trust created in said clause, shall leave a child or children surviving on her decease; and (2) upon his (the bankrupt's) surviving his sister, the said Julia Cronin; and that unless she dies without leaving child or children, and before his death, he cannot receive any benefit from such bequest, and that this bequest is such a contingent remainder that it cannot be liable for his debts, and is in no way liable under the bankruptcy laws, and cannot be taken, sold, or applied towards the payment of the creditors of this bankrupt.

The facts in relation to Julia Cronin, this beneficiary, are that she is now living, at the age of 58 years. She is married and has no living children, nor has she ever had a child. On his argument the bankrupt's attorney laid some stress upon the possible adoption of a child by Julia Cronin. The question of adoption will be considered later.

The sole question to be determined in this matter is, had Nelson A. St. John, this bankrupt, at the time of his adjudication in bankruptcy, such an interest in the $10,000 bequeathed by Vincent St. John, and now held in trust for Julia Cronin, as, under section 70, subd. "a," cl. 5, of the act of bankruptcy would pass to the trustee as an asset of his estate? If the interest of Nelson A. St. John under the will of Vincent St. John is one which prior to the filing of his petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him, then it becomes a part of the estate, and upon the appointment and qualification of a trustee the title thereto at once vests in said trustee. In order to determine the nature of the interest of Nelson A. St. John herein, we must resort to the definitions in the statutes of New York state. In the personal property law of New York state it is provided: "In all other respects, limitations of future or contingent interests in personal property shall be subject to the rules prescribed in the first chapter of this act in relation to future estates in lands." 2 Rev. St. N. Y. (Banks & Bro.) p. 1857, c. 4, tit. 4, § 2.

The bankrupt's first contention, that the interest of Vincent St. John in this matter is a contingent interest, subject to be devested by the decease of Julia Cronin, leaving child or children her surviving, may be, and possibly is, sound. As to whether it is or is not a contingent interest will be discussed hereafter. The bankrupt urges the possibility of the adoption of a child by Julia Cronin, and that the survival of Julia Cronin by such adopted child would devest the bankrupt of any interest he might have under the law. Such a contingency is at once disposed of by the statutes of this state, which provide: "But as respects the passing and limitations whether of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor child is not deemed the child of the foster parent so as to defeat the rights of remaindermen." 5 Rev. St. (Banks & Bro.) p. 323; Laws 1896, c. 272, § 64. The adoption of a child by Julia Cronin would in no way affect the interest of Nelson A. St. John. The only contingency that could affect his interest would be the survival of a child born of Julia Cronin.

The bankrupt's second contention, that he must survive Mrs. Cronin before he can receive any benefit from such bequest, is as unsound as is that as to the adoption of a child. The same question was raised in Roosa v. Harrington, reported in 31 Misc. Rep. at page 529, 65 N. Y. Supp. 601. The provisions of the will in the case above cited were similar, if not identical, with those herein. Latham Cornell died, leaving a will in which he provides a trust fund for the use of his grandson, Charles W. Cornell, during his natural life, and that, on death of said Charles without issue surviving, the trustees were directed "to pay said

principal [i. e. the trust fund] on his death to my said son, William W. Cornell, and my said daughter, Sarah E. Harrington, to be equally divided among them." It will be noted that the provisions of the two wills are almost identical. The son, William W. Cornell, died intestate, leaving no widow or children; the daughter, Sarah E. Harrington, died, leaving a will and three children. The grandson, Charles W. Cornell, died, leaving no widow or issue. The matter comes up in two actions,—one brought by the trustee for an accounting and distribution of the trust funds in his hands; the second by the widow of the testator, asking for a judicial construction of the will, and for the payment to her of one-third of the personalty. The judge says: "The fundamental question presented for determination under this will is whether the gift to the son, William W. Cornell, and to the daughter, Sarah E. Harrington, upon the termination of the trust estate for the benefit of Charles W. Cornell, is a gift to take effect in the future, or did it vest in the son and daughter at the death of the testator?" The authorities need not be cited in support of the well-settled general propositions that in the construction of wills the law favors vesting and disfavors intestacy. The same situation would be presented here, were Nelson A. St. John and his brother, Lewis E. St. John, to die before their sister, the beneficiary, and the same condition as to the intestacy of Vincent St. John would arise, so that in respect to this matter the opinion in Roosa v. Harrington, above cited, is on all fours. Judge Chester, after carefully considering the Revised Statutes, as re-enacted in the real property law, holds: "These future estates vested in William W. and Sarah E. at the death of the testator."

The bankrupt also cites in support of his contention that "his interest cannot be liable for his debts, and is in no way liable under the bankruptcy laws, and cannot be taken and sold or applied towards the payment of the creditors of this bankrupt," the case of In re Hoadley, 3 Am. Bankr. R. 780, 101 Fed. 233, which is the only decision on this question under the present law which I have been able to find. The case is somewhat similar to the one under consideration, but differs from it because the bequest considered therein was uncertain as to the person or persons who are to take. In that case all bequests are to a class yet undetermined; that is, to the heirs. In the case under consideration the persons who would take on the determination of the precedent estate are named. The trustee in the Hoadley Case cites many of the cases cited by the trustee herein, in support of his position, and Judge Brown, in determining the case, says: "In the other case above cited, that is, the case cited by the trustee, the persons to ultimately take were named in the will. There was no uncertainty as to the person, but only as to the event which might defeat their right. They were regarded, therefore, as having a present right or interest in a future, expectant estate, which by the said statute is devisable and alienable." That is the exact condition of affairs here. The persons who are to take ultimately are named in the will. There is no uncertainty as to them, but only as to the event which may defeat their right. They have, therefore, a present right or interest therein. Judge Brown concludes: "Upon the view, therefore, that the testators here intended no present gift of any estate or interest in expectancy or otherwise to pass to either of the bankrupts, and none until the death of the beneficiaries for life, and then only to persons then living, that until then the trustees under the will held the entire estate, and that until then the bankrupts have no interest capable of being devised or aliened. The report is confirmed. And the application of the trustee in bankruptcy is denied." I think it will be evident that the decision of Judge Brown is based upon terms of a will entirely different from those in this case. Under the will here considered, the point urged by the trustee is, first, that the interest of Nelson A. St. John vested upon the death of the testator. Under the common law of this state and the cases thereunder decided prior to the adoption of the Revised Statutes, there was much uncertainty and confusion upon the subject of vested and contingent remainders, and many of the cases cited by the bankrupt are of that kind. It was the purpose of the revision of the statutes of this state to avoid this uncertainty and confusion, and, to that end, vested and contingent remainders were carefully and explicitly defined. Judge Woodruff, in discussing this question, says: "In my opinion, they have defined a vested remainder in terms which do fully avoid much of the uncertainty in

which the subject was before involved." Moore v. Littel, 41 N. Y. 66. "The estates as respects the time of their enjoyment are divided into estates in possession and into estates in expectancy." Laws 1896, c. 547, § 25; 5 Rev. St. (Banks & Bro.) p. 3548.

The interest of Nelson St. John in this bequest, whatever it may be, is an expectant estate, and, by section 26 of the laws above cited, such estates are divided into future estates and reversions. By section 27, "A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate or on the determination by lapse of time, or otherwise of a precedent estate, created at the same time." It is plain that St. John's interest is a future estate, limited to commence in possession at a future time, on the determination by death of the estate of Julia Cronin, and on the contingency that she die without child or children surviving. Section 28: "Where a future estate is dependent on a precedent estate, it may be termed a remainder." Section 30 holds a remainder vested "where there is a person in being who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain." Nelson St. John is the person in being who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates. That is, if Julia Cronin were to die at this moment, Nelson St. John, this bankrupt, is the person in being who would have the immediate right to the possession of this property. Judge Woodruff, in Moore v. Littel, above cited, after commenting upon the definitions of vested remainder, continues: "It is now true that if there be a person in being of whom it can be positively averred that, if the estate for life were now to cease, he would have an immediate right of possession, he has a vested remainder, and notwithstanding subsequent events may defeat it, the operation of the statute itself is to make them subsequent conditions." Again he says: "But here suppose that the one sole condition, to wit, the determination of the precedent estate, is all that is necessary to entitle a person in esse to take. It is not denied that such person has a vested remainder. Why, then, if the precedent estate can only be determined by the death of the life tenant, and by that death the heirship is alike also determined, is not the statute definition in all respects satisfied? It makes the precise case described, and I deny the right to interpolate qualifications drawn from the refined reasoning of cases or text-books prior to the statute to limit the operation by its plain terms." Further on, he says: "Without enlarging further, the statute, rejecting technical expressions and phrases heretofore employed, meant, by 'person,' just what it expresses, and no more. 'When there is a person in being,' means when you can point to a human being, man, woman or child; 'and who would have an immediate right to the possession of the lands upon the ceasing of a precedent interest,' means that if you can point to a man, woman, or child who, if the life estate should now cease, would, eo instante et ipso facto, have an immediate right of possession, then the remainder is vested, and by necessary consequence all contingencies which may operate to defeat the right of possession are to operate, and only to operate, as conditions subsequent." In support of this view, he quotes later Chancellor Walworth in Lawrence v. Bayard, 7 Paige, 75, who says, among other things: "It is the present capacity of the individual to take the remainder in possession, if the particular estate should immediately determine, which vests the remainder in interest, and not the absolute certainty that such remainder will ever in fact become vested in possession in him." Also, Meade v. Mitchell, 17 N. Y. 210. I quote extensively from the opinion of Judge Woodruff, because this is the case establishing the construction of this section of the statute, and has been repeatedly cited and concurred in by the courts of this state. See Campbell v. Stokes, 142 N. Y. 23, 36 N. E. 811; Levy v. Levy, 79 Hun, 290, 29 N. Y. Supp. 384; Mullarky v. Sullivan, 63 Hun, 156, 17 N. Y. Supp. 715; Nelson v. Russell, 135 N. Y. 137, 31 N. E. 1008. This construction seems to me to be a fair and reasonable one. And on the strength of it and the other cases above cited, I have reached the conclusion that the interest of Nelson A. St. John in his father's bequest is a vested remainder, and it nec-

essarily follows that as such it is alienable, and becomes a part of the bankruptcy estate, the title to which is vested in the trustee.

But what if we take the view of the bankrupt, that it is a contingent remainder? Let us again refer to the statutes of this state. If a contingent remainder, then it is a future expectant estate, under Laws 1896, c. 547, §§ 25–27; but a future expectant estate is "descendible, devisable and alienable in the same manner as an estate in possession." Id. § 49; 5 Rev. St. (Banks & Bro.) p. 3552. If this be true, and I can see no reason why such a construction is not sound, taken upon the bankrupt's own contention that his interest is a contingent remainder, it is alienable, and as such becomes a part of his estate in bankruptcy. Judge Woodruff, in Moore v. Littel, above referred to, in considering this phase of the question, determines that the interest, if a contingent remainder, is alienable, and this view, while not concurred in by the entire court, is sustained by a majority, and is cited as the leading case in this state upon that point. See Ham v. Van Orden, 84 N. Y. 269; Griffin v. Shepard, 124 N. Y. 74, 26 N. E. 339. The bankrupt has cited numerous cases holding that the bequest is a contingency, with futurity annexed. It seems to me, after a careful examination of these cases, that the conclusions arrived at therein are based upon what Judge Woodruff termed "qualifications drawn from refined reasoning," and to which he "denies the right to limit the operation of the plain terms of the statute." I have arrived at these conclusions after no little study, and not without considerable doubt as to the correctness of my reasoning. However, I am of the opinion that the interest of Nelson A. St. John is alienable, and that it is a part of his estate, no matter how undesirable an asset it may be, and that as such the trustee should take possession of it, and sell it for the benefit of the creditors. Let an order be made, directing the trustee to take possession of and sell, upon due notice to creditors and all parties in interest herein, all the interest of Nelson A. St. John, this bankrupt, under and by virtue of the bequest to him made under the last sentence of the third clause of the will of Vincent St. John, deceased.

Thomas J. Mangan, for trustee, in pro. per.

Carver & Deyo, for Susquehanna Val. Bank.

E. C. Moody, for bankrupt.

Newell & Hennessey, for First Nat. Bank, F. B. Newell, and W. W. Newell, executors.

COXE, District Judge. I have examined with care the question involved and concur with the referee that the interest of the bankrupt in the bequest of $10,000 provided for by the third clause of the will of his father, Vincent St. John, passed to the trustee in bankruptcy, pursuant to section 70, subd. a, cl. 5, Bankr. Act. Although I incline to the opinion that the referee is correct in holding that the interest in question is an alienable vested remainder, it is unnecessary to characterize it further than property which, prior to the filing of the petition, the bankrupt could have transferred, or which might have been levied upon and sold under judicial process against him. It follows that the court will hardly be justified in closing up the estate with this interest outstanding. Even were there more doubt regarding the question, the safer course for the trustee is to dispose of his interest by a sale. The fact that the possession of the estate depends upon a future contingency which may never happen, although it lessens materially the value of the estate, does not destroy its character as a vested interest which passed to the trustee, and which it is his duty to dispose of. The entire subject is so fully and clearly discussed in the opinion of the referee that further comment is unnecessary. The order appealed from is affirmed.

UNITED STATES v. AMBROSINI.

(District Court, N. D. Illinois. October 27, 1899.)

INTERNAL REVENUE—STAMP DUTIES—SALOON BONDS.

A bond executed to a state or municipality under the provisions of a statute or ordinance as a condition precedent to the issuance of a saloon license is for the individual benefit of the applicant, and not an instrumentality for the exercise of the functions of state or municipal government, and must be stamped, under the war revenue act of 1898.

On Demurrer to Indictment.

S. H. Bethea, for the United States.
Levy Mayer, for defendant.

SEAMAN, District Judge. The indictment charges the defendant on two counts for executing and issuing two bonds, respectively, without the revenue stamp required by the act of June 13, 1898; one being a bond to the people of the state of Illinois, as demanded by statute, for obtaining a license to keep a dramshop, and the other a bond to the city of Chicago, as required by ordinance of the city for like purpose. The contention on behalf of the defendant is twofold: (1) That the bonds in question are exempt under the terms of this act of congress; and, (2) if included within the terms of this act of congress, the provision is unconstitutional in respect of such bonds as instrumentalities of the state and municipal government. I am of opinion that neither of these propositions is tenable.

1. For the first contention, section 17 of the act is cited, but the exemption there provided relates exclusively to bonds and other instruments issued by the governmental authorities, and, with the utmost liberality of construction, are not applicable to bonds executed by individuals to the state or municipality for a license or other individual benefit.

2. If the bonds can be regarded as necessary means or "instrumentalities for the exercise of the functions of state or municipal government," as counsel insists, the second proposition is not without force. State v. Garton, 32 Ind. 1; Jones v. Keep's Estate, 19 Wis. 369; Sayles v. Davis, 22 Wis. 225; Fifield v. Close, 15 Mich. 505. But the business of saloon keeping is neither a governmental function nor essential to its administration, although good government may demand that the business be permitted only under regulations secured by bonds on the part of the applicant. The bond so exacted is a mere incident of the regulation. It is in no sense the act or obligation of the public or of a representative of the public, but is the applicant's individual undertaking to obtain a personal privilege, and as such is certainly not an immune in respect of stamp duties required of other citizens executing personal bonds or obligations. Neither the state nor its administration is affected directly or indirectly by the tax so imposed, as the bond must be executed and stamped when tendered; and, if in any view an instrumentality of the state, it becomes such only when fully executed. The motion to quash the indictment is overruled, and an order will so enter.

## UNITED STATES v. LOGAN.

(Circuit Court, D. Oregon. December 6, 1900.)

1. INDIANS—CRIMINAL OFFENSES—ASSAULT COMMITTED ON RESERVATION.
Under Act March 3, 1885 (23 Stat. 385, § 9), which provides that an Indian committing any one of certain named crimes against the person or property of another Indian or other person within the boundaries of any state and within the limits of any Indian reservation "shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States," an Indian who commits an assault with intent to kill upon another Indian on a reservation within a state is indictable therefor in a court of the United States, under Rev. St. § 5346, which provides for the punishment of such crime when committed by any person "within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state."

2. SAME—INDICTMENT.
To bring a defendant within the provision of such two statutes, however, the indictment must allege that he is an Indian.

3. SAME—ALLOTTEES OF LANDS—STATUS.
The allotment of lands in severalty to an Indian on a reservation under Act Feb. 8, 1887, does not exempt him from the operation of regulations provided for the government of reservations, or from liability to prosecution for crime under their provisions.

On Demurrer to Indictment.

John H. Hall, for the United States.
M. L. Pipes and B. F. Jones, for defendant.

BELLINGER, District Judge. This is a demurrer to an indictment charging the defendant with having assaulted an Indian upon the Siletz Indian reservation, in this district, with intent to kill; the defendant being at the time armed with a dangerous weapon. It is stipulated that the defendant is an allottee in severalty of lands upon the reservation under the act of February 8, 1887. The defendant demurs to the indictment upon the grounds: First, that the facts alleged and stipulated are not sufficient to constitute a crime; second, that the court has no jurisdiction of the crime charged.

The statutes under which the indictment is found are as follows:

Section 5346: "Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board any vessel belonging in whole or part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another shall be punished by a fine of not more than three thousand dollars, and by imprisonment at hard labor not more than three years."

Section 9, Act March 3, 1885 (23 Stat. 385): "That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the com-

mission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The question for decision turns upon the construction to be given to the last clause of the section just quoted: "And all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." The crime charged is within the description of "any of the above crimes," contained in the clause last quoted; and I am of the opinion that the offenses provided for in section 5346 within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state are "within the exclusive jurisdiction of the United States," within the meaning of the last clause of section 9 of the act of 1885, and that an Indian committing such an assault as is described in said section 9 is punishable as other persons are punished under section 5346 for the commission of like offenses. I am of the opinion, further, that the allotment of lands to the defendant does not take the case out of the jurisdiction of this court. The Indians affected by these allotments are still dependent communities. The lands allotted to them continue to be held by the United States, in trust for their benefit. The allottees are still subject to the regulations provided for the government of Indian reservations. Notwithstanding the mandate of the act of congress declaring them citizens, they are still minors in the eyes of the law, incapable of disposing of the lands held by them, or even of leasing them without the consent of the reservation agent; and their dependence is still so complete that it is a crime to sell or give to them whisky or other intoxicants. The rights of the defendant as an allottee of land are not material. The question of jurisdiction is with reference to the place where the crime was committed, which must be "within the limits" of a reservation. Unless the allotment took this land out of the reservation limits, a thing beyond question and not contended for, the jurisdiction of the court is not affected by it. The demurrer must be sustained because of the omission of the pleader to allege that the defendant is an Indian. This omission is fatal. I have considered the other and vital questions presented in the case, however, because these questions cannot be affected by another indictment.

## BROWN v. ZAUBITZ.

(Circuit Court, S. D. New York. December 10, 1900.)

1. PATENTS—PRIOR USE—EVIDENCE.
   The defense of prior use, to defeat a patent, must be established beyond a reasonable doubt; and oral testimony, unsupported by patents or exhibits, which is contrary to the probabilities, under the circumstances shown, and inconsistent with previous statements and representations made by the alleged prior user, is insufficient.
2. SAME—INFRINGEMENT—PYROMETERS.
   The Brown patent, No. 494,245, for an improvement in pyrometers, was not anticipated, and is valid; also, *held* infringed as to claims 1, 2, and 5.

In Equity. Suit for infringement of patent. On final hearing.

Joseph C. Fraley and C. V. Edwards, for complainant.

Lemuel Skidmore and Eugene K. Sackett, for defendant.

COXE, District Judge. This is an equity action for the infringement of letters patent, No. 494,245, granted to the complainant March 28, 1893, for an improvement in pyrometers. The application was filed April 19, 1892. The novel feature of the patent consists of the introduction of a platinum expansion strip, V-shaped in cross section. As there is a second action pending between these parties upon another patent the instrument now under consideration may, for convenience, be designated as the platinum pyrometer.

The only defense which demands serious consideration is that of prior use. The rule applicable to this defense is as axiomatic as a similar rule of the criminal law, and yet, in approaching its consideration, it is always well to remember that it is a defense which must be established beyond a reasonable doubt. In order to reject the defense it is not necessary for the court to find the testimony in its support to be false; it is enough that the court is unable to say, with reasonable certainty, that it is true. If there be a fair doubt as to its verity the defense falls and the patent stands. Because of the high character of proof required it is a defense that seldom succeeds. If a flaw exists of sufficient magnitude to admit of an honest doubt the entire structure must be condemned as unsafe. "Oral testimony," says the supreme court, "unsupported by patents or exhibits, tending to show prior use of a device regularly patented, is, in the nature of the case, open to grave suspicion." Deering v. Harvesting Works, 155 U. S. 286, 300, 15 Sup. Ct. 118, 39 L. Ed. 153. The question, then, is, did the defendant manufacture and sell the identical instrument covered by the patent prior to the date of the invention, which, in the absence of other proof, is agreed upon as of the date of filing the application, April 19, 1892? The defendant testifies that he commenced making pyrometers, similar in all material details to the infringing instrument, in the year 1886, and that he has made and sold them since that date. A number of witnesses have been called whose testimony tends to corroborate the defendant. Which of the parties to this action is the inventor of the platinum pyrometer? The complainant is 65 years of age. He is a mechanical engineer and has been since 1859. He became interested in pyrometers 35 years ago

and has been dealing in them ever since. In 1869 he obtained a patent for improvements in pyrometers and has received several other similar patents. In short, it may be said that both practically and theoretically no man in the United States is better acquainted with the art than is he. The defendant is 49 years of age and is a native of Germany, where he was a mechanical instrument maker and also a soldier in the German army. He was wounded at Gravelotte in 1870. In 1871 he came to this country to reside permanently. He was then 20 years of age. He worked for others until 1881 when he commenced business for himself in a small way and has so continued ever since. In 1881 he solicited work from the complainant and continued to do work for him until 1892, chiefly upon an instrument known as the portable pyrometer. He seems to have been a metallurgist of some skill and a competent machinist; but that he possessed a very moderate comprehension of the scientific side of the art relating to the construction of pyrometers, is manifest from his testimony. As the two men appear upon the record there can be no question that the complainant would be selected by any intelligent tribunal as more likely than the defendant to develop inventive genius. The presumptions are all in his favor. His intellectual and scientific attainments, his thorough knowledge of the art and his long and presumably honest business career, not only indicate that he was capable of developing the inventive faculty but also that he was incapable of seizing the fruits of another's labor and attempting by a false oath to secure a patent to which he was not entitled. And yet, if it be true that the defendant made the platinum pyrometer in 1886 it is not easy to see how the complainant can answer these accusations successfully. The improvement in question is not hidden in a tube, it is open to view and would certainly have attracted the attention of the complainant if it had been on the market since 1886. It is difficult to imagine that two men, without each other's knowledge, could not only conceive such an improvement but embody it in almost identical structures. It must be concluded either that the defendant copied from the complainant or vice versa. If, then, the complainant made oath in 1892, that he was the first inventor of a device which the defendant had made and put on the market six years before, it is clear that he can no longer be regarded as an ingenious inventor, but only as a mendacious swindler and a simpleton as well; for no man in his senses would attempt to patent a device which had been in public use for six years. The complainant in his past life has never shown the slightest disposition to appropriate the fruits of another's industry and genius. Unfortunately, however, this is not true of the defendant. In his circulars and catalogues published in 1892 are found exact copies of complainant's pictures of his pyrometers. Subsequently to April, 1895, defendant published a catalogue describing the instruments which he manufactured and sold. The date is indisputably fixed by the fact that the catalogue refers, on page 6, to the "Tinning and Galvanizing Pyrometer," as "Latest Improved, April, 1895." On the next page, although he had issued several previous catalogues, he describes for the first time, "A Platinum Portable Pyrometer," and illustrates it by a cut taken

bodily from Fig. 4 of the complainant's patent, which, it will be remembered, was made public March 28, 1893. He refers to the platinum pyrometer as "this newly constructed instrument" and in a letter, dated December 15, 1896, he refers to it as of "January, 1895." Two months afterwards he writes another letter offering his platinum pyrometer at "a special price for advertisement only." These printed declarations of the defendant demonstrate two facts, first, that he did not scruple to appropriate the complainant's property; and, second, that he had not been making and selling for nine years a pyrometer, which he described for the first time in 1895 as "newly constructed." No platinum pyrometer sold by the defendant prior to the complainant's invention has been produced. This omission is certainly suggestive in view of the defendant's testimony that he has been manufacturing and selling them in large numbers since 1886. In the language of the supreme court, supra, the case is "unsupported by patents or exhibits tending to show prior use." The defendant has called eight witnesses to corroborate his statements. They were examined in 1898 and testified regarding matters which transpired from five to eleven years before. The general course of the examination was to place in their hands the infringing pyrometer and ask them to compare it with the pyrometers which they saw eight, nine or ten years previous. It is unnecessary to discuss this testimony in detail. Some of the witnesses were positive that the earlier pyrometers were identical in all essential particulars, others thought them similar, and others still thought them the same to the best of their knowledge. There is no doubt, however, that this testimony if true anticipates the patent. The difficulty is that the court is unable to accept it as true. The supreme court had the same situation to deal with in the Telephone Cases, except that there the alleged anticipation was established by testimony infinitely stronger than that produced here. In rejecting it the court said:

"We do not doubt that Draubaugh may have conceived the idea that speech could be transmitted to a distance by means of electricity and that he was experimenting upon that subject, but to hold that he had discovered the art of doing it before Bell did would be to construe testimony without regard to 'the ordinary laws which govern human conduct.'" Telephone Cases, 126 U. S. 567, 8 Sup. Ct. 778, 31 L. Ed. 863.

It is not necessary to denounce these witnesses as perjurers. A much more demulcent and charitable view is that they are mistaken either as to the details of the pyrometer which they saw, or the time when they saw it. The desire to aid a friend, the actual presence of the infringing pyrometer, and the assurance of the defendant that the prior pyrometers were like it in structure may have encouraged imagination to encroach upon the domain of fact; but this is a condition frequently encountered in patent causes. The witnesses may honestly have thought that they saw the platinum strip in a pyrometer made by the defendant prior to 1892. They are in all probability mistaken, but at least, there is a doubt about it and this doubt destroys the force of the defense.

The syllogism is a simple one. If the defendant never made a platinum pyrometer prior to 1892 his witnesses could not have seen one.

The defendant's surroundings, course of conduct and printed declarations demonstrate with almost absolute certainty that he could not have made such a pyrometer. Therefore the convincing evidence required to establish the defense of prior use is necessarily wanting. The court does not overlook the fact that the defendant's evidence is directly controverted by two witnesses who worked for him during the period in question and that it is indirectly controverted by the complainant, who was frequently in defendant's shop and saw no platinum pyrometer. There is also evidence that the Franklin Institute awarded the complainant a gold medal in 1896 for his inventions, the platinum pyrometer being one. It is argued with some force that it is a fair inference that such an award could only have been made after the institute was convinced by investigation that the complainant was the true inventor. But all this evidence is open to criticism. Some of it to the same criticism which is urged against the defendant's testimony. The two witnesses referred to are not wholly disinterested and are testifying regarding events which took place long ago. The court prefers to rest the decision mainly upon the defendant's own declarations that his platinum pyrometer was constructed two years after the date of the complainant's patent. Infringement of claims 1, 2 and 5 is proved beyond dispute. Infringement of claim 6 is not asserted. No other question is presented which requires consideration. The complainant is entitled to the usual decree.

## BROWN v. ZAUBITZ.

(Circuit Court, S. D. New York. December 10, 1900.)

PATENTS—PRIOR USE—PYROMETERS.

The Brown patent, No. 520,875, for improvements in pyrometers, the essential feature of which is a compensating stem, made of alternating sections of iron and brass, *held* void for prior use, on evidence showing beyond a reasonable doubt that exhibits produced in court, and containing all the elements of the infringing article, had been made and sold by defendant several years before the date of the alleged invention by the patentee.

In Equity. Suit for infringement of patent. On final hearing.

Joseph C. Fraley and C. V. Edwards, for complainant.
Lemuel Skidmore and Eugene K. Sackett, for defendant.

COXE, District Judge. This is an equity action for the infringement of letters patent, No. 520,875, granted to the complainant June 5, 1894, for an improvement in pyrometers. The claims involved are the first, second and fourth. The principal improvement relates to an outside expansion tube having an inside bar and a sliding rod, the rod being proportioned in its expansion per degree of heat in excess of that of the tube inclosing it. The rod is composed of alternating sections of iron and brass fastened together and rests upon a bar of graphite at the bottom of the tube, the lower end of the tube being closed. The rod is provided with guides to facilitate its move-

ment in the tube. The upper end of the tube is open to enable the composite rod to connect with the indicating mechanism in the head of the pyrometer. It is upon the introduction of this rod, composed of alternating sections of iron and brass, and resting upon a bar of plumbago-ware or other material, which expands less than the tube, that the claim of invention rests. For convenience the instrument now under consideration will be termed the compensating stem pyrometer. The application for the patent was filed September 6, 1893. This date, in the absence of other testimony, is agreed upon as the date of the complainant's alleged invention. The defense is that the defendant, since 1881, has made and sold a large number of instruments identical in all essential features with the complainant's pyrometer. The situation is in many of its aspects similar to that found in the platinum pyrometer case and it is unnecessary to repeat what was there said. It must, however, be conceded that the proof of prior use is infinitely stronger and that many of the criticisms in the former case have no application to the evidence here. Some of the important points of difference may be briefly summarized as follows:

First: The time during which it is asserted that defendant made and sold anticipating instruments extends over a period of 12 years or twice the period of the former case.

Second: The defense is sustained by 11 witnesses, some of them wholly disinterested and apparently men of high character and intelligence.

Third: Two pyrometers having the expansion rod of the patent and which were purchased long prior to the application for the patent are actually in evidence, their identity being established by the purchasers, who are men whose character is above reproach. In short, the "oral testimony" is supported by "exhibits tending to show prior use."

Fourth: There is no positive and direct declaration by the defendant, as in the prior case, that the improvement was made subsequent to 1895. There are statements on page 6 of catalogue No. 4 from which such an inference may be drawn, but it is not the absolute demonstration found upon page 7. The illustrative diagram is similar to those found in previous catalogues and does not show the expansion rod. There is nothing in the statement on page 7 absolutely incompatible with the previous use of the compensating stem as stated by the witnesses.

Fifth: The improvement in controversy is hidden from view and cannot be examined without dismembering the instrument. The complainant may have seen pyrometers having the composite rod without knowing what the tube contained. In reaching a conclusion favorable to the defendant it is not, therefore, necessary to charge the complainant with bad faith, as in the other case, where the platinum strip was in plain sight, and must have attracted his attention when he visited the defendant's shop, had it been on exhibition there.

Sixth: The nature of the improvement is such that it is not impossible that two mechanicians might have adopted it independently of each other. The complainant's witness Ryan testifies that the defendant made pyrometers with the expansion rod resting on a bar

of graphite, and also that he made pyrometers with a combination stem which he describes as follows:

"A half-inch iron pipe outside, with a plug screwed at the bottom and a portion of the interior stem was made either of copper or brass, and the top of it was connected with an iron pipe, a nipple joining both together to secure them fast." The length of the sections of the interior stem "depend how deeply it was inserted in the heat. If it was to be immersed twelve inches in the heat the brass or copper was twelve inches long."

Concededly, then, the defendant was familiar with the use of graphite and of an expansion rod made of iron and brass. The step from these to the construction of the infringing instrument was not an unnatural one. It surely required no disintegration of brain tissue to accomplish the task and it may well be doubted whether invention can be based upon the change from the prior art, as Ryan describes it, to the device of the patent. The complainant concedes it to be "a minor invention addressed to the improvement of an existing instrument." It is enough, however, for the present discussion that the defendant was fully competent to make the change, and there are no conclusive presumptions, as in the other case, against his having done so.

Enough has been said to indicate the lines of departure between the two cases and to demonstrate that the defense in the case now in hand is much stronger and the complainant's reply to it much weaker than in the former case. Eleven witnesses of intelligence and character testify to a great number of instances of prior use in circumstances which make it almost impossible for them to be in error. It is true that the court has found that eight of these witnesses were mistaken regarding the prior use of the platinum pyrometer, but, as before stated, this conclusion was mainly based upon two considerations lacking here, namely, the failure to produce exhibits and the unanswerable statements of the defendant that his platinum pyrometer was produced after the date of the patent. It is unnecessary to analyze the testimony of these witnesses, but two of them, Neubeck and Somers, require more than a passing comment. Mr. Neubeck is engaged in manufacturing and selling mechanical, scientific and optical instruments on Twenty-Third street, New York. In 1890 he purchased of the defendant a pyrometer with a short stem to fit his show case and he has had it in his possession ever since. The year is fixed by a bill dated August 28, 1890, which is not only identified by Neubeck and the defendant, but bears on its face persuasive evidence that it refers to the pyrometer in question. It is for "1 combination stem pyrometer latest improved reg. 1400° F. 18.00." The pyrometer was produced in court and offered in evidence. It is a "combination stem pyrometer" and registers 1,400°. Upon being taken apart in court it was found to contain all the elements of the infringing exhibit. As to one of the exhibits produced by the defendant it was admitted at the argument that it contained every essential feature of the patented structure, and it is the recollection of the court that the admission applied to both exhibits, leaving only the date of their construction in dispute. An attempt was made upon cross-examination to show that the witness had purchased other

pyrometers of the defendant and that the bill may have referred to one of these, but the attempt failed. In summarizing this branch of the argument the complainant's brief says,

> "As Zaubitz has undoubtedly been making this infringing device since the year 1895, and as the witness admits that he has sold them since that date, how easy it is to simply attach the bill of August 28, 1890, to the instrument now produced and make a perfect story."

But this supposition overlooks the unquestioned fact that the pyrometer was in Neubeck's store in Nassau street, and was made expressly to fit a show case which he had in that store, and that he moved from Nassau street to Twenty-Third street in 1893 or 1894. No impartial person can read Neubeck's testimony and not be convinced that he had this pyrometer in his show case long prior to September, 1893.

The other witness is Daniel M. Somers. Mr. Somers is a mechanical engineer and a manufacturer of metal goods. He has had a lifelong experience in the business. In 1892 he started the manufacture of tin-plate and needed to use pyrometers. He found the defendant through the business directory and purchased three pyrometers of him. The bill is dated March 17, 1892, and the check which paid the bill is dated April 26, 1892. One of these was a horizontal pyrometer, which, on being tested, was found to be useless and was returned to the defendant who supplied a perpendicular one in its place. This pyrometer, which was furnished within 40 days of the original purchase, has been kept ever since in the possession of Mr. Somers. The pyrometer was brought into court by a messenger employed by him, and upon being examined was found, like the Neubeck exhibit, to contain all the essential features of the patented and infringing instruments. Nothing was developed upon cross-examination to weaken the force of this evidence. It all occurred in a presidential year when the tariff was "the paramount issue," and when tin plate played a conspicuous part in the campaign. As the witness was among the first to manufacture the much-debated plates, some of them being exhibited at public meetings, it is only natural that the facts regarding them should be impressed upon his memory.

The court has endeavored to consider this evidence from every point of view and with a desire to do exact justice to the complainant, but it has been impossible to resist the conclusion that the defense of prior use has been established beyond a reasonable doubt. There is no tenable theory upon which the court can disregard the testimony. Its force cannot be disguised by any refinement of dialectics. Neubeck corroborated by Somers and both corroborated by eight or nine other witnesses make a case too strong to be arbitrarily rejected. If a party were on trial for a felony and his conviction depended upon proof by the prosecution that the anticipating pyrometers were in the hands of Neubeck and Somers prior to September, 1893, the court is convinced that a jury after listening to this testimony would without hesitation return a verdict of guilty.

The court had a somewhat similar state of facts to consider in Webbing Co. v. Nicholls (C. C.) 70 Fed. 1009, and many of the observations there made are applicable to the present case. It follows that the bill must be dismissed.

## THOMSON-HOUSTON ELECTRIC CO. v. H. W. JOHNS MFG. CO.

(Circuit Court, S. D. New York. November 28, 1900.)

No. 7,400.

PATENTS—SUIT FOR INFRINGEMENT—CROSS-EXAMINATION OF EXPERT WITNESS.

Where the direct examination of an expert witness introduced by a complaint in a suit for infringement in making his prima facie proofs is confined to its proper limits, covering only a description of the patent, an explanation of the obscurities it may present to a mind not skilled in the art, and a definition of its technical terms, supplemented by a presentation of the infringing device, and an explanation of whatever features of it are covered by the claims, the defendant cannot, in cross-examination, open up the state of the art relied upon in defense; but when the witness, in his direct testimony, has referred to the state of the art, it is the defendant's right to cross-examine upon the whole subject.

In Equity. On motion to compel witness to answer.

The certificate of the examiner, setting out the facts, is as follows:

I, Ermina E. Walker, notary public, acting as special examiner by consent, do hereby certify: That on the 26th day of November, 1900, I was attended by the witness Edwin W. Hammer, then under cross-examination, and by Theodore T. Dorman, as counsel for respondents, and Thomas J. Johnston, counsel for complainant, and that in the course of the said examination the proceedings herein appended took place. The witness was asked ×Q. 300, as follows: "I show you a patent, and I will ask you to examine the same with especial reference to any supports for a trolley runway which you may find therein, and will ask you to describe the same briefly. I refer you especially to Figs. 2 and 3 of this patent, and lines 65 to 68 of the specification thereof." That thereupon said question was objected to by complainant's counsel in the language following: "Question is objected to as not cross-examination, as irrelevant and immaterial, and as attempting to prove some part of respondent's case at complainant's expense; as also referring to matters not in evidence, and not tending to prove the issues; and the witness is advised that he may refuse to answer the question if he so elects." That thereupon the witness replied as follows: "Under the foregoing assurance of complainant's counsel, I decline to answer this question at present." That thereupon the patent to which the cross question refers was produced by defendant's counsel, and the following stipulation was entered of record: "The patent produced by defendant's counsel is marked 'Defendant's Exhibit, Stentz Patent,' for identification. It is stipulated that a printed patent-office copy of the patent may be used with the same force and effect as a certified copy thereof, subject to correction." That thereupon defendant's counsel propounded ×Q. 301, as follows: "Does the patent referred to show a rail, upon which a trolley runs, supported upon a hanger, which in turn depends from a stationary support, by an attachment which permits oscillation of the hanger in an arc transverse to the track or rail?" To which the complainant's counsel interposed the same objection, and the witness answered as follows: "Under advice of counsel, I decline to answer this question." That thereupon defendant's counsel placed upon record the following: "Defendant's counsel notes a motion, based on the refusal of the witness to answer, and the advice of complainant's counsel that he may refuse to answer, to strike out the entire deposition." To which complainant's counsel rejoined: "Complainant's counsel will welcome such a motion, and would be glad to submit it to the court." And I do further certify that on the following day, to wit, November 27, 1900, before proceeding with the deposition of the witness, defendant's counsel caused a notice to be placed upon the record as follows: "Defendant's counsel gives notice of a motion, based on the refusal of the witness to answer questions 300 and 301, put at the last session,—this refusal having been consequent upon advice of complainant's counsel to the effect that the witness might refuse to answer,—to compel the witness, by order of the court, to answer these ques-

tions, and requests the examiner to certify these questions, the patent in question, and the objections and proceedings appertaining thereto, to the court for consideration in connection with the motion." And I do further certify that the annexed paper is the printed patent-office copy produced by respondent's counsel, and then marked "Defendant's Exhibit, Stentz Patent."

Thomas J. Johnston, for complainant.
Wetmore & Jenner, for defendant.

LACOMBE, Circuit Judge. The witness is complainant's expert, who is being cross-examined on the prima facie; and the question relates to one of many patents set up in the answer, either as anticipations, or as showing a state of the art which calls for a narrow construction of the patents sued upon, or possibly for a decision adverse to complainant on the question of invention. Objection is taken that this is not proper cross-examination, since the prior patent was not referred to on the direct. Where the direct examination of an expert on prima facie is confined to its proper limits, viz. a description of the patent, explaining whatever obscurities it may present to the mind not skilled in the art, and defining its technical terms, supplemented by a presentation of the infringing device and an explanation of whatever features of it are covered by the claims, then it is not logical or proper to open up the state of the art relied upon in defense through cross-examination of complainant's witness. It is defendant's expert who should introduce that branch of the case. In this case, however, complainant's expert has not so confined himself. He has referred to the state of the art, briefly, it is true, but nevertheless sufficiently, in order to magnify the meritoriousness of the invention; and therefore defendants are within their rights in insisting upon a cross-examination covering the whole state of the art. If the direct examination is to stand as it is, the objections to cross questions 300 and 301 are overruled. If complainant, however, is willing to pay the stenographer's fees for taking so much of the cross-examination as deals with the prior art,—a cross-examination induced by the witness' direct testimony,—he may strike out all the direct testimony of his expert, except such as qualifies him, down to and including the long quotation from Judge Townsend's opinion on page 10, and all of the cross which deals with the prior state of the art, and the objections will then be sustained.

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## ROYMANN v. BROWN et al.

(Circuit Court of Appeals, Fifth Circuit. November 20, 1900.)

No. 916.

SHIPPING—INJURY OF STEVEDORE'S EMPLOYE—DEFECTIVE APPLIANCES.

Libelant's intestate, employed by stevedores in loading a ship, stepped upon a hatch cover, which tilted, and he fell through into the hold, receiving injuries from which he died. A steel coaming, over three feet in height, surrounded the hatchway, having a flange on the inner side, upon which the covers rested, and it appeared that such coaming had become bulged outward opposite the cover which gave way, so that such cover did not reach the flange or have a secure footing thereon. The weight of evi-

dence, however, showed that the vessel, which was new, and all its appliances, were in good condition when it was delivered to the stevedores for loading, and that the bulge in the coaming was caused by their negligence in permitting slings of cotton bales to strike against it in loading, which had proceeded but about four hours before the accident occurred. *Held*, that the owners were not guilty of any negligence which rendered them liable for the death, in the absence of proof that they or their agents had notice of the defect, and time and opportunity to repair it.

Appeal from the District Court of the United States for the Eastern District of Texas.

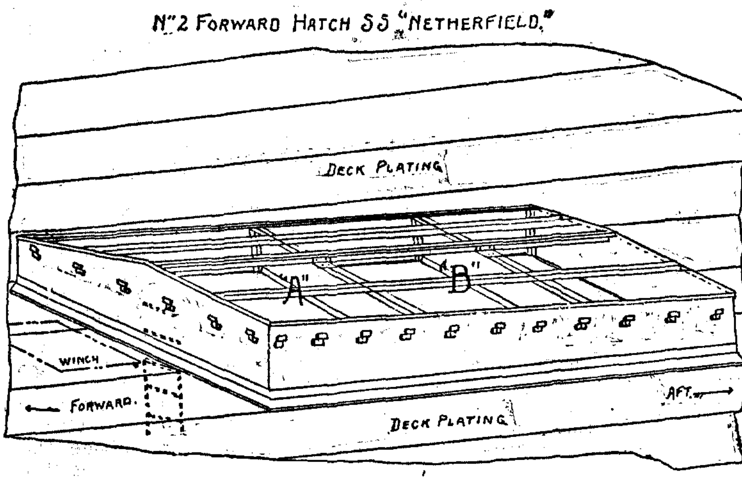
In this case a libel in personam was filed by Julia Roymann, in her own behalf and as next friend of her minor children, Thomas and Mike Roymann, alleging that on December 12, 1898, Jens Peter Roymann, husband and father of libelants, lost his life by negligence of respondents, owners of the British steamship Netherfield, and claiming $10,000 damages. The libel alleges that Roymann was a cotton screwman, a stevedore's employé, engaged in loading the ship; that the owners of the ship failed to furnish Roymann with safe appliances and apparatus and a safe place in which to work; that by reason thereof he was precipitated into the hold, and sustained mortal injuries, dying the same day. By amendment, it is alleged with particularity that Roymann lost his life on the first day he worked; that the construction of the outer flange hatch was improper and unsafe, because too narrow; that the hatch flange was bent or curved outwardly, and that such defect was not observable to Roymann when the hatch covers were on; and that the hatch covers had been put on by the officers and crew shortly before his death, and that they were charged with knowledge of the defect in the flange, and of its unsafe and dangerous condition. The libel further alleges that, by reason of the defect in the hatch flange, one of the hatch covers at the place where the hatch flange was bent was made liable to tilt, and that Roymann's duty required him to go down into the hold by means of the ladder, which was located in a dangerous place, viz. near the winch, which was 10 inches from the hatch coaming; and in adopting the method apparently safest, and which would have been safest but for the defective condition of the hatch flange and covers, a hatch cover on which he stepped tilted by reason of failing to catch on the bent hatch flange, acting as a trapdoor, throwing him 35 feet into the hold. The respondents deny negligence, and allege that the curve, if any, in the hatch flange was caused by the co-employés of Roymann permitting sling loads of cotton to strike against the hatch coamings, and that Roymann and his fellow servants removed part of the hatch covers from the forward port compartment, and were negligent in not removing them all. They deny that the winch and ladder were dangerously located, and deny that it was necessary for Roymann to cross the forward port compartment of No. 2 hatch to avoid being mangled by the winch, alleging that the safest way to the ladder was by passing the winch, and that the spring or bend in the hatch flange could have been seen by ordinary diligence, and circumstantially they deny all the allegations of negligence, and, further, the respondents charge contributory negligence. At the hearing the district court dismissed the libel, and the libelant prosecutes this appeal.

Forster Rose, Wm. T. Austin, and John C. Walker, for appellant.
J. Parker Kirlin and H. Pillans, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The Netherfield was a vessel about two and a half years old, which had been running for a number of consecutive voyages constantly in the Galveston trade, coming out in ballast, and carrying back cotton and grain. On December 12, 1898, she was loading cotton exclusively, and was in the hands of the charterer's stevedore and his long-

shoremen, who were loading and stowing cargo. She was a well-built vessel, of the highest class at Lloyd's. Her No. 2 hatch was, for the convenience of the grain trade, provided with a high coaming of three feet five inches rise from the deck, made of steel, and reinforced by a half-round heading outside, and an inch and a quarter flange for receiving the ends of the hatch covers on the inside. This hatch was divided into three chambers by two athwart-ship beams of iron, fitted with appropriate sockets with three fore and aft beams, which fitted into the ends of the hatch and into these cross beams, one being the main or strong back, running fore and aft along the middle of the hatch, and the other two being the parallel beams on each side; and these fore and aft beams were each in three parts, a part for each chamber. The following diagram is in the record:




A, compartment through which Roymann fell; B, compartment used in lowering cotton.

The crew of the vessel had on the voyage out, and shortly before the vessel reached Galveston, in the business of painting and cleaning the hold, several times uncovered and recovered this hatch, and the officers examined as witnesses had been with the vessel a number of voyages. When the ship arrived at Galveston, and was turned over to the stevedore, with the hatches on, this No. 2 hatch was apparently in good condition. The covers were all good, and with clean edges. The stevedore's gang took possession of the ship and her deck and holds, and, as customary in Galveston, removed such hatches as they desired. They opened in this No. 2 hatch the middle compartment by taking the covers off, and they took off the fore and aft covers Nos. 1 and 5 of compartment A,—No. 1, to give access to the iron ladder which led down to the lower decks and the hold. The ship lay outside of the Jamaican, a larger vessel, and received her cotton from the wharf over the Jamaican, which was higher than the Netherfield; the cotton being hoisted into No. 2 hatch by the derrick rigged on the mast, and fixed not to swing, and the cotton was dragged up from the wharf across stagings on the Jamaican, and then

swung down towards the hatch of the Netherfield, and lowered into the hold. The stevedore controlled the operations of loading the vessel and handling the cotton-loading appliances, hatches, and the like. The loading operations began in the morning at 7 o'clock, and the injury occurred at about 11 o'clock, the loading up to that time having gone on actively. The cotton was taken in slings of three bales, the entire load weighing about 1,800 pounds. No stage or skid was placed between the top of the coaming and side of the Jamaican or rail deck of the Netherfield, but, according to the testimony of the stevedore's men, some cotton, which is variously stated by the witnesses at from one to three bales, was placed on the deck against the coaming; but this left a projection of from 12 to 18 inches of coaming above the cotton. The evidence is conflicting, but the preponderance establishes that the slings of cotton, after they were dragged over the Jamaican, were allowed to strike and drag with more or less force against the coaming. The decedent, having finished a turn of work on the wharf, went aboard the ship to go below and screw cotton, and, instead of going by the deck to the head of the ladder, he stepped across upon one of the hatch covers of compartment A, three of which had been left in place, and this cover tilted, and fell with him into the hold, whereby he received injuries from which he died. There was no difficulty in going from the deck directly over the coaming to the ladder, though there was a winch 10 inches from the forward end of the coaming of the hatch near the ladder, which had guards, and was entirely under the control of the winchmen. Whether the winch was in operation at the time is disputed. The foreman or boss who had charge of the operations and other witnesses testified that it was not running; others insisted that it was; but it is clear that the stoppage of the winch for the purpose of allowing a man to pass was a matter of a very short time,—a few moments. At the time Roymann went on the hatch covers to reach the ladder others were waiting for the winch to stop in order to go down the ladder in the usual way. It appeared, on an examination of the hatch coaming and hatches after the fall of Roymann, that there was an indentation inwardly in the coaming at the chamber through which the loading operations were carried on, and on the side on which the fall took place, and that there was a corresponding bulge outwardly in the coamings of the forward and after chambers on the same side, and this spread in the end compartment was a natural consequence of the crushing inward in the middle compartment; and it was admitted in open court on the trial that this effect could have been produced by the striking by the cotton cargo, while being hoisted aboard, against the outside of the coaming of the middle compartment, through which the loading was going on. In the examination which took place after the accident, it was also found that the hatch cover No. 4, in compartment A, which tipped with Roymann, was probably, through this bulging outward of the coaming there, a trifle short of reaching its footing upon the inner flange which was placed to receive it, and which ordinarily held it up.

On this state of fact, the libelant cannot recover. The controlling question is whether the ship Netherfield and her appliances, when

turned over to the stevedore and his men to be used in loading the ship, were in good condition, and reasonably safe and proper for the purposes intended; and, under the evidence, this depends on the time when the conceded bulge in the coaming of compartments A and B took place. There is nothing to show that it was prior to the arrival of the ship in Galveston. It could not have existed without speedy discovery, as the ship's crew had been removing and replacing the hatch covers in the business of cleaning and painting. No cause whatever is shown for such bulging after the ship's arrival until the cotton was taken on board. In dragging the cotton over the Jamaican, in the manner shown by the evidence, the striking of the sling loads against the coaming would naturally cause the bulge in question, and everything points to that as the cause. If the ship and its appliances were in good order when turned over to the stevedore and his men, and thereafter they became defective, we are satisfied that it was through the faulty use of the appliances by the stevedore and his men, and certainly for this the owners of the ship cannot be held responsible before their agents had notice of the defect, and time and opportunity to repair the appliances.

The matters involved in this case seem to us to be merely questions of fact, and the law thereon is so plain that we do not feel called on to cite text-books, nor to distinguish adjudicated cases, with which the briefs on both sides are full. Nor is it necessary to consider the assignments of error in detail, nor the question—much argued—as to whether the deceased, Roymann, was guilty of contributory negligence in crossing over a loose hatch cover to reach the ladder leading to the lower deck, instead of waiting for the winch to be stopped (if it was in action), so as to go below in the usual way. The decree of the district court in dismissing the libel is affirmed.

## FOX v. DAMM.

(District Court, S. D. New York. November 26, 1900.)

SHIPPING—LANDING SCOW ON ROCKY BEACH—CHARTERER'S RISK.

A charterer of a scow, which at his instance made a landing at an unusual place, with which the master was unacquainted, must be held to have assumed the risk of such landing, and is liable to the owner for an injury received from striking upon rocks near the shore without the fault of the master.

In Admiralty.

Frederick W. Park, for libelant.

Louis L. G. Benedict, for respondent.

BROWN, District Judge. There is considerable conflict in the evidence as to what was said or agreed as respects beaching the scow for the purpose of landing the house; but the circumstances are so peculiar, the place of landing so unusual and unnatural, that it is extremely improbable that either the owner or the master of the

scow, would have undertaken to make any such landing on his own responsibility. The scow was taken to the place of landing by a tug that was employed by the respondent and was acting under his orders, and in that sense and to that extent the scow was in his charge. When brought to the beach the scow was cast off from the tug by the latter and allowed to drift ashore. I credit the captain's statement that he objected to taking the house on the boat to be landed in such a manner; and there is no doubt that the respondent urged the landing, and represented that the landing place was safe for beaching. The libelant's witnesses say that the respondent also agreed to be responsible for the event, which the latter denies.

Without passing upon the question of credibility involved in this last point, I think there can be no doubt that it was through the respondent's representations and assurances of safety that this landing was made. The scow was brought there directly by the respondent, and the captain was wholly ignorant of the situation. It is said that stakes marked the place where the scow should go. It may be true that if she could have been landed and kept in that precise spot without swerving, the stones upon the bottom near the stakes by which the scow was damaged would have been avoided. I do not think that this would be sufficient to excuse the respondent from liability for causing the landing to be made in such a locality. I am not satisfied that the settling upon the rock which damaged the scow was through any remissness or carelessness of the captain. The rock was so near the exact place indicated by the respondent as to be a menace to the safety of boats undertaking to go there, and any such attempted landing was, therefore, at the respondent's risk, unless some positive fault or negligence of the boat was established, which has not been done.

I must, therefore, decree for the libelant for the hire and towage as claimed in the libel, as well as for the damage and detention, as to which a reference may be taken if the parties cannot agree.

## THE CLINTONIA.

### NEALL et al. v. GENERAL MARINE INS. CO. OF DRESDEN.

(District Court, S. D. New York. December 3, 1900.)

MARINE INSURANCE—PROCEEDS OF WRECK—ERRONEOUS DISTRIBUTION.

After a ship had partially loaded, both vessel and the cargo loaded were badly damaged by a fire at the wharf, and were sold in salvage proceedings. The charterer had made advances of inland freight on the cargo, for which it had a lien thereon. In distributing the proceeds in the salvage suit, a cargo owner received an overpayment, which should have been applied on such freights. *Held* that, as between the charterer and an insurer of its freight advances, the former must bear the loss, if any, resulting from such erroneous payment, although neither were parties to the salvage proceedings; such loss being one not covered by the policy, and there having been no abandonment to the insurer which charged it with the duty of looking after its distribution of the fund recovered.

In Admiralty.

Convers & Kirlin, for libelant United States Shipping Co. of Dresden.

Robinson, Biddle & Ward, for libelants Neall and others.

Butler, Notman, Joline & Mynderse, for the Clintonia.

BROWN, District Judge. From the further evidence it appears that neither the Shipping Company nor the Insurance Company were parties to the salvage suit in which the overpayment of $729 to the Buffalo Company was made. 104 Fed. 92, 98. The Shipping Company, however, was the party more immediately and directly concerned in holding the proceeds of the iron, because it had a lien thereon; and that company must have had full knowledge of the salvage suit and of its own means of securing its partial payment out of the proceeds, even before Mr. Hughes called special attention to that subject. The loss, however, was only a "partial loss" under the policy, and there had been no abandonment, such as to require the insurer to look out for any partial recovery. That duty therefore, remained on the Shipping Company, and any loss by inaction or improper action was at its risk. In truth the loss by the overpayment to the Buffalo Company was not proximately a loss by a sea peril, but by a new and subsequent cause in no way naturally or necessarily arising out of the sea peril. The $729 was actually recovered in money; but by error and mistake in the salvage suit it was paid over prematurely to the wrong party. As the duty to "sue and labor" had not been legally thrown upon the insurer by abandonment, and the insurer did not insure against such subsequent errors or loss in litigation, I think the Shipping Company must bear it.

# Y-TA-TAH-WAH v. REBOCK et al.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. December 1, 1900.)

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—RIGHTS OF TRIBAL INDIANS.

An action by a tribal Indian, living on a reservation, to recover damages for his arrest by defendants for violation of a state statute, on the ground that such statute was not applicable to the plaintiff, involves a construction of the laws and treaties of the United States, and is of federal cognizance.[1]

2. ABATEMENT—LAWS GOVERNING—ACTION BY TRIBAL INDIAN.

The fact that tribal Indians residing on a reservation within a state under charge of Indian agents are not subject to the laws of the state as to their property rights does not prevent such Indians from maintaining actions for the protection of their rights either of person or property, in the courts of the state or in federal courts therein, where such courts have jurisdiction by reason of the questions involved; and where such an action has been brought, and the court has acquired jurisdiction over the parties, the effect of the death of the plaintiff upon the action is determined by the state statutes.

3. INDIANS—POWER OF STATE COURT TO APPOINT ADMINISTRATOR.

On the death of a tribal Indian residing upon a reservation, his property does not become subject to the laws of distribution of the state in which the reservation is situated, but descends in accordance with the custom of his tribe; and hence the courts of the state have no jurisdiction to appoint an administrator for his estate, there being no property within its jurisdiction to be administered.

4. ABATEMENT AND REVIVAL—IOWA STATUTE—ACTION BY TRIBAL INDIAN.

By the statute of Iowa (Code, §§ 3443-3445), all causes of actions survive notwithstanding the death of the person entitled thereto, and it is provided that on the death of such person an action "may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased." Under the decisions of the supreme court of the state, actions for personal torts must be brought or continued in the name of the administrator of the deceased. A tribal Indian, residing upon a reservation within the state, brought suit in a federal court to recover damages for his wrongful arrest by defendants for violation of a state statute, which plaintiff alleged was not applicable to him because of his status as a tribal Indian, and pending the action plaintiff died. *Held*, that the purpose of the statute being to remove an obstruction to the enforcement of rights existing at common law, by preserving the right of action therefor for the benefit of the successors in interest of the deceased, and there being no court with jurisdiction to appoint an administrator, mere matters of form must yield to substantive rights, and the court would permit the substitution as plaintiffs of the successors in interest of the decedent under the customs of the tribe.

On Motion to Substitute the Next of Kin as Plaintiffs in Place of the Deceased Plaintiff.

Charles A. Clark & Son, J. W. Lamb, and W. S. Clark, for plaintiff.
Struble & Stiger and J. R. Caldwell, for defendants.

SHIRAS, District Judge. This action was brought in this court by Y-ta-tah-wah, a tribal Indian living on the Indian reservation in Tama county, Iowa, to recover damages for an alleged false arrest and imprisonment brought about by the defendant H. M. Re-

[1] Jurisdiction in cases involving federal questions, see notes to Bailey v. Mosher, 11 C. C. A. 308, and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

bock, who was at that time the agent appointed by the United States, and placed in charge of the Indians upon the named reservation; the defendant Tode being the sheriff of the county. From the allegations of the petition, it appears that Y-ta-tah-wah acted as a "medicine man" in his tribe, and the proceedings instituted against him by the Indian agent charged him with practicing medicine without having obtained a license, as required by the provisions of the state statute, and without pursuing the studies and passing the examinations required thereby. It is further averred in the petition that the provisions of the state statute are not applicable to the tribal Indians in Tama county, and that the action of the defendants was wholly without authority. Subsequent to the bringing of the action the plaintiff died, and his heirs and next of kin now seek to be substituted as plaintiffs in the action, and the defendants move to strike the application from the files upon three general grounds: (1) That the court did not have jurisdiction over the action as originally brought; (2) that the right of action, if any existed in favor of the original plaintiff, died with him; and (3) that, if a right of substitution exists, it must be under the terms of the statute of Iowa, which authorizes the substitution of the administrator of the deceased, but not of his heirs at law. In support of the objection to the jurisdiction of the court over the action as originally brought, it is contended that the petition does not show on its face that the action is based upon the laws of the United States. This question was considered and passed upon in the case of Peters v. Malin (decided at the present term) 104 Fed. 849, it being therein held that it appeared from the allegations of the petition that the right of action relied on was based upon the laws and treaties of the United States in such sense that the case was clearly one of federal cognizance; and, following the ruling in that case, it must be held that the court had jurisdiction over the suit as originally brought.

The next proposition to be considered is whether the right of action died with the original plaintiff, or whether it survived under the law applicable to the situation. The nature of the action, being for injuries to the person, is such that at the common law it would not survive; but by section 3443 of the Code of Iowa it is enacted that "all causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." On behalf of the defendants, it is contended that the laws of the state are not applicable to the property rights of tribal Indians residing on reservations under charge of Indian agents, and in many respects this contention is doubtless well founded. It is the general rule that so long as the tribal organization is maintained, and so long as "the United States recognizes their national character, they are under the protection of treaties and the laws of congress, and their property is withdrawn from the operation of state laws." The Kansas Indians, 5 Wall. 757, 18 L. Ed. 667. It does not follow from this, however, that a tribal Indian may not invoke judicial aid for the protection or enforcement of his personal or property rights. By the provisions of the act of the general assembly of Iowa, ap-

proved July 15, 1856, the state consented that these Indians should reside in the state, and, being thus residents in the state, they would come within the protection of section 1, art. 1, of the state constitution, which declares that "all men are, by nature, free and equal and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." Courts of justice are created for the purpose of aiding in the protection of life, liberty, and the rights in and to property, and certainly it would be a violation of the true meaning and spirit of the constitutional declaration if any court in Iowa, state or federal, should refuse its aid, when invoked, for the protection of life, liberty, or property, on the sole ground that the person seeking its aid was an Indian.

In the case of Felix v. Patrick (C. C.) 36 Fed. 457, Judge Brewer expressly upheld the jurisdiction of the circuit court of the United States, the plaintiff therein being an Indian; and further stated in his opinion that "as a matter of fact Indians are frequent suitors in the courts of the various states." In that case the complainant's bill was dismissed on the ground of laches, in that suit had been delayed for many years, it being held that the state courts were open to the Indian; and on appeal the supreme court affirmed the ruling on the same ground, saying that "the courts of Nebraska were open to them, as they are to all persons, irrespective of race or color." Felix v. Patrick, 145 U. S. 317, 332, 12 Sup. Ct. 862, 36 L. Ed. 719.

While it is true, as is said in the case just cited, that ordinarily tribal Indians are not deemed to be citizens in such sense as to enable them to bring suit in the federal courts, on the ground of diverse citizenship, yet, in all cases coming within federal jurisdiction by reason of the questions involved, the tribal Indian has always been recognized as a proper suitor before the federal tribunals. Wau-pe-man-qua v. Aldrich (C. C.) 28 Fed. 489; Fellows v. Blacksmith, 19 How. 367, 15 L. Ed. 684; Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643. The court whose aid is rightfully sought, whether state or federal, has the power to enforce the rights pertaining to the suitor, no matter whether the same are based upon the common law, or the statutes of a state, or the recognized customs of the Indian tribes.

Thus, in Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439, a case involving the question whether a federal court in New York could recognize and enforce a cause of action created by a statute of the state of New Jersey, giving a civil remedy for damages resulting from the death of a party, it was held that:

> "Wherever, by either the common law or the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties. The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the circuit court of the United States were competent to try such a case when the parties were properly before it."

The ruling in this case was cited and approved by the supreme court of Iowa in Morris v. Railway Co., 65 Iowa, 727, 23 N. W. 143, a suit brought in Iowa to recover damages caused by the death of a railroad employé in Illinois, the statute of the latter state giving a right of action in such cases, it being therein said:

"It is not necessary that we should go further in this case than to hold that the action can be maintained, because the recovery sought is in accord with our laws and the policy of our state; and yet we think, as is said in Dennick's Case. supra: 'It would be a very dangerous doctrine to establish that, in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred.'"

These authorities clearly demonstrate that, if it be true that the defendants were guilty of a trespass to the person of the Indian, the injured party had the right to bring suit for the damages caused him in any state court within whose territorial jurisdiction the defendants could be found, and in the federal court in whose district the defendants reside. The defendants, being citizens and residents of Iowa, cannot question the jurisdiction of the courts of Iowa over them, and the Indian, though not a citizen, by invoking the aid of the court, submits himself to the jurisdiction thereof, and the court, having obtained jurisdiction over the parties, will apply the law, no matter what its source, that is applicable to the question in dispute, and the same rule will be followed in cases coming within federal jurisdiction. If the defendants, without right or authority so to do,—a question to be solved by the laws and treaties of the United States,—undertook to subject the Indians to the provisions of the state laws regulating the practice of medicine therein, and in so doing committed a trespass on his person, then the common law would give a right of action therefor, and to enforce the same the courts, state and federal, were open to the injured party.

The original plaintiff brought the action at law for damages in this court, and, the suit being thus properly brought in this court, the question of the effect of the death of the plaintiff is to be determined by the law of the state, just the same as it would had the party chosen to have brought the action in the state court. The cause of action arose in the state of Iowa, and it is the law of the state that the death of a party shall not terminate the right of action, and therefore it must be held that the cause of action which accrued to Y-ta-tah-wah during his lifetime is still in existence, under the express declaration of the Code of Iowa that "all causes of action shall survive."

The more difficult question, perhaps, arises under the claim that, under the provisions of the state law, actions for damages to the person, brought or continued after the death of the party injured, must be maintained in the name of the personal representative, to wit, the administrator of the deceased. As already stated, section 3443 of the Code of Iowa enacts that all causes of action shall survive, notwithstanding the death of the party entitled thereto; and section 3444 declares that the right of civil remedy is not merged in a public offense; and then follows section 3445, which provides that "any action contemplated in the two preceding sections, may

be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased." It is well settled by the decision of the supreme court of Iowa that actions for personal injuries should be brought or continued in the name of the administrator, in case of the death of the injured party either before or after the bringing of the action; and, relying upon this rule, defendants herein contend that it is not within the discretion of the court to permit the action to be continued in the name and for the benefit of the next of kin or heirs of the deceased. If it were possible in this case to lawfully secure the appointment of an administrator for the estate of the deceased Indian, it might well be the duty of the court to require the parties in interest to obtain the appointment of an administrator in order that he might be substituted for the deceased plaintiff in this action. The basis of the jurisdiction of the state district court, acting as a court of probate, to appoint an administrator in a given case, is the presence of property belonging to the decedent within the territorial jurisdiction of the courts. If the person at the time of his death was a resident of the county, then jurisdiction in that county exists because the situs of his property for probate purposes is that of his residence; but, if he was not a resident, then it must appear that in fact there is property belonging to the estate in the county in order to confer jurisdiction. Christy v. Vest, 36 Iowa, 285.

An administrator is appointed in order that he may care for and properly distribute the property of the intestate decedent, but, if there is no estate within the jurisdiction of the probate court, then an appointment would be nugatory. Therefore, in the case at bar, the district court of Tama county has not jurisdiction to appoint an administrator of the estate of the deceased plaintiff, unless the property or property rights left by him are within the probate jurisdiction of the state.

As the plaintiff was at the time of his death, and always had been, a tribal Indian, his property was not subject to the laws of the state. The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49. If it be true, as it undoubtedly is, that during the lifetime of the deceased plaintiff his property, he being a tribal Indian, was not subject to the laws of the state, then certainly the fact of his death would not subject the property to the laws of the state, but the same would be disposed of according to the customs of the tribe of which he was a member. This general question is fully discussed in the above-cited case of Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49, in which was involved the question of the title of certain realty situated in Minnesota which had been the property of a tribal Indian, and it was therein held that "the elder chief, Moose Dung, being a member of an Indian tribe whose tribal organization was still recognized by the government of the United States, the right of inheritance in his land at the time of his death was controlled by the laws, usages, and customs of the tribe, and not by the law of the state of Minnesota, nor by any action of the secretary of the

interior." If it were true that, upon the death of a tribal Indian, his property, real and personal, became subject to the laws of the state directing the mode of distribution of estates of decedents, it is apparent that irremediable confusion would be caused thereby in the affairs of the Indians, and hence the necessity for enforcing the rule that the property of the tribal Indians is wholly without the plane of the state laws, although actually situated within the territorial boundary of the state. Under these circumstances, it seems clear that the district court of Tama county could not rightfully undertake to administer the estate of the deceased plaintiff, and an appointment of an administrator to that end would be without jurisdiction, and hence wholly nugatory. If, therefore, the present suit cannot be continued in any other name than that of an administrator, then the contention of the defendants must be sustained, and the action be dismissed, for the reason that the parties asking to be substituted are not the administrators, and cannot be made such, of the deceased plaintiff.

Under the statutes of the state, it is the settled rule that the administrator is the proper party to maintain suits for the collection of the debts and the enforcement of claims belonging to a deceased person at the time of his death. But this rule is not without exception. If for any reason administration of an estate cannot be had, any person interested in the property of the deceased may establish and enforce his right by a proceeding at law or in equity as the facts of the particular case may require. Thus, in Haynes v. Harris, 33 Iowa, 516, wherein suit was brought to recover on a promissory note by the heirs of the deceased payee, it was held that, as it did not appear that there was any obstacle to the appointment of an administrator, the suit could not be maintained by the heirs, but it was also held that "there is no impropriety in our expressing the opinion that plaintiffs are not without a remedy, in case it be made to appear that there are no debts against the estate, and letters of administration, on account of the lapse of time, cannot be taken out. In such a case, plaintiffs' legal or equitable rights to the proceeds of the note could not be questioned. If the law would supply no remedy, equity, which is for 'the correction of that wherein the law, by reason of its universality, is deficient,' would afford relief." This ruling is clearly a recognition of the principle that the fact that an administrator cannot be appointed to enforce a claim or debt due to an intestate during his lifetime will not have the effect of discharging the claim or debt, but, upon a proper showing, a party interested therein, either as a creditor or heir, may institute legal proceedings to enforce payment against the debtor. It certainly would be considered a reproach upon our judicial system if it were true that debts due from residents of the state to members of the Indian tribe could not be enforced after the death of the Indian creditor, solely for the reason that no provision is made for the appointment of an administrator of the Indian's estate. Furthermore, it is not true that the state law in terms limits the survivorship of actions only to the personal representatives. Section 3445 of the Code of Iowa declares that

the court, on motion, "may allow the action to be continued by or against the legal representatives or successors in interest of the deceased." If, in a given case, there is no legal representative,—that is, no executor or administrator,—and none can be legally appointed, then the action may be continued by or against the successors in interest.

If it be true in the present case that an administrator cannot be appointed to represent the interest or estate of the deceased plaintiff, is it not clear, under the express terms of the Code, that the court may allow the action to be continued in the names of the successors in interest of the deceased? Confining the question solely to the construction to be given to the language of the Code, it must be held that it is within the power of the court to allow the action to be continued in the name of the heirs as the successors in interest to the original plaintiff in cases wherein the appointment of an administrator cannot be had. Taking a broader view of the question, as one arising under the rule to be followed when judicial aid is sought for the enforcement of a cause of action arising under the common law, and not created by a state statute, is it not within the power of the court whose aid is invoked to recognize, as to matter of form, a procedure which will give protection to substantive rights, rather than to make matter of substance yield to matter of form?

When a statute creates a cause of action out of a condition of facts which, aside from the statute, would not constitute ground for an action, and the statute also declares the remedy to be pursued for the enforcement of the statutory cause of action, it is the usual rule that parties are limited to the remedy thus provided. Where, however, the facts are such that they would constitute a cause of action at the common law, and a state statute, in aid of the enforcement of such a cause, removes some obstacle to the right of action, and in aid of that purpose provides a method of enforcing the cause of action, as by providing for suit in the name of the personal representative, the main purpose of the statute is the preservation of the cause of action, which purpose will be recognized and enforced by all courts; whereas, the provision of the statute that the suit may be brought in the name of the personal representative is merely directory, and, while it should be followed in all cases wherein a personal representative can be legally appointed, yet, when that cannot be done, courts will recognize the right of the real parties in interest to enforce the cause of action by a proper proceeding at law or in equity. This I understand to be the meaning of the supreme court in the ruling made in Stewart v. Railroad Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. The action in that case was brought by Stewart, as the administrator of Andrew Casey, in the supreme court of the District of Columbia, to recover damages for the death of Casey, caused by the negligence of the railway company in the state of Maryland. The Maryland statute gave a right of action in cases of death resulting from negligence, and provided that the action should be brought by and in the name of the state of Maryland. The statute in force in the District of Columbia also

gave a right of action in like cases, but provided that suit should be brought in the name of the personal representative. If the suit had been brought in Maryland, where the cause of action, to wit, the killing of Casey, was created, it would have been brought in the name of the state. In fact, the suit was brought in the District of Columbia, in the name of the administrator; the statute of the District giving the right of action to the personal representative. The court of appeals of the District dismissed the action, holding that the statute in Maryland not only created a statutory liability, but prescribed a particular remedy, and that no action could be maintained, either in Maryland or elsewhere, unless that special remedy was pursued. The supreme court reversed this ruling, holding that:

"A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim, 'Actio personalis moritur cum persona,' damages therefor could have been recovered in an action at the common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the states, in more or less conformity to what is known as 'Lord Campbell's Act,' is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death. * * * It may well be that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued; but, where the statute simply takes away a common-law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common-law obstacle has been removed. * * * The two statutes differ as to the party in whose name the suit is to be brought. In Maryland, the plaintiff is the state; in this District, the personal representative of the deceased. But neither the state in the one case, nor the personal representative of the deceased in the other, has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. * * * For purposes of jurisdiction in the federal courts, regard is had to the real, rather than to the nominal, party. * * * And so, within the rule heretofore announced in this court, it must be held that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland."

Thus, the supreme court held that although the cause of action arose in Maryland, and though the suit in the District of Columbia was brought for the benefit of the persons designated in the statute of Maryland, and although the statute of Maryland required the suit to be in the name of the state, yet this provision, being as to a matter of form, would not control in the courts of the District, which could entertain the action in the form recognized in that jurisdiction. In substance, the statute of Iowa provides for the survival of all actions for the benefit of the successors in interest of the person deceased, and, an interest in the chose in action being thus recognized to exist in the successors in interest, they should and will be permitted to continue suit for the protection of their rights in their own names, in all cases wherein a legal representative cannot act in their behalf.

Unless this be the rule, it would follow that if a white man should take the property of the tribal Indian without right, and, pending the suit to recover possession thereof, the Indian should die, then the wrongdoer would retain the property, although clearly not en-

titled thereto. To obviate wrongs of this nature, it must be held that, in all cases wherein an administrator cannot be appointed as the representative of the interests of the heirs of the deceased person, then the courts will permit the heirs, they being the real parties in interest, to become the parties to the suit, and in this way the litigation will be conducted between the real parties in interest, and matter of substance will not be sacrificed to mere matter of form.

So far the question has been considered in the light only of the state statute; but, in the final determination of the matter, regard must be had to the provisions of section 955, Rev. St., wherein it is declared that:

"When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment."

Construing this section, it is held that with respect to actions which at common law would abate with the death of the plaintiff, and in the absence of congressional legislation, recourse must be had to the law of the state wherein the action is pending to determine whether the cause of action survives the death of the plaintiff. Martin v. Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311. As already pointed out, this action, being for injuries to the person, did not die with the death of the plaintiff; the declaration of the state statute being that:

"All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same."

And therefore, in the absence of legislation on the subject-matter by congress, the rule established by the state statute governs this court under the provisions of section 721, Rev. St. Henshaw v. Miller, 17 How. 212, 15 L. Ed. 222. The death of the original plaintiff after the institution of the suit did not, therefore, abate the cause of action, and the only question is whether the suit can be revived and continued in any other name or form than that of an administrator, under the provisions of section 955, above cited.

In Ex parte Schreiber, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. Ed. 65, it is said:

"If the cause of action survives, the practice, pleadings, and forms and modes of proceeding in the courts of the state may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. Rev. St. § 914. But, if the cause of action dies with the person, the suit abates, and cannot be revived. Whether an action survives depends on the substance of the cause of action, not on the forms of proceedings to enforce it."

In Railroad Co. v. Joy, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677, it was held that a right given by a statute of a state to revive a pending action for personal injuries in case of the death of the plaintiff is not lost by a removal of the case into a federal court; it being further ruled therein that congress—

"Has not established any rule that will prevent a recognition of the state law under which the present action was originally instituted, and which, at the

time the suit was brought, conferred the right, when the plaintiff in an action for personal injuries died before final judgment, to revive in the name of his personal representative."

See, also, Ex parte Connaway, 178 U. S. 421, 20 Sup. Ct. 951, 44 L. Ed. 1134.

From these rulings of the supreme court the following principles are fairly deducible: (1) That the right of survival of causes of action, notwithstanding the death of the party to whom the right of action originally accrued, created by the provisions of state statutes, is a matter of substance, not of form; (2) that, in the absence of congressional action, recourse may be had to the laws of the state wherein the action is pending, in order to determine whether the cause of action abates on the death of an original plaintiff; (3) that, in case the cause of action survives the death of the plaintiff, then under the provisions of section 955, Rev. St., the action may be continued in the name of the executor or administrator; (4) that, in cases wherein the provisions of section 955 cannot be availed of, by reason of the fact that an executor or administrator cannot be appointed, then, if the state law provides a mode of procedure, in the name of the real parties in interest, by which the cause of action may be prosecuted, the same may be availed of in the courts of the United States. Under the facts of this case, I therefore hold that upon the death of the plaintiff the cause of action declared on did not die, but under the provisions of the Code of Iowa it survived for the benefit of the heirs of said plaintiff; and, as it appears that there is no executor or administrator of his estate and that none can be appointed, the plaintiff being at the time of his death a tribal Indian, residing upon an Indian reservation, it follows that the provisions of section 955, Rev. St., cannot be made applicable to the case, and resort must therefore be had to the statutes of the state in determining in what form or mode the action can be continued, and, as the state statute provides for continuing actions in the name of the successors in interest, as well as in the name of a legal representative, the action may be continued in the names of those persons who, under the tribal laws and customs obtaining among the Indians on the reservation in Tama county, Iowa, constitute the heirs of the deceased plaintiff.

## MEXICAN NAT. COAL, TIMBER & IRON CO. v. MACDONELL et al.

(Circuit Court, W. D. Texas, San Antonio Division. December 1, 1900.)

No. 103.

FEDERAL COURTS—TRANSFER OF CAUSES—CONSTRUCTION OF STATUTE.

In Act March 2, 1899 (30 Stat. 1002), establishing a division of the circuit court in the Western district of Texas, at Laredo, and providing that pending suits against parties residing in certain counties may be transferred to such division "on the application of either party," the words "either party" refer to all the individuals upon the one side or the other of the suit, and a suit can only be transferred on the application of all the plaintiffs or defendants.

In Equity. On motion to transfer cause to Laredo division.

Denman, Franklin & McGown, for complainant.

C. L. Bates and Duval West, for cross complainant.

Upson, Newton & Ward, William Aubrey, J. O. Nicholson, and E. A. Atlee, for defendants.

MAXEY, District Judge. The bill in this case was filed by the complainant at the San Antonio division of the court on March 6, 1897. By the original bill and subsequent pleadings quite a number of persons were made parties defendant, and among them the following: Allan Macdonell, Mary Macdonell, Daniel Milmo, Albert Urbahn, W. H. Mowry and his wife (Margarita B. Mowry), Jose Benavides, Santos Benavides, Miguel Benavides, Anastacia Benavides, Natividad Herrera and his wife (Ester B. Herrera), William Anderson, D. T. Roy, and Thomas T. Brewster,—all of whom are alleged to be citizens of Texas, and residents of Webb county. Thomas Carmichael and A. B. Frank, citizens of New York, and several foreign corporations appear, also, as defendants; but the further enumeration of parties is not deemed essential to the decision of the question arising upon the present motion. The complainant claims by its bill an interest in certain coal lands included within the limits of a tract known as the "Santo Tomas Ranch," situated in Webb county, Tex. Among other things, the bill prays for an accounting, for the appointment of a receiver, and for a decree settling the rights and interests of the respective parties in the property in controversy. It is not necessary to refer further to the merits of the case, except to state that it was conceded by counsel upon the argument that all the persons named as defendants are necessary parties to the suit.

The only question to be now determined is whether the suit shall remain here, or be transferred to the Laredo division of the court. A motion to transfer it to the Laredo division was filed by the defendants Albert Urbahn, Daniel Milmo, Mowry and wife, Herrera and wife, and Jose Benavides, and the right of such defendants to transfer the causes is resisted by the complainant and at least one of the defendants. The motion was predicated upon the act of congress establishing a division of the court at Laredo, approved March 2, 1899 (30 Stat. 1002, c. 393). That part of section 2 of the act pertinent in this connection to be considered reads as follows:

"That all actions or proceedings now pending in the courts at Brownsville and San Antonio against parties residing in the counties of Webb, Zapata, Duval, Encinal, La Salle and McMullen may, on the application of either party to such actions or proceedings, be transferred to the court at the city of Laredo; and in case of such transfer all papers and files therein, with copies of all journal entries, shall be transferred to the office of the deputy clerk of the court at the city of Laredo, and the same shall proceed in all respects as if originally commenced in said court."

It will be observed that the act authorizes the transfer upon the application of "either party to such actions or proceedings," and it devolves upon the court to decide whether all the defendants, admitted to be necessary parties to the suit, must join in the application. If the expression "either party" be held to include all the individuals upon one side of the controversy, then an application

made by less than all would be insufficient to authorize the transfer. If, however, "either party" be construed to mean any one or more of the individuals, plaintiffs or defendants, it is clear that an application made by seven defendants, as is the case here, would be sufficient. While the act under consideration has not received judicial interpretation, the expression "either party," as it appears in the first clause of section 2 of the act of March 3, 1875 (18 Stat. 470), providing for the removal of causes from the courts of the states to those of the United States, has been construed by federal courts in several reported cases, and quite uniformly to the effect that, to authorize a removal of the suit under that clause of the section, it was necessary for all the parties to unite in the application. Referring to section 2 of the act of 1875, above mentioned, Judge Brown, now associate justice of the supreme court, used this language:

"In construing the first clause of this section it has been uniformly held that the words 'either party' comprehended all the individuals upon one side of the controversy, and that all such individual parties must unite in the petition." Smith v. McKay (C. C.) 4 Fed. 354.

In Ruckman v. Land Co. (C. C.) 1 Fed., at page 370, it was said by Judge Nixon:

"The removal is prayed for because the controversy in the suit is between citizens of different states. But that is one of the grounds of removal stated in the first clause of the section, in which the united action of all the defendants or all the plaintiffs is necessary to make the petition operative."

In speaking of what he deemed an inconsistency between the first and second clauses of the second section of the act of 1875, Judge Lowell said:

"It is not easy to give a reason for the inconsistency between two clauses of the same sentence or paragraph; but it exists, because in the first clause 'either party' undoubtedly means all the plaintiffs or all the defendants; and in the second the language is clear that any one plaintiff or defendant interested in the particular controversy may petition. The courts reconcile this conflict as well as they may by holding that the first clause refers to an ordinary action at common law, like the one at bar, where there is but one party on each side, no matter of how many persons that party may consist, and that in such actions the plaintiffs or defendants must act as a unit; and the second, to suits in equity, where there may be distinct controversies between different sets of plaintiffs or defendants." Maine v. Gilman (C. C.) 11 Fed. 215.

In Thompson v. Railway Co. (C. C.) 60 Fed. 774, it was said by Judge Sanborn:

"It is well settled under this clause of act of 1875 * * * [the first clause of the second section] that a removal could not be effected unless all the parties on the same side of the controversy united in the petition."

Insurance Co. v. Champlin (C. C.) 21 Fed. 85; Mayor, etc., of City of New York v. Independent Steamboat Co., Id. 593; 20 Am. & Eng. Enc. Law, 980. See, also, Removal Cases, 100 U. S. 457, 25 L. Ed. 593; Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514; Blake v. McKim, 103 U. S. 336, 26 L. Ed. 563; Fletcher v. Hamlet, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. Ed. 679; Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962.

The expression "either party," appearing in the act to establish the Laredo division of the court, evidently refers, as it does in the removal act of 1875, to the individuals upon the one side or the other of the suit, acting together as a unit. The individuals composing the party, whether plaintiffs or defendants, must all unite in the application to remove. As the present application embraces only seven of a much larger number of defendants, it must be denied. Ordered accordingly.

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UNITED STATES v. QUEEN et al.

(District Court, E. D. Pennsylvania. December 12, 1900.)

No. 3.

FEDERAL COURTS—CONSTITUTIONAL POWERS—STATUTE IMPOSING ADMINISTRATIVE DUTIES.

Act June 22, 1874, § 6, par. 1 (1 Supp. Rev. St. [2d Ed.] p. 33), which requires the court or judge to certify the value of the services of an informer in regard to frauds upon the customs revenue, which have been the subject of a judicial proceeding, for the information of the secretary of the treasury, seeks to impose upon the court duties which are administrative, and not judicial, and is unconstitutional.

On Petition of Matthew H. Chadwick, Informer.

Henry J. Hancock, for petitioner.

James B. Holland, U. S. Atty., and J. Whitaker Thompson, Asst. U. S. Atty.

J. B. McPHERSON, District Judge. The petitioner avers that he furnished original information concerning certain frauds committed by the defendants upon the customs revenue, that suit was brought upon this information, and recovery had by the government, and therefore that he is entitled to compensation, under section 4 of the act of 1874 (1 Supp. Rev. St. [2d Ed.] p. 32). He asks the court to examine and determine the validity of his claim for compensation, and also to certify the value of his services to the secretary of the treasury, under the first paragraph of section 6 of the same statute (Id. p. 33). The paragraph is as follows:

"That no payment shall be made to any person furnishing information in any case wherein judicial proceedings shall have been instituted, unless his claim to compensation shall have been established to the satisfaction of the court or judge having cognizance of such proceedings, and the value of his services duly certified by said court or judge for the information of the secretary of the treasury; but no certificate of the value of such services shall be conclusive of the amount thereof."

He gave notice of this application to the collector of the port of Philadelphia, and the United States district attorney appeared, and examined the witnesses.

The government now moves to dismiss the proceeding on the ground that the duties which section 6 attempts to impose upon the court are not judicial duties, and therefore that the section is so far unconstitutional. The question has already been considered by

at least two federal judges, and their opinions may be found in Ex parte Gans (D. C.) 17 Fed. 471, and Ex parte Riebeling (D. C.) 70 Fed. 310. In view of these decisions, I need do no more now than to say that I agree with them in holding that the duties sought to be imposed upon the court by the section in question are administrative, and not judicial, and that congress could not constitutionally impose them. Judge Maxey's discussion of the subject in Ex parte Riebeling is so full and satisfactory that it would be superfluous to attempt more. It may be proper to add that although my predecessor, Judge Butler, gave several certificates such as is now asked, it was evidently with considerable doubt concerning his authority, as will appear by the following extract from the order in U. S. v. 563 Diamonds, No. 2 of 1896:

"It appearing to the court that there is some doubt as to its authority because of the nature and character of the proceedings, but, for the purpose of aiding the secretary of the treasury in the proper discharge of his duties as contemplated by the statute, [the court] will entertain jurisdiction."

The petition is dismissed.

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SOUTHERN RY. CO. v. NORTH CAROLINA CORP. COMMISSION et al. SEABOARD & R. R. CO. v. SAME. ROANOKE & T. R. R. CO. v. SAME. RALEIGH & G. R. CO. v. SAME. RALEIGH & A. AIR-LINE R. CO. v. SAME. CAROLINA CENT. RY. CO. v. SAME. ATLANTIC COAST-LINE RY. CO. OF VIRGINIA v. SAME. WILMINGTON & W. R. CO. v. SAME. NORFOLK & C. R. CO. v. SAME.

(Circuit Court, E. D. North Carolina. December 10, 1900.)

EQUITY PLEADING—AMENDMENT OF ANSWER.

Amendments cannot be allowed to an answer after the time for taking testimony by the complainant has expired, the purpose of which is to make certain a construction of the original answer contended for by defendant, but disputed by complainant. Such amendment is either unnecessary, or it makes a change in the issues not permissible by the defendant at that stage of the case.

On Motions by Defendants for Leave to Amend Their Answers. See 104 Fed. 700.

Chas. Price and C. M. Busbee, for complainants.

H. G. Connor, Simmons, Pou & Ward, J. C. L. Harris, C. A. Cook, and John W. Hinsdale, for defendants.

SIMONTON, Circuit Judge. These cases now come up on a motion by defendants to amend the answers in each case. The reason for the proposed amendments is stated in the motion:

"Whereas, the complainants' counsel insist that the defendants in their answer in the above-entitled case have admitted that the corporation commission has assessed the property of the complainants at its true value; and whereas, the defendants contend that no such admission was made or intended to be made: Now, in order to avoid any uncertainty upon this point," defendants will move "for leave to amend the answer of defendants by inserting the following paragraphs."

The zeal and ability with which this motion has been argued, and the elaborate briefs submitted, deserve a full statement and discussion of the point involved. The cases were first heard upon the

return to a rule to show cause why an injunction should not issue. An immense number of ex parte affidavits were submitted at this hearing. An examination of the affidavits convinced the court that no satisfactory conclusion could be drawn from them. Nothing is more common in the trial of causes than a variance between the evidence of the same witness on examination and cross-examination and his statements in an affidavit. And this without any reflection upon the motives or character of the witness. Affidavits are generally prepared by a person other than the affiant. The scribe uses expressions which he thinks set out the meaning of the affiant. The latter is apt to sign after cursory reading or hearing, and, when afterwards his attention is directed to the words used in the affidavit, he discovers that he has wholly misunderstood the words used for him. At any rate, reading the affidavits submitted in these cases, the necessity for cross-examination of the affiants became manifest, and the causes were referred to a master. After that the answers were filed. Replication being in, the testimony was taken on behalf of complainant, and the time for taking it is about to end. At the date of this opinion it has ended. Then the motion now under consideration is made. There is no doubt that amendments can be allowed to the pleadings at almost any stage of a case (Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864),—in matters of form, mistakes of date, verbal inaccuracies, always; material amendments in an answer, rarely (Walden v. Bodley, 14 Pet. 156, 10 L. Ed. 398). A bill may be amended without material detriment to a defendant, because to such an amendment he has the right to answer. But if an answer be amended, shifting the issue or the ground of defense, a complainant may be driven to filing a new bill. Among other rules laid down as directing the discretion of the court in granting leave to amend, are two of great weight. The proposed amendment should not contain the same matter and defense as the original answer. Story, Eq. Pl. § 868. The amendment must not be of matter which could, with proper diligence, have been put in the answer. Comb Co. v. Phelps, Fed. Cas. No. 7,025. The answers in these cases were prepared by counsel of the highest standing at the bar, not only for learning, but accuracy. It would be difficult to believe that they have made use of language not conveying the meaning they intended. And now they assert that the answer does express their intention. If this appears in the answer as filed, then there is no occasion for any amendment. There is no need for the expression of the intention in language of classic purity. It is enough if the language used can bear the idea intended. An amendment at this stage of the case is too grave a matter to be used simply to improve the style of the answer. If the language used in the answer does not express the purpose for which it was used, so that the opposite party and the court cannot so interpret it, and if the amendment gives a new complexion to the case, it could not be allowed. The complainants have completed their testimony in chief. If the proposed amendment give a new complexion to the case,—if it raise issues not logically or properly raised in the answer,—then complainants would have the right to ask leave to introduce evidence looking to this new com-

plexion of the issue, and the cause which should be speedily decided may be prolonged indefinitely.

There are nine cases involved in this litigation. The bill of complaint in each case charges that the defendants have assessed the property of railroads at its full value, and that in this they have discriminated against the railroads, inasmuch as by universal rule all property other than railroad property in North Carolina is assessed for taxation greatly below its actual value in money. Although expressed in varying language, this is the gravamen of each bill. In the original answers this charge is categorically denied. The amendments proposed are eight in number, numbered xi a, b, c, d, e, f, g, h. These proposed amendments simply deny the allegations in detail, and aver that a practice to the contrary exists in every respect. Very much of the argument in support of the amendments goes to the merits of the case. This is not the time for such a discussion. The motion to amend as prayed for is refused.

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## OLIVER et al. v. PARLIN & ORENDORFF CO.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1900.)

No. 965.

FEDERAL COURTS—ENJOINING SUIT IN STATE COURT—PRIORITY OF JURISDICTION.

In a suit in equity in a federal court, brought, among other things, to recover possession of certain real estate, and to cancel a deed of trust executed by prior owners thereon for fraud, the grantors and grantees in such deed were made defendants. The grantees answered, under oath, that long before the commencement of the suit they had sold and transferred the deed of trust and the notes secured thereby to a bank named, and disclaimed any interest in the property. After replications had been filed, the testimony taken, and the cause set down for hearing, the bank which owned the deed of trust commenced a suit for its foreclosure in a state court, and, in accordance with the practice, procured the issuance of a writ of sequestration, under which the sheriff took possession of the property. *Held*, that the federal court had not acquired such priority of jurisdiction as authorized it, in view of Rev. St. § 720, which prohibits the granting of any injunction to stay proceedings in any court of a state, to enjoin the prosecution of the foreclosure suit in the state court, upon the filing of an amended bill by the complainant, in which for the first time the bank was made a party defendant.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Lauch McLaurin, for appellant.

U. F. Short, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is an appeal from an interlocutory order granting an injunction restraining proceedings in a state court. The original bill was filed the 18th day of December, 1899, against D. Oliver, F. C. Oliver, S. S. Walker & Sons (a firm composed of S. S. Walker, J. L. Walker, and Sanders Walker), and W. W. Wright,

trustee. The allegations of the bill, more or less, tend to support the prayer for relief, which is as follows:

"In consideration whereof, and for as much as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and reviewable, your orator prays that the defendants S. S. Walker & Sons, a firm composed of S. S. Walker, J. L. Walker, and Sanders Walker, be compelled to answer under oath, and to state whether or not the said sum of money owing from F. C. Oliver to them, as hereinbefore stated, and secured by deed of trust upon said premises, is paid, and to state specifically and definitely the credits to which said sum is entitled, and the respective dates and amounts of each of said credits, and how and when the same was received by them, and the balance due or claimed to be due upon said indebtedness; that the said defendants F. C. Oliver and D. Oliver may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator. It now prays the court that the deed aforesaid executed by F. C. Oliver to D. Oliver, on the 15th day of April, 1897, be canceled, set aside, and for naught held, and that the said D. Oliver be ordered and directed by a decree of this court to convey to your orator, by a quitclaim deed, all the right, title, and interest which he acquired under and by virtue of said fraudulent conveyance of F. C. Oliver to him, within such time as the court shall direct; that an account be taken of the rents and profits of said property from the 5th day of December, 1899, at which time your orator acquired title thereto, and that the same be directed to be paid to your orator by the defendant or defendants receiving the same, and that your orator have a writ of possession directing the said defendants to deliver said property to your orator; that an account be taken of the sum or sums due and owing from the said F. C. Oliver to the defendants S. S. Walker & Sons, if any, and that your orator be permitted to pay the same, if any such sum is found due, and that the cloud created by said deed of trust upon the title to said premises be removed, and that said deed of trust be canceled, satisfied, and for naught held, and that the said defendants S. S. Walker & Sons and W. W. Wright, trustee, be enjoined and restrained from foreclosing said deed of trust by advertisement and sale pending this litigation."

All the defendants appeared and answered at more or less length, and the defendants S. S. Walker & Sons answered as follows:

"First. And now come the respondents S. S. Walker, J. L. Walker, and Sanders Walker, composing the firm of S. S. Walker & Sons, and, in answer to the subpœna heretofore served on them herein, would show to the court that they have no interest in the property herein sued for, and had none at the time of the commencement of this suit; wherefore they pray the court that they go hence without day, and that they have judgment for their costs, and for such other and further relief as they may be entitled.

"Second. And, for further answer, now come the said respondents, and say, in answer to the bill herein filed, requiring that they answer under oath what interest, if any, they have in a certain deed of trust executed by F. C. Oliver and wife, on the 23d day of November, 1896, in favor of these respondents, to secure a note for the sum of two thousand nine hundred and forty-five ($2,945.00) dollars, in which W. W. Wright, one of their co-respondents, is trustee, and would show to the court that said note was given for the erection of a brick building on the lots described in the bill herein filed, and that long prior to the commencement of this suit said note had been transferred by these respondents to the Groesbeck National Bank; that at the time of said transfer no credits had been indorsed on said note, and that the only money received by these respondents was paid to them by the Groesbeck National Bank; that they have no knowledge as to whether F. C. Oliver, or any other person, has paid anything on said note since it has been transferred to the Groesbeck National Bank; that these respondents have not now, nor have they had for a long time (for more than two years) prior to the filing of this affidavit, any interest in said note, or the property herein sued for. Where-

fore they pray that they be discharged, and that they go hence without day, and have judgment for their costs, etc.; and as in duty bound they will ever pray."

The record shows that, at the time the defendants entered their appearance, the complainant, through his counsel of record, was informed by the defendants' counsel, as well as by the answer of S. S. Walker & Sons, that the note secured by the deed of trust had long before been transferred to the Groesbeck National Bank, who then held the same, and that a request was made that the complainant should make the said Groesbeck National Bank a party to the suit. The complainant filed replications to all the answers, an examiner was appointed, the evidence all taken, and the case made ready for hearing. The record further shows:

"That on May 3, 1900, the Groesbeck National Bank instituted its suit, No. 3,507, on the docket of the district court of Texas for Limestone county, making F. C. Oliver, D. Oliver, and Parlin & Orendorff Company parties defendant therein, and immediately had issued citation therein on them. In said suit the said bank makes the following claims: That it is the legal and equitable owner and holder of the promissory note for $2,945.00 mentioned in the bill of complaint in said cause No. 532, in the United States circuit court at Dallas, Texas, made by F. C. Oliver to S. S. Walker & Sons on November 23, 1896, as well as the lien executed by said Oliver on the lands described in the bill of complaint in said cause No. 532, to secure the payment of said note; that it so owned and held said note and lien since a time prior to the maturity of said note,—that is, since a date prior to January 23, 1897; that the said note is wholly due and unpaid, and that the said bank is entitled to recover thereon the face value thereof, with interest and attorney's fees, and is further entitled to a foreclosure of the said lien as a prior lien upon the said land against all the defendants in the said suit, and prays for relief accordingly; that the Groesbeck National Bank, in its suit No. 3,507 in the said state court, in compliance with the law in such cases made and provided, made its affidavit and bond for the purpose of securing the issuance of a writ of sequestration in said cause No. 3,507, upon said land hereinbefore named, being the same land described in complainant's said cause No. 532, in the United States circuit court; and thereafter, in compliance with the statutes in such cases made and provided, a writ of sequestration was issued by the said state court in the said cause No. 3,507, to the sheriff of Limestone county, Tex., who, in compliance therewith, according to law seized and took into his possession the land above described."

On May 28, 1900, the complainant, the Parlin & Orendorff Company, filed its amended bill in the circuit court, averring substantially the same matters set forth in the original bill, together with the fraternal relationship between Rod Oliver, the president of the Groesbeck National Bank, and the defendants D. Oliver and F. C. Oliver, and the knowledge of the bank of the suit pending, and charged fraud and collusion, and on these allegations prayed that the Groesbeck National Bank should be made a party defendant, and that it should be restrained by injunction from further proceeding in the action commenced in the district court of Limestone county, Tex., and from commencing or prosecuting any further action or proceeding at law in respect of or concerning the matters aforesaid, or any of them, and for such other and further relief as the circumstances of the case might require. Upon notice, the Groesbeck National Bank was then made a party to the suit, and the injunction issued as prayed for, on a bond of $3,000.

The assignments of error are numerous and lengthy, and relate mainly to the right of the court below to permit an amendment to the original bill on the showing made, and, after replication, the taking of testimony and the setting of the cause for hearing. But the only question we deem it necessary to pass upon on this appeal, which is based on an interlocutory order granting an injunction, is whether the injunction restraining the proceedings in the state court was properly issued. Jurisdiction to issue this injunction, notwithstanding the provisions of section 720, Rev. St., is claimed; because it is said the circuit court, prior to the commencement of proceedings in the state court, was fully seised of jurisdiction of the parties and the matters in controversy, and that to allow the proceedings to go on in the state court would be to defeat the previously acquired jurisdiction of the circuit court, and forestall any decree that may be therein rendered. The scope of the bill in this case, as taken from the allegations and the prayer, is very wide, and the bill is to be considered as one to recover possession of certain real estate, set aside a deed of trust for fraud, remove clouds from title, recover rents and profits, and for an accounting in a certain contingency; and, as to these matters and against the parties to the bill, we assume, for the purpose of this appeal, that the circuit court is fully seised of jurisdiction. "The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to federal and state courts. Peck v. Jenness, 7 How. 612, 12 L. Ed. 841; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; Bank v. Stevens, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807; Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399." Farmers' Loan & Trust Co. v. Lake St. El. R. Co., 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667. The leading cases in regard to the right of a court of the United States, in a proper case, to issue an injunction in disregard of section 720 of the Revised Statutes, are French v. Hay, 22 Wall. 231, 253, 22 L. Ed. 799, 857, and Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497. In citing and considering these cases, the supreme court says:

"The cited cases were of ancillary bills, and were, in substance, proceedings in the federal courts to enforce their own judgments by preventing the defeated parties from wresting replevied property from the plaintiffs in replevin,

who by the final judgments were entitled to it. As was said in Dietzsch v. Huidekoper: 'A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court. Dietzsch, the original plaintiff in the action on the replevin bond, represented the real parties in interest, and he was a party to the action of replevin, which had been pending, and was finally determined in the United States circuit court. That court had jurisdiction of his person, and could enforce its judgment in the replevin suit against him, or those whom he represented. The bill in this case was filed for that purpose, and that only.'" Harkrader v. Wadley, 172 U. S. 148, 165, 19 Sup. Ct. 119, 43 L. Ed. 399.

An examination of the cases which have attempted to follow French v. Hay and Dietzsch v. Huidekoper will show that in every well-considered case, when an injunction restraining already instituted proceedings in a state court has been issued by a United States court, it was either based on a decree or judgment of the United States court which it was necessary and proper to enforce; or, if issued prior to judgment or decree, it was directed against a party who, after jurisdiction over him and the cause was fully vested, had resorted to proceedings in the state court necessarily conflicting with, if not ousting, the jurisdiction of the United States court. See Shoemaker v. French, Fed. Cas. No. 12,800; Sharon v. Terry (C. C.) 36 Fed. 337; Mutual Life Ins. Co. v. University of Chicago (C. C.) 6 Fed. 443; Railroad Co. v. Kuteman, 4 C. C. A. 503, 54 Fed. 551; Abeel v. Culberson (C. C.) 56 Fed. 333; President v. Merritt (C. C.) 59 Fed. 7.

The present case shows that the Groesbeck National Bank acquired the note secured by the deed of trust involved in this controversy long prior to the maturity of the same, and long prior to the institution of the present suit in the circuit court, and that the said bank was neither a party nor a privy to the suit in the circuit court; in fact, the record shows that although the complainant was fully advised that the Groesbeck National Bank owned the note in question, and had acquired the same prior to the filing of his bill, he neglected and refused to make the Groesbeck National Bank a party. Under these circumstances, we are of opinion that although the said bank, through its president, may have been fully informed, it was not compelled to intervene in the complainant's suit, nor to await the decision of issues pending therein between other parties, but had the right to commence, in a proper court, a suit for the determination of its rights, including a foreclosure of the deed held by it. It thus appears that the present case is clearly distinguishable from each and all of the cases wherein it has been held that notwithstanding the provisions of section 720, Rev. St., the United States court might issue an injunction restraining instituted proceedings in a state court. If section 720, Rev. St., means something, and is not to be emasculated by construction and exceptions, it means that, in cases like the present, no injunction shall be granted "to stay proceedings in any court of a state." The order appealed from, so far as it restrains proceedings heretofore instituted in the state court, is reversed, and the cause is remanded to the circuit court, with instructions to further proceed as equity may require.

## RICHARDSON v. OLIVIER.

(Circuit Court of Appeals, Fifth Circuit. November 20, 1900.)

No. 929.

1. BANKS—RECEIVING DEPOSIT WHEN INSOLVENT—RIGHT OF OWNER TO RECLAIM.
A check deposited in a bank on the day it closed its doors, and when it was known by its officers to be insolvent, remains the property of the depositor, who may recover the proceeds from the receiver, where they are shown to have come into his possession.

2. SAME—STOCKHOLDER AS DEPOSITOR.
The rights of a depositor in a national bank, as such, in case of the bank's insolvency, are not affected by the fact that he is also a stockholder, his duties and liabilities as stockholder being measured by the provisions of the statute; and he has the same right to reclaim a deposit fraudulently received from him when the bank was known by its officers to be in a failing condition as any other depositor, where he had no knowledge of the bank's condition, and did not participate in the frauds of its officers.

3. SAME—SUIT AGAINST RECEIVER—LACHES.
A suit by a depositor in a bank against its receiver to recover the proceeds of a check fraudulently received by the officers of the bank after its insolvency, and which came into the hands of the receiver, commenced within three years after the insolvency, is not barred by laches, in the absence of a statute of limitations which would bar an action at law of like character, where no injury to any one has resulted from the delay, which was due solely to a misunderstanding of his rights by complainant, caused in part, at least, by statements made to him by the receiver.

4. SAME—ESTOPPEL—ELECTION OF REMEDIES.
Complainant was a depositor in a national bank, and on the day the bank closed its doors, and when it was known by its officers to be insolvent, he deposited a check. On the statement of the receiver that the proceeds of the check had gone into the general funds of the bank, he included the amount of the check in the proof of his claim in the insolvency proceedings, and received partial dividends on such claim. In fact, the check was collected by the bank examiner after the suspension, and the proceeds went into the hands of the receiver. *Held*, that the action of complainant in including the amount of the check in his claim under such circumstances did not amount to an election of a remedy, or create an equitable estoppel which precluded him, on learning the facts, from maintaining a suit against the receiver to recover the proceeds of the check as his property, on tendering back the dividends received thereon, before the closing of the estate in insolvency, and while the money was still in the receiver's hands.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

W. C. Cochran (F. L. Richardson, on the brief), for appellant.
Henry Chiapella, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a suit in equity brought by P. Numa Olivier against F. L. Richardson, as receiver of the American National Bank. Between 2 and 3 o'clock p. m. on August 5, 1896, Olivier deposited in the bank a check drawn by B. F. Peters on the New Orleans National Bank for $716. The bank, when it received the check, was known to its officers and managers to be insolvent; and at 3 o'clock on that day the bank closed its doors,

and was not again opened for business. On the next morning, August 6, 1896, a bank examiner of the United States took possession and control of the bank. The check so deposited was collected by the bank examiner after the American National Bank had closed. After the check had been collected, F. L. Richardson was by the comptroller of the currency of the United States duly appointed receiver of the bank, and qualified as such receiver. The assets of the bank went into his possession as receiver, as did also the $716 collected on the check, which latter sum is now held by the receiver. The main purpose of the bill is to recover of the receiver this sum. On the facts stated, it was a fraud on the part of the bank to receive the check, if it intended to collect it and mingle the proceeds of the collection with its general assets, and for this and other reasons not material to state, the check and the proceeds of its collection remained the property of Olivier, and he, in the absence of other facts constituting a defense, would be entitled to recover the same. This has been decided in several recent decisions of this court, where the reasons are given. Richardson v. Bank, 36 C. C. A. 315, 94 Fed. 450; Same v. Denegre, 35 C. C. A. 452, 93 Fed. 572; Same v. Redemption Co., 42 C. C. A. 619, 102 Fed. 780; Same v. Coffee Co. (C. C. A.) 102 Fed. 785.

The receiver contends that Olivier is not entitled to recover (1) because he is a stockholder in the bank; (2) because of laches and delay in asserting his claim; and (3) because he is now estopped from asserting a claim to the entire proceeds of the check, he having elected to prove his claim and receive dividends as a general creditor. The facts relevant to these defenses should be stated. Olivier owned 20 shares of stock in the American National Bank. The Bank was found to be so insolvent that it was necessary for the comptroller of the currency to assess the stockholders to the amount of the par value of the stock held by them. This assessment being made, Olivier on October 20, 1896, paid to the receiver the amount of the assessment against him, $2,000. On the morning of August 5, 1896, before he deposited the check as stated, Olivier had a balance in the bank to his credit, as shown by his pass book, of $816.19. The check deposited was also entered on his book. Adding the amount of the check, $716, to the balance on the book, $816.19, the entire amount of credit on the book was $1,532.19. Richardson, the receiver, was known to Olivier to be a lawyer. The latter applied for a blank form to prove his claim against the bank. On Olivier's cross-examination by Richardson in reference to the check for $716, he was asked:

"Q. Did you say to me or did you claim that the money should be returned to you? A. Yes; I made the observation that I thought the money ought to be returned because the bank had no right to receive that deposit."

The following is from Olivier's deposition:

"Q. At the time you made that proof of claim for the whole amount, $1,532, did you ask Mr. Richardson, the receiver, whether you should include that check for $716 or not? A. Well, I made the proof for the whole amount. Mr. Richardson had told me that my check had gone into the general assets of the bank. Q. Had you ever asked Mr. Richardson, the receiver, whether you

could claim back the check or the proceeds of the check for $716 deposited on the 5th of August, on the day prior to the failure of the bank? A. Well, at the time I paid that assessment— It was at that time I asked Mr. Richardson about that check, and he said that it was gone; that it was in the general assets of the bank. So I paid the assessment. I did not think of making any opposition. I never had any lawsuit before. Q. Why did you ask him that question,—for what purpose? A. Well, because I thought they would return me that check, or the amount of that check, and I could use it to pay part of my assessment, but he told me that it had gone into the general assets of the bank."

In reference to paying the assessment of $2,000 without demanding the return of the $716, the witness testified:

"Q. Did you take my advice, or that of any other lawyer, at the time you made that payment to Mr. Richardson, receiver? A. No. Q. Upon whose assurance as to the law of the case did you act? A. Well, I thought, Mr. Richardson being a lawyer, and telling me it had gone into the general assets of the bank, I need not go to consult with any other lawyer."

It is provided by statute:

"The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof." Rev. St. § 5235.

Under these circumstances Olivier filled up the blank so as to include both the previous deposits and the amount collected on the check, and received the receiver's certificate, dated March 10, 1897, for the entire sum $1,532.19. Afterwards he received two dividends on the claim, one of 10 per cent. and one of 5 per cent. In his bill, filed on June 19, 1899, Olivier tenders these dividends in certified checks, so far as they were payments on the money collected on the check, one for $71.60 and one for $35.80. Since the bill was filed the receiver tendered Olivier other dividends, but he declined to receive them. It was conceded in the bill that the receiver had acted in good faith, and it was not claimed that it had been his intention to deceive or mislead the appellee. The circuit court filed with the decree appealed from an opinion showing the reasons on which the decree is based. (See note.)[1]

It is claimed by the appellant that the fact that the appellee is a shareholder in the bank should deprive him of the right to secure

[1] The following is the opinion of the circuit court (PARLANGE, District Judge):

"It is evident that the complainant is entitled to recover, under the doctrine of Richardson v. Denegre, 35 C. C. A. 452, 93 Fed. 572, unless by his acts he has deprived himself of the benefit of the doctrine. I am satisfied that he has done nothing which can be successfully pleaded against him as an estoppel. No one has been injured by his acts. No one has been thereby induced to change his position to a less favorable one. Estoppels en pais are sustained to prevent the party against whom they are pleaded from gaining an unfair advantage over one whose conduct was influenced by the act from which the estoppel is claimed to result. In this case the injustice, it seems to me, would be in sustaining, and not in rejecting, the plea of estoppel. Though it is fully conceded (and in fact it is pleaded) that the receiver acted in perfect good faith, yet his statement to the complainant was material in producing the condition of

a preference. We quote from the brief of the learned counsel for the appellant:

"It may well be doubted whether a court of equity ought ever to give a stockholder of a bank a preference over the creditors of the bank, when the only ground for asking such preference is the fraud of the officers of the bank, who represent him in their dealings with depositors. He is joint proprietor of the business, interested in its profits, having a voice in the election of its directors, and therefore responsible in a measure for their conduct of the business. Why should he be preferred to general creditors, who have no interest in the profits and no voice in the management, on the score that his agents have defrauded everybody, including himself?"

The statute fixes certain liabilities on the shareholders of national banks. They are made responsible for the contracts of the bank to the amount of their stock therein at its par value, in addition to the amount invested in such shares. Rev. St. § 5151. The appellee has responded to that liability, and paid the amount of the assessment against him. The shareholders of the bank, unless they are also officers of the bank, do not participate in its active management. It is true that they select, either directly or indirectly, the officers,—the president, the cashier, and the directors,—but beyond that they do not participate in its control. When a shareholder makes a general deposit in the bank, the bank becomes his debtor, as in the case of deposits by nonshareholders. When he makes a special deposit, the relation of trust arises, as in the case of special deposits by others. There is no sound reason, we think, for refusing to give a shareholder the same remedies against the bank on account of its frauds that are given to other creditors. The shareholder who is a creditor occupies a dual relation to the bank, and his liabilities and duties in the one relation should not embarrass him in the enforcement of his rights in the other. There is no fact in evidence in this case that shows that the appellee obtained any knowledge or notice of, or that he in any way participated in, the frauds of the bank, so that he should be placed on a footing different from that of nonshareholders who had dealings with the bank. To deprive him of the rights and remedies of others would be to add to the responsibilities and liabilities imposed on him by the act of congress under which the banks are organized. To establish the doctrine advanced by the appellant would be to discourage shareholders from dealings with the banks

things from which it is now claimed that an estoppel arises. The claimant is not chargeable with laches, under the facts of this cause; the receiver having contributed to the delay by his statement to the complainant, and no one having been injured by the delay. For the same reasons, and because complainant was not aware of the facts, the plea that he should be held to his election is not good, in my opinion. The error of mixed law and fact which caused the complainant to act as he did is such an error as a court of equity, in such a case as this, can and should relieve from. Not to do so would be unjust to the complainant, and would be giving to others an unfair advantage over him. Let there be a decree ordering the receiver to pay the complainant $716 by preference, being the proceeds of the check on the New Orleans National Bank received by the receiver after the failure of the bank. Let the decree further order that the money tendered by the complainant be paid over to the receiver."

in which they held stock, for they would always be at a disadvantage as compared with other clients of the banks. It may be said that it would make the shareholder more particular in the selection of the bank's officers, but the congress thought it sufficient to impose a fixed liability on the stockholder, and we do not find precedents requiring or permitting us to increase such liability. We think the shareholder in cases like this is entitled to the same remedies that the courts give to the nonshareholder.

The deposit of the check was made on August 5, 1896. The bill was filed on June 19, 1899, less than three years after the deposit. In the application of the doctrine of laches the rule is that courts of equity are not bound by, but they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law in cases of like character. This rule means that under ordinary circumstances a suit in equity will not be barred by laches before the time fixed by the analogous statute of limitations at law. But the statute of limitations would not always govern. If, owing to special circumstances, it was inequitable to apply the statute, it might not be applied in equity; and, if equitable considerations required the application of the bar, it might be applied in cases where the statute would not bar an analogous case at law. Our attention is not called to any statute of limitations of the state of Louisiana that would bar a suit at law by Olivier to recover the money of the bank within the period which elapsed from the deposit of the check to the time the bill was filed. It is true that, in the absence of any statute of limitations, equity discountenances gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights. This principle is applied as a matter of course in cases where to grant relief to the party guilty of the delay would do injustice to innocent third parties who acquired interests during the delay. But in this case there is no analogous statute of limitations that would bar the suit if at law. No innocent third parties have acquired interests to be affected, and such delay as has occurred was apparently caused by a mistake as to the law and the facts caused by the appellant, the defendant in the court below. The rule as to laches is established to promote, and not to defeat, justice. It appears to us that it would be inequitable and contrary to precedent to apply the doctrine to defeat the claim asserted in this suit. Godden v. Kimmell, 99 U. S. 201, 25 L. Ed. 431; Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14; Williamson v. Monroe (C. C.) 101 Fed. 322; Wagner v. Baird, 7 How. 234, 12 L. Ed. 681; Billings v. Smelting Co., 2 C. C. A. 252, 51 Fed. 338, 348.

The claim that Olivier is bound by his election is in effect a claim that he is, in equity, estopped from now asserting his right to the return of the entire proceeds of his check. The answer, in fact, presents the defense in that form. The answer asserts that Olivier, on account of the facts stated, "is thereby forever estopped from altering his position in relation to said claim, and from attempting to avoid the effect of the settlement thereof which he has voluntarily accepted and made with this respondent." A brief examination of this defense will show the absence of several elements essential to

create an equitable estoppel. This will be evident from an attempt to apply the definition of equitable estoppel, as given by modern authorities, to the facts of this case. Pomeroy says:

"Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy." 2 Pom. Eq. Jur. § 804.

The position of the receiver has not been changed by any act of the appellee. The receiver has not in good faith acted on any representation or act of the appellee so that the change of position on the part of the appellee will injuriously affect the rights of the receiver or of those whom he represents. It could not have been Olivier's purpose to elect to prove his claim for the proceeds of the check as a general creditor because he thought he would obtain a larger dividend in that way. He could, of course, as a general creditor, or as a privileged creditor or claimant, receive no more than the amount of the check. If the bank was able to pay its debts in full, he, as a general creditor, would be paid in full; and, if the assets were not sufficient to pay in full, he, as a general creditor, would receive only a pro rata share. On the other hand, as a preferred creditor he would obtain in full the amount of the check. It is, therefore, clear that he did not elect to prove the claim as a general creditor with the expectation that he would obtain more than if he claimed a return of the amount of the check. The evidence shows that his original purpose was to claim as a privileged creditor, and he had said to the receiver that "he thought the money ought to be returned, because the bank had no right to receive the deposit," but, on the assurance of the receiver that the collection had passed into the general fund, he proved the claim as a general creditor. The acts or representations of Olivier will not create an estoppel against him, and in favor of the receiver, unless the receiver was deceived or misled. If the receiver was cognizant of the facts, he cannot claim to have been misled or deceived, and cannot urge an estoppel on account of the appellee's conduct, which indicated a different state of facts. 2 Pom. Eq. Jur. § 810. The record leads us to believe that the receiver must have known when and under what circumstances the check was collected. He should not have treated the collection as a part of the general assets of the bank. Having knowledge of the real facts, he cannot claim to have been misled by Olivier's proving the collection as a part of his account against the bank. It cannot, we think, be fairly claimed that Olivier, with full knowledge of all the facts, and without inducement or suggestion on the part of the receiver, so conducted himself in the assertion of his claim and the receipt of the dividends that it would now be contrary to equity and good conscience for him to be allowed to allege and prove the truth. The doctrine of equitable estoppel, therefore, should not be applied to this case. 2 Pom. Eq. Jur. §§ 805, 808, 809.

Some observations were made by the supreme court in the case of Dickson v. Patterson, 160 U. S. 584, 592, 16 Sup. Ct. 373, 40 L. Ed. 543, that seem pertinent to the instant case. That was a suit brought to procure a decree to rescind certain sales of real estate on the ground of fraud. The plaintiff and the defendant had been dealing in real estate together. They had made purchases and sales. The plaintiff had received some money from the defendant on a sale made by the latter on their joint account. Later he filed a bill to set aside the sale. The court below dismissed the bill on the ground that the plaintiff had elected to retain what he had received from the sale of the land in question, and to pursue his claim for moneys claimed to be still due. The circuit court held that after the alleged fraud came to his knowledge he was bound to promptly make his election, and, having elected to let the sale stand, he could not thereafter maintain an action to set it aside. The bill having been dismissed for these reasons, which we have very briefly stated, an appeal was taken to the supreme court. The supreme court reversed the decree of the circuit court, and laid much stress on the fact that Patterson's action had induced or caused the conduct of Dickson which was insisted on as an election. The court said:

"But there are other considerations which preclude Patterson from insisting that Dickson made his election of remedies, and must abide by that election. During the correspondence that took place between the parties in 1886, Dickson, so far as the record shows, was not aware that the sale and conveyance to Boehme was merely fictitious, and in execution of Patterson's scheme to defraud him. Patterson assured him that the sale was a real one, and there is no proof to show that Dickson at the time knew or believed anything to the contrary. If it was a real sale, Dickson, having joined in the deed to Boehme, could not go behind it, unless he could show that the latter did not purchase in good faith. But, from what Patterson wrote to him, he had no reason to doubt the validity of the sale to Boehme. Besides, Patterson induced Boehme to inform Dickson by letter that the amount paid was only $6,000, and that it was changed in the deed to $10,000 at his (Boehme's) request, and that Patterson was an honest man, with a good reputation. All this was well calculated to make the *impression upon Dickson that the only relief he could have against Patterson was to obtain an accounting, and a decree or judgment for such additional sum as was justly due him.*" (The italics are ours.) Dickson v. Patterson, 160 U. S. 584, 591, 16 Sup. Ct. 376, 40 L. Ed. 548.

The court held that, no rights of innocent third parties having intervened, the plaintiff ought not to be denied the fullest relief to which, according to the principles of equity, he was entitled. We think this case is instructive, as tending to show that a plaintiff should not be held to have made an election which creates an estoppel against him if his conduct in making such election was in any way influenced by the acts of the defendant. Can one doubt, to apply the language of the supreme court, that what Richardson, the lawyer and receiver, said to Olivier was well calculated to make the impression on the latter that the only relief he could have against the receiver of the bank was to obtain a pro rata distribution by proving his claim as a general creditor?

The learned counsel for the appellant has cited many cases on the point now under discussion. We shall briefly comment on the two cases which he has selected as being nearest in point. One of the cases so selected is Nanson v. Jacob, 93 Mo. 344, 345, 6 S. W.

246, 253. This was an action of trover for the conversion of a number of bales of hops. The court first held that a demurrer to the evidence should have been sustained because no conversion was proved, because "a mere bailee, whether common carrier or otherwise, is guilty of no conversion, though he receive property from one not rightfully entitled to possession, and, acting as a mere conduit, delivers it in pursuance of the bailment, if this is done before notice of the rights of the real owner." This ruling really disposed of the case, but the court further considered the effect of obtaining a judgment as on contract for the value of the hops, saying:

"There was error committed in regard to the allowance of the claim presented to the assignee of Jacob, in regard to the force and effect of said allowance. That allowance was, to all intents and purposes, a judgment, appealable from as such, and conclusive as such. The official record of the assignee shows positively that he refused to allow the claim on the basis of a conversion, but allowed it as on account. The record of the assignee also shows that Jacob was adjudged by the assignee entitled to a reduction of two and a half per cent. commission on the hops, and the claim was then allowed (i. e. with such a deduction), and it was admitted on the trial that plaintiffs had received several thousand dollars on the allowed claim; and at that time the assigned estate of Jacob was still unsettled, and it did not appear what additional payment would be made on account of allowance. In such circumstances as the foregoing, the conversion, if any had occurred, must be deemed as waived. Clearly, the plaintiffs could not have two strings to their bow,—could not ratify the act of Jacob, on the one hand, by having their claim allowed in the ordinary way, with a deduction of commissions, and then, on the other hand, proceed as for a conversion. The two proceedings were entirely incompatible. The plaintiffs were put upon their election to choose which remedy they would pursue, and, having elected to go before the assignee as aforesaid, were necessarily precluded from any other or further remedy."

The court added that:

"Any other theory announces this remarkable result: that Jacob is allowed a commission of two and a half per cent. on the value of the hops he is alleged to have converted tortiously."

And after quoting a number of cases involving the sales of personal property, in which plaintiffs were not permitted to sue for the price and also sue for the property or for its conversion, the court added:

"For the most obvious reasons, then, the plaintiffs could not with one hand gather in the proceeds of the hops in the assignee's court, and with the other hand take the hops or their proceeds in the circuit court."

The case of Burrows v. Johntz, 57 Kan. 778, 783, 48 Pac. 28, is the other case cited in the brief for appellant. In this case the claim was first allowed as a debt against the estate in the hands of the assignee. Under the Kansas laws, on the allowance of the claim it "became in effect a judgment." After the creditor had in this way obtained judgment as a creditor, he sought to obtain a preference by showing that he was entitled to a return of the entire fund on which his debt was based. The court held that the claim as last asserted was barred by the Kansas statute of limitations of three years. The court further held that the trust sought to be enforced could not be established because the evidence was not sufficient on a vital point. The court said:

"It is impossible to say, from the record, with certainty, that the assignee ever got these funds in any form. A trust is not imposed on the assignee unless the funds of the plaintiff actually came into his hands in their original form, or commingled with the estate, or had been used by the assignee to swell and increase the estate which passed by the deed of assignment."

It was after disposing of the case on these vital points that the court made the observations about the election of remedies, and held that the claimant's election to prove his claim as a general creditor was conclusive against him in his effort to establish the trust.

It will be observed that in both of the cases mainly relied on by the appellant the election made was held to have been, under the local law, in effect the bringing of a suit and the obtaining of a judgment. In neither case was the point concerning the doctrine of election necessary to a decision of the case. The defendant in neither case did anything to cause the claimant to present his claim as a general creditor. We do not question that the court in each of these cases arrived at a correct conclusion, but neither of them can be considered as controlling authority in the present case.

It is not feasible to comment on all the cases which counsel cite as bearing on the question of election and estoppel. Many of them assert well-recognized principles applied to plain cases,—cases where the plaintiff has brought a suit on a contract, and subsequently sought to avoid the same contract, and cases where a plaintiff has sued for the purchase money of chattels, and afterwards, in another suit, claimed the chattels themselves. In many of the cases the election of the plaintiff has put the defendant to costs, and placed him in a position he would not have occupied except for such election. In some of the cases the rights of innocent third parties have intervened, based on the plaintiff's election. All such cases may easily be distinguished from the instant case. In this case no suit was brought, except the one now trying. The plaintiff only proved a claim which he was required to prove by statute, and included in the proof the collection in dispute. Whether he claimed as a common creditor, or sought to obtain the entire collection, what he asked for in either case was the money. The case is not analogous in that respect to cases where a plaintiff must elect to sue for or claim specific property or its price. In this case, clearly, he was in some measure induced to take the course he took by the receiver's statement. The dividends he received, even if not returned as they were, would have been only a part payment on the entire sum that he was entitled to receive. There is not that incompatibility that would exist in a case where a plaintiff sought to gather in with one hand the property he had sold, and its purchase money with the other. The plaintiff here has only sought to obtain the money. The receiver was not deceived or misled. His position was not altered to his detriment. The rights of no third person have intervened. Olivier did not seek any advantage. He presented his claim in the first instance in a way which could not by possibility give him more than he will obtain by his suit. He acted in good faith and with *no improper* motive. All these considerations—not any one of them

alone—constrain us to hold that Olivier made no such election as to create an estoppel against him. The decree of the circuit court is affirmed.

SEA INS. CO. OF LIVERPOOL, ENGLAND, Limited, v. JOHNSTON et al.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1900.)

No. 961.

1. INSURANCE—RESCISSION OF CONTRACT.

A provision of an insurance policy giving either party the right to cancel the same on 30 days' notice to the other does not prevent the parties from rescinding the contract by mutual consent at any time without such notice.

2. SAME—CONSTRUCTION OF CORRESPONDENCE.

An insured firm holding an open policy wrote the insurer returning a bill for premiums earned, and asking a reduction in the same, stating that, unless the rate were reduced, they "could not go on," as their business would not stand such a rate. The insurer answered, again sending the bill, stating that it could not make the reduction, and asking that, if the insured decided not to continue using the policy, it be returned. The insured replied, inclosing the policy and a check for the amount of the bill, saying: "We inclose check and policy, which we suppose will conclude the whole matter. If we are mistaken, please return the check." The check was retained and cashed. *Held*, that the effect of such correspondence was to rescind the contract of insurance by mutual consent.

3. TRIAL—PROVINCE OF COURT AND JURY—CONSTRUCTION OF WRITTEN EVIDENCE.

Where the determination of a case depends upon the construction of written correspondence, the genuineness of which is conceded, in connection with facts which are undisputed, and the oral evidence is such that different inferences cannot be drawn from it, it is the duty of the court on request to direct the verdict.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

E. B. Kruttschnitt (E. H. Farrar and B. F. Jonas, on the brief), for plaintiff in error.

J. D. Rouse (Wm. Grant, on the brief), for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action on a fire insurance policy, and is brought by Johnston Bros., a commercial firm composed of Charles A. Johnston, a citizen of the state of Mississippi, and Harrison R. Johnston, a citizen of the state of Alabama, against the Sea Insurance Company, Limited, of Liverpool, England, a corporation created and existing under the laws of Great Britain. The policy sued on was issued August 31, 1898, by the Sea Insurance Company to Johnston Bros. to insure them against loss or damage of their cotton by fire during the year following the date of the policy. It was an open policy, and was to cover cotton to be afterwards declared by the insured. Johnston Bros., having 4,000 bales of cotton at West Point, Miss., declared 2,000 bales of them as covered by the policy. This declaration contained no specific description of the cotton. Johnston Bros. were authorized by the terms of the policy to issue certificates under it for such cotton as they might

ship on their own account or for others, making the loss, if any, payable to the holders of the certificates. These certificates, when issued, and proper notice thereof given to the insurance company, became separate obligations,—"petite policies,"—and were payable and enforceable just as a coupon would be separately payable and enforceable when clipped from the bond. A number of bales of cotton were insured under such certificates issued by Johnston Bros. It is conceded by both parties that such certificates created distinct obligations. This controversy has no reference to them. The premiums on those certificates which Johnston Bros. had issued were included in the bill rendered by the insurance company on January 14th up to that date, and such premiums were paid by the check inclosed in the letter of Johnston Bros. of February 21st. The entire contents of these letters will be stated later. No premium had been paid on the main policy,—the one in suit. These certificates, or petite policies, are not involved in this action. On the 6th of March, 1899, Johnston Bros. having then about 1,376 bales of cotton at West Point, Miss., the same were destroyed by fire, resulting in a loss of about $47,099.17. This loss was covered by insurance in the Atlantic Mutual Insurance Company of New York to the amount of $25,000. This action is to collect the remainder of such loss, $22,-099.17, with interest at 6 per cent. per annum from March 20, 1899. The insurance company admitted in its answer the execution of the policy, but alleged that prior to the fire on March 6, 1899, the policy, by the mutual agreement of the parties, had been surrendered and rescinded, and all obligations thereunder terminated; and that, if the policy had not been so terminated and annulled, no cotton or other property to which the policy had ever attached was included in the cotton alleged to have been destroyed by fire. Upon this petition and answer the case was tried before a jury. A verdict for Johnston Bros. for $22,099.17 was found, and from a judgment thereon the Sea Insurance Company sues out this writ of error.

The unmaking of a written or oral contract is, of course, within the power of those who made it. The parties who make the contract can rescind it, but it requires, to accomplish this, the same concurrence of their wills which is required to make a contract. Mutual release from the old contract is an adequate consideration for the rescission. This doctrine is applicable to the contract of insurance. Bish. Cont. (2d Ed.) §§ 812, 813, 815; Joyce, Ins. § 1637; May, Ins. (4th Ed.) § 67. The contract of insurance in this case contains this language: "Either party at liberty to cancel upon giving 30 days' written notice to that effect, but without prejudice to any risk pending at the termination of that period." This provision is intended to authorize either party to cancel the contract without the consent of the other. It has no bearing on the question of rescission by mutual agreement. In Insurance Co. v. Phinney, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088, the court was dealing with a case in which a state statute was cited which declared that no life insurance company doing business in that state should have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of the nonpayment of any annual premium. The

court held that, if such statute was controlling in the case, it did not prevent the parties from dealing with the contract of insurance as with any other contract; and that, if they chose to abandon it by mutual agreement, their action was conclusive notwithstanding the statute. It is clear, we think, that the provision which we have quoted from the policy does not prevent the parties from rescinding it as they could rescind any other contract. Albert Willcox & Co. were the authorized agents of the Sea Insurance Company to make the contract of insurance in question, and were fully authorized to represent that company in all things connected with the policy. The following correspondence between Johnston Bros. and Albert Willcox & Co. was made an exhibit to the answer of the insurance company, and offered in evidence on the trial of the case:

"Columbus, Miss., January 24, 1899.

"Messrs. Albert Willcox & Company, New York, N. Y.—Dear Sirs: The gross of your bill as rendered January 14 struck us at sight as being excessive for the amount of business done. Upon investigation we find the rate in excess of the rate sheet you gave us and from $^{31}/_{100}$ to $^{60}/_{100}$ in excess of what we get from the Atlantic Mut. When you sent us the rate sheet on September 9, you stated that the rates were higher, and you would alter them later to whatever we had quoted from other companies. We inclose your bill, and will thank you to make at least 33⅓ % reduction; else we cannot go on, as business will not stand any such rate.

"Yours, very truly, Johnston Bros."

"New York, 7th February, 1899.

"Messrs. Johnston Bros., Columbus, Miss.—Dear Sirs: We duly received your favor of the 24th ult., and have been going into the matter of your premiums. We regret that it is quite impossible for us to compete with the rates of the Atlantic Mutual. Shippers, as a rule, find it quite impossible to use the policy of this company; but, if you are able to do so with satisfaction, we fear that we cannot hope to compete with the rates. You refer us to our letter of the 9th September, and say that we would alter the rates to whatever you had quoted from other companies. We have referred to our letter, and we cannot see that we made such a statement. We said that we inclosed a scale, which was the lowest that had been so far issued, and that, should any reduction be made later on, we would promptly advise you. No material reductions, however, have been made by any of the stock companies, and, as we have said before, we cannot obtain with the stock companies rates as low as you can get from the Atlantic Mutual, and it is fortunate for you if you can use their policy. We think that we may possibly be able to secure you a reduction of $^{1}/_{16}$ % all around if your business is continued with the Sea Insurance Co., but, if you decide not to go on using this policy, we fear it will be impossible to make any reduction, and we would kindly ask you to return your policy, as under it the Sea Insurance Co. are entitled to insurance on all the shipments you have made. We return you our bill, which we can reduce by $^{1}/_{16}$ % if we continue your business. We should be obliged if you would kindly send us a check to balance the account.

"Yours, very truly, Albert Willcox & Co., per Douglas Franks."

"Columbus, Miss., Feb. 21, 1899.

"Messrs. Albert Willcox & Co., New York, N. Y.—Gentlemen: Your favor of the 7th instant was duly received. This reply has been delayed by the writer's absence the past ten days. The rates you charge are not only in excess of the Atlantic Mutual, but of those given by such companies as the North American to our competitors, and it will be impossible for us to go on with such a handicap. The letter that we referred to was a personal one to the writer, which we inclose, and will thank you to return. We inclose check and policy, which we suppose will conclude the whole matter. If we are mistaken, please return the check with inclosed letter.

"Yours, very truly, Johnston Bros."

The evidence shows without conflict that Albert Willcox & Co. collected on the 23d or 24th of February the check inclosed in the letter of February 21st, and that the policy returned to them remained in their possession. No other correspondence passed between the parties until after the fire. It is contended by the plaintiff in error that it was the duty of the circuit court to decide whether the three letters rescinded the contract of insurance. It is contended by the defendant in error that that question was properly submitted to the jury by the trial court. It is unquestionably the general rule that written evidence should be construed by the court. In Levy v. Gadsby, 3 Cranch, 180, 2 L. Ed. 404, Chief Justice Marshall said that no principle is more clearly settled than that the construction of a written evidence is exclusively with the court. There are cases where writings are properly left to the jury to determine their meaning,—writings in which the words used have different meanings, and the whole is capable of different interpretations according to circumstances not made certain by the oral evidence. Brown v. McGrann, 14 Pet. 479, 10 L. Ed. 550. And where the effect of a written agreement collaterally introduced as evidence depends not merely on the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury. Barreda v. Silsbee, 21 How. 146, 16 L. Ed. 86. But these modifications of the general rule have no application to a case where the writings are free from such obscurities, and are not introduced collaterally, but form the basis of the suit or of the defense. In U. S. v. Shaw, 1 Cliff. 317, Fed. Cas. No. 16,266, the question was whether the correspondence introduced in the case constituted a rescission of the contract. The court held, Clifford, circuit justice, delivering the opinion, that "the court, and not the jury, must construe the correspondence, although it may extend over a considerable length of time, and embrace a great variety of circumstances." In Bliven v. Screw Co., 23 How. 420, 16 L. Ed. 510, two letters were offered in evidence; one from the plaintiffs to the defendants, and the reply of the defendants. The trial court construed these letters, stating their effect to the jury. This action was approved by the supreme court, Mr. Justice Clifford saying:

"Written evidence, as a general rule, must be construed by the court, and the first instruction was confined to that purpose. It gives the true exposition of the correspondence, and therefore is not the subject of error."

A clear and elaborate statement of the rule is found in the case of Goddard v. Foster, 17 Wall. 123, 21 L. Ed. 589. That case involved the construction of letters that had passed between the parties in reference to a previous contract which was rescinded. The court said:

"Next error assigned is that the court erred in charging the jury that the correspondence showed an agreement between the parties distinct from the prior written agreement which was litigated in the equity suit, but the court is of the opinion that the charge was correct, as it is well-settled law that written instruments are always to be construed by the court, except when they contain technical words, or terms of art, or when the instrument is introduced in evidence collaterally, and where its effect depends not merely on

the construction and meaning of the instrument, but upon extrinsic facts and circumstances, in which case the inference to be drawn from it must be left to the jury. Where the question was whether there was a contract between two parties to be deduced from correspondence, Parke, B., said: 'The law, I take it, to be this: that it is the duty of the court to construe all written instruments. If there are peculiar expressions used in the instrument, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what is the meaning of those expressions, but it is for the court to decide what is the meaning of the contract.' Contracts are frequently made by correspondence between the parties, and in such a state of the evidence it was held in the case of Begg v. Forbes, 30 Eng. Law & Eq. 508, that the question was exclusively for the court; Jervis, C. J., remarking, 'Surely, the construction of written documents is for the judge, whether many or few in number.' Exceptional cases arise where the contract rests partly in the correspondence and partly in oral communications, in which it is held that the question whether or not there is a contract is a question for the jury. Courts of justice, however, are not denied the same light and information the parties enjoyed when the contract was executed, but they may acquaint themselves with the persons and circumstances that are the subjects of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

The letters in evidence in this case are not introduced collaterally. They are made exhibits to the defendant's answer. This defense is as distinctly founded on the letters as the suit is founded on the policy. In a jurisdiction where the system of pleading permitted it a special plea of rescission would have been filed, setting out the three letters, and alleging that the check inclosed in the letter of February 21, 1899, was accepted and collected, and the policy retained by the insurance company. If the insured was advised that such correspondence and facts were not a rescission, a demurrer would have been filed to such plea. The question then without doubt would have been one of law for the court to decide,—whether the letters and facts stated in the plea constituted a rescission. The letters are before the court, under the system of pleading proper within the jurisdiction, as exhibits to the answer and as evidence. Their authenticity is admitted. The additional fact of the receipt and acceptance of the check is also undisputed. The result, then, depending on the written evidence and the other undisputed facts, it seems to us clearly a question of law for the court to decide whether or not they constitute a rescission of the contract of insurance. In the letter of January 24th Johnston Bros. complain of the rates charged on the policy, and request a reduction of 33⅓ per cent. in the bill rendered; else they could not go on, as the business would not stand the rates charged. Willcox & Co., in their answer on February 7th, decline to make the reduction requested, but state that they might get a reduction of one-sixteenth per cent. all around if business were continued with the Sea Insurance Company; "but," they added, "if you decide not to go on using this policy, we fear it will be impossible to make any reduction, and we would kindly ask you to return your policy." The bill was returned to Johnston Bros. in this letter. The offer was made to reduce it by one-sixteenth per cent. upon condition that "we continue your business." Johnston Bros. reply to this letter, inclosing a check for the full

amount of the bill, declining to accept the offered reduction, and returning the policy, which they say "we suppose will conclude the whole matter." This correspondence begins with an expression of dissatisfaction with the charges made, and with the significant statement, returning the presented bill and asking for a reduction, that, if the reduction is not made, "we cannot go on, as business will not stand any such rate." That letter clearly means that the writers would stop business with the Sea Insurance Company unless the desired reduction was made. Willcox & Co. so interpret it. They answer proposing the smaller reduction, and, if the concessions be not accepted, they ask a return of the policy "if you decide not to go on using it." To transpose the parts of the sentence, it reads, "We would kindly ask you to return your policy * * * if you decide not to go on using it." To return the policy, even in silence, in answer to this letter, would be to say, "We have decided not to go on using it." The offer to reduce the bill "if we continue your business" is met by the significant refusal to accept the reduction, which implies that the business was not to be continued. But Johnston Bros. conclude their letter with words which show how they understand the effect of the correspondence, "We inclose check and policy, which we suppose will conclude the whole matter." We condense these letters into their substance, so far as they bear on this question: The insured writes: "Unless you reduce rates 33⅓ per cent., we cannot continue business with you." The insurance company replies: "We cannot make that reduction. If you decide not to use the policy, return it. Will reduce bill one-sixteenth per cent. if we continue your business." Insured answers: "We inclose check [for full amount of account]. We return the policy. This, we suppose, will conclude the whole matter." When the Sea Insurance Company asked a return of the policy if the insured was not going to use it, it was an offer, we think, to rescind the contract of insurance. When the insured posted a letter which was to conclude the whole matter, and which inclosed the policy, returning it, as requested, we think the contract of rescission was complete. This last letter was an acceptance of the offer to rescind. Tayloe v. Insurance Co., 9 How. 390, 13 L. Ed. 187; Utley v. Donaldson, 94 U. S. 29, 45, 24 L. Ed. 54; Patrick v. Bowman, 149 U. S. 411, 424, 13 Sup. Ct. 811, 866, 37 L. Ed. 790. Such, unquestionably, is the effect of the acceptance by the insured of the proposition if the acceptance is unqualified. The minds of the contracting parties must meet in this case as in that of other contracts. The last letter of the insured, after concluding the whole matter, added, "If we are mistaken, please return the check with inclosed letter." Does the addition of these words alter the legal effect of the acceptance? Under some circumstances that might be an important question, but in the attitude of this case it cannot affect the result. If that addition to the letter prevented the acceptance from being absolute, how long did it, on the facts of this case, keep the agreement from taking effect? If the contract was not closed by the letter, what was needed to close it? It may be conceded, for the sake of argument, that, if the check had been returned to Johnston Bros., the contract of re-

scission would have been incomplete, but it must be admitted that, if the check was accepted and collected, and not returned, the contract of rescission was then, if not before, completed. The evidence shows without conflict or dispute that the check was not returned, but was applied to the payment of the account immediately after it was received. If the policy, instead of being an open policy, had described specific property as insured, and if, after the foregoing correspondence had occurred, premiums had accrued, and the insurance company had sued Johnston Bros. for the amount due, and Johnston Bros. had defended on the ground that the contract was rescinded, could there be a recovery? They would say in defense of such suit that "differences arose between us. We asked for a reduction in rates. You declined to give it, and asked for a return of the policy. We returned it. You now have it. We wrote you, sending a check to pay a bill, when we returned the policy, saying that this closed the whole matter. We added that, if we were mistaken, please return the check. You did not return, but collected, the check, and applied it to the payment of the account." We cannot think that, on these facts, Johnston Bros. could be required to pay premiums on the policy. Their letter surrendering the policy, with the other admitted facts, would be a conclusive defense against such suit for premiums. This correspondence could not be so construed as to make the surrender of the policy relieve the insured from paying premiums, and yet make the insurance company liable if a loss occurred. We think that the circuit court should have held that the contract of insurance had been rescinded by mutual agreement.

Where the case depends on correspondence, the genuineness of which is conceded, and on oral evidence about which there is no conflict, and where such oral evidence is of a kind that different inferences cannot be drawn from it, it is the duty of the court, on request, to direct the verdict. If it would be the duty of the court to set aside a verdict if found for the plaintiff, the court should direct the jury to find a verdict for the defendant. Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780. The evidence of the witness Johnston as to his intention in writing the letters cannot be received to affect the plain meaning of the letters. Hinds v. Keith, 6 C. C. A. 231, 57 Fed. 10, 13; Burke v. State, 71 Ala. 377, 382. If such evidence is admitted in the case without objection, it is to be disregarded by the appellate court in construing the written contract. Moody v. McCown, 39 Ala. 586. On the question under discussion —the question of rescission—there is no conflict in the legal evidence. It depends on the correspondence, with nothing needed to supplement it, unless, perhaps, the conceded fact of the acceptance and collection and failure to return the check inclosed in the letter of February 21st. The circuit court should have granted the request of the Sea Insurance Company, and directed the jury to find a verdict for the defendant.

We shall not comment on the other defense presented—that no cotton to which the policy had attached was included in the cotton alleged by the plaintiff to have been destroyed by fire. We only

mention it to say that we have given careful attention to the arguments of counsel on this question, but we refrain from expressing any opinion on it, because the question may not arise on the same evidence in the next trial, and what we have said on the other defense may be found conclusive of the case. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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SOUER v. DE BARY et al.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1900.)

No. 966.

APPEAL—REVIEW—QUESTIONS DETERMINED ON FORMER APPEAL.
Questions once considered and decided by an appellate court will not be re-examined on a subsequent appeal or writ of error in the same case.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

W. W. Howe (C. P. Cocke, on the brief), for plaintiff in error.

J. D. Rouse (Wm. Grant, on the brief), for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This case is now before this court for the second time. The opinion of this court on the first writ of error contains a full statement of the case. De Bary v. Souer, 41 C. C. A. 417, 101 Fed. 425. The case is now here on the same facts. No new material question is raised. It is well settled that questions once considered and decided by an appellate court will not be re-examined on a subsequent appeal or writ of error in the same case. Railway Co. v. Wilder, 41 C. C. A. 305, 101 Fed. 198; Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260. The judgment of the circuit court is affirmed.

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EVANS-SNIDER-BUEL CO. et al. v. McFADDEN et al.

(Circuit Court of Appeals, Eighth Circuit. November 19, 1900.)

No. 1,403.

1. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—ACTS OF CONGRESS.
The constitutional inhibition against the passage of laws impairing the obligation of contracts is a limitation upon the powers of the states, but not upon those of congress.

2. SAME—CONTRACTS PROTECTED—JUDGMENTS.
A judgment is not a contract in such sense that it is protected by the provision of the federal constitution against laws impairing its obligation.

3. SAME—VESTED RIGHTS—ATTACHMENT LIENS.
Remedies, and those rights pertaining to the remedy, which are purely of statutory creation, may be altered or abolished even after an action is instituted, provided an adequate remedy remains for the enforcement of rights founded on contract; and congress, which is not prohibited from passing retrospective or retroactive laws, has power to devest or impair

an attachment lien acquired under a federal statute, at least until there has been an adjudication that adequate grounds for the attachment exist, and that the lien of the attachment be enforced.

4. SAME—RETROSPECTIVE STATUTE—ACT VALIDATING MORTGAGES.

Act Feb. 3, 1897 (29 Stat. 510, c. 136), amending Mansf. Dig. § 4742, as in force in the Indian Territory, provides that, where the mortgagor of personal property in the territory is a nonresident, the mortgage shall be recorded in the judicial district in which the property is situated, and that "all mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated." At the time of the passage of such act property covered by a mortgage which had been recorded as therein prescribed had been levied on by an attaching creditor of the mortgagor who had also taken judgment by default against the defendant, but the mortgagee had intervened in the action, claiming the property, and the issues between him and the plaintiff had not been tried or determined. *Held*, that the act, as retrospectively applied to the mortgage involved in the suit, was not unconstitutional, as depriving the attaching creditor of his property without due process of law, since there had been no adjudication which gave him a vested right to subject the property to the payment of his debt, as against the mortgagee, which constituted "property" within the meaning of the constitution, but the question of such right was pending in the suit and undetermined.

5. SAME—CONSTRUCTION OF LEGISLATIVE POWERS—EQUITABLE CONSIDERATIONS.

In determining whether a curative act intended to validate existing mortgages is in violation of vested rights and unconstitutional as against attaching creditors of a mortgagor, the courts may properly consider the equities of the parties affected; and, where the act is clearly in the interests of justice, and was designed and operates to protect the parties having the highest equitable rights, they should construe the legislative powers liberally to uphold it.

Sanborn, Circuit Judge, dissenting.

In Error to the United States Court of Appeals in the Indian Territory.

The record in this case discloses the following facts, in the light of which it is to be determined: On June 17, 1896, the Evans-Snider-Buel Company, the principal plaintiff in error, held two deeds of trust in the nature of mortgages, one dated April 23, 1896, and the other May 19, 1896, covering about 6,775 head of cattle, which deeds of trust had been executed by John R. Blocker, who was at the time a resident and citizen of Bexar county, state of Texas. The cattle described and covered by the two deeds of trust were at the time in pasture near the town of Muscogee, in the Creek Nation of the Indian Territory. The deeds of trust were given to secure the payment of notes executed by John R. Blocker to the amount of about $130,000, which were held at the time by the Evans-Snider-Buel Company, and represented money that had been advanced by that company to Blocker to enable him to purchase the cattle in controversy. The testimony shows without any contradiction that Blocker had not advanced any money of his own to purchase the cattle, but that they had been acquired with funds furnished for that purpose by the Evans-Snider-Buel Company. Both deeds of trust were filed for record and were recorded, within a day or two after their execution, in the clerk's office of the United States court for the Northern district of the Indian Territory, that being the district in which the mortgaged property was located. One of the mortgages—being the one that was first executed to secure notes to the amount of $122,184.60—was also recorded, the day after it was executed, in Bexar county, Tex., where the mortgagor resided. On June 17, 1896, William McFadden & Son, the defendants in error, commenced a suit by attachment against John R. Blocker in the United States court for the Northern district of the Indian Territory upon a judgment in the sum of $55,875.71, which the attaching creditors had recovered against John R. Blocker in Jefferson county, Tex., on May 26, 1887. On June 29,

1896, they caused the writ of attachment in that suit to be levied on the cattle covered by the aforesaid deeds of trust, which were then in pasture near Muscogee, in the Indian Territory. At the time of directing the levy of the writ of attachment, McFadden & Son were aware of the existence of the two deeds of trust aforesaid, they having obtained a description of the cattle on which they directed the levy to be made by examining the description contained in said deeds of trust as then recorded in the Indian Territory. On July 14, 1896, the Evans-Snider-Buel Company gave bond as interpleader in the cause in the sum of $150,000, and, having given such bond in accordance with law, was permitted to retain possession of the attached cattle. The writ issued in the attachment suit was returnable on the 3d day of December, 1896, and at the return term of the writ, to wit, on January 27, 1897, the Evans-Snider-Buel Company filed its interplea in due form, asserting therein that the cattle were not subject to seizure and sale as the property of John R. Blocker, but were its property. Two days later, to wit, January 29, 1897, judgment by default in the sum of $55,875.71 was rendered against J. R. Blocker in the attachment suit, he having failed to make answer to the complaint. Subsequently the issue arising on the interplea in the case as between the Evans-Snider-Buel Company and William McFadden & Son was twice tried, and resulted on each occasion in a verdict in favor of the interpleader and against the attaching creditor, which judgments, however, were in each instance reversed on appeal by the United States court of appeals in the Indian Territory. The opinion of that court on the first appeal is reported in 48 S. W. 1043. On the last reversal the United States court of appeals in the Indian Territory rendered a judgment in favor of the attaching creditors and against the interpleader and the sureties on its bond in the sum of $72,250.35. The interpleader has brought the case to this court for review.

U. M. Rose and H. M. Pollard (C. B. Stuart, W. E. Hemingway, and G. B. Rose, on the brief), for plaintiffs in error.

W. T. Hutchings and N. B. Maxey (J. B. Clayton, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Among the numerous chapters of Mansfield's Digest of the Laws of Arkansas which were extended over and put in force in the Indian Territory by the act of congress of May 2, 1890 (26 Stat. 81, 95, c. 182), was chapter 110, entitled "Mortgages," which chapter contains, among others, the following sections:

"Sec. 4742. All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded—if for lands, in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides.

"Sec. 4743. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Prior to the adoption of the chapter concerning mortgages as the law of the Indian Territory, it had been decided by the supreme court of Arkansas in Main v. Alexander, 9 Ark. 112, that by force of the aforesaid sections a mortgage on personal property executed in that state was good as between the parties thereto, though not acknowledged and recorded; but that it constitutes no lien upon the

mortgaged property as against strangers until it is acknowledged and recorded in the mode prescribed by the statute, although they have actual notice of its existence. The doctrine last stated had been recognized and enforced in the state of Arkansas in several other cases prior to May 2, 1890, but in some cases—notably in Mitchell v. Wade, 39 Ark. 377, 386, Martin v. Ogden, 41 Ark. 186, 192, and in Ford v. Burks, 37 Ark. 91, 94—it had been criticised as harsh and unjust, and not in harmony with equitable principles as they prevail elsewhere. It had also been decided as early as 1886 in Watson v. Lumber Co., 49 Ark. 83, 4 S. W. 62, that a foreign corporation, not being a resident of that state, could not execute a mortgage on personal property located in that state which it owned, and, by placing it of record, create a lien which would be good as against strangers. In Main v. Alexander the controversy arose between a mortgagee whose mortgage was recorded, but not properly acknowledged, and a creditor of the mortgagor, who had attached the mortgaged property subsequent to the execution and record of the mortgage; and it was decided that the lien of the attaching creditor was paramount. In the case of Watson v. Lumber Co. the controversy arose between a mortgagee who held a mortgage executed by a foreign corporation that was recorded in the county where the property was situated and certain judgment creditors of the mortgagor company who had caused executions to be levied on the mortgaged property subsequent to the execution and recording of the mortgage, and it was held that the lien of the judgment creditors was paramount to that of the mortgagee. On February 3, 1897 (29 Stat. 510, c. 136), congress passed an act to the following effect:

"That section forty-seven hundred and forty-two of Mansfield's Digest of the Laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: 'Provided, that if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated.' "

As this statute in express terms validated all mortgages theretofore made by nonresidents of the Indian Territory on personal property there located which had been recorded in the judicial district where the property was situated, and therefore embraced and validated the two mortgages that had been executed by J. R. Blocker in favor of the Evans-Snider-Buel Company, one of the principal questions discussed before this court concerns the power of congress to enact the statute aforesaid, and give to it such retrospective operation. It will be observed that William McFadden & Son, hereafter referred to as the attaching creditors, caused the writ of attachment in the action brought by them against J. R. Blocker, the mortgagor, to be levied on the cattle that were conveyed by the mortgage, about seven months before the act of congress validating the mort gage was approved; also that the judgment by default was entered in that case against the attached debtor five days before the law was enacted. But when the act was approved the interplea of the

Evans-Snider-Buel Company in the attachment suit was still pending and undetermined, as well as when the judgment by default was taken, and no trial of the issue existing between the interpleader and the attaching creditors was had until several months thereafter, to wit, on April 20, 1897.

We deem it wholly unnecessary to indulge in any extended discussion of the question which has been mooted whether the act of congress aforesaid impairs the obligation of a contract, and is for that reason void—First, because the inhibition against the exercise of such a power which is contained in section 10, art. 1, of the federal constitution, is not addressed to the national legislature, but to the legislatures of the several states (Mitchell v. Clark, 110 U. S. 633, 643, 4 Sup. Ct. 170, 28 L. Ed. 279; Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287; Beach, Mod. Cont. § 1633); and, second, because no contract is disclosed by the record which the act of congress in question operates to impair. It is true that the attaching creditors have a judgment against J. R. Blocker, and that judgments are sometimes termed "contracts of record"; but such general statements mean only that the law will imply a promise on the part of a judgment debtor to pay a judgment that has been recovered against him, and that he may be sued in form ex contractu on such implied promise. A contract of that nature, however, which does not rest on the mutual assent of the parties thereto, but is forced upon the judgment debtor as the result of a legal implication, is not such a contract as the federal constitution was intended to protect against legislation tending to impair its obligation. This proposition is well established by controlling authority. Louisiana v. Mayor, etc., of City of New Orleans, 109 U. S. 285, 288, 3 Sup. Ct. 211, 27 L. Ed. 936; Garrison v. City of New York, 21 Wall. 196, 203, 22 L. Ed. 612. If the act of congress of February 3, 1897, above quoted, is invalid, it is made so by virtue of the fifth amendment to the federal constitution, which, in so far as it is pertinent here, declares that "no person * * * shall be deprived of life, liberty or property without due process of law." This is a limitation on the power of congress, and the question is whether the attaching creditors will be deprived of a property right in the cattle which they have caused to be seized under the writ of attachment in their favor if the act is given effect according to the manifest purpose of the lawmaker.

It is urged in behalf of the attaching creditors that the lien obtained by virtue of the writ of attachment was of such a nature that it could not be impaired by an act of congress, even if it had been passed prior to the entry of the judgment by default against J. R. Blocker, the mortgagor; and certain authorities are cited in support of that contention, notably Day v. Madden, 9 Colo. App. 464, 48 Pac. 1053; Mulnix v. Spratlin, 10 Colo. App. 390, 50 Pac. 1078; Hall v. Stephens, 65 Mo. 670, 681; and Hannahs v. Felt, 15 Iowa, 141; but three of these cases—the same being those that are first cited—were decided in states whose constitutions at the time declared that "no * * * law retrospective in its operation * * * shall be passed," and in two of the cases the ruling to the effect that the lien of an attachment cannot be devested by a legis-

lative enactment at any time after the writ is levied appear to have been based mainly on the theory that to give an act of the legislature the effect of impairing an existing attachment lien would conflict with the local constitutional provision last quoted. The Iowa decision in Hannahs v. Felt, supra, does not appear to have been made under the influence of such a constitutional provision as has been adopted in Colorado and Missouri. In that case, however, the decision denying the efficacy of a legislative act to discharge the lien of an attachment was based principally on the ground that the act under consideration did not in terms attempt to devest such liens, but that its real purpose was to postpone for the time being sales of property belonging to persons in the military service, either under a mortgage, or deed of trust, or by virtue of an execution under a judgment or decree. In so far, however, as that decision lends support to the claim that an attachment lien cannot be impaired at any time by legislative action, even where the legislature is not deprived of the power to pass laws that are retrospective in their operation, it is not only opposed to the decision of this court in Bank v. Reithmann, 49 U. S. App. 144, 25 C. C. A. 101, 79 Fed. 582, but to the decisions of other courts in cases where the question has been expressly raised and decided. Freiberg v. Singer, 90 Wis. 608, 63 N. W. 754; Stephenson v. Doe, 8 Blackf. 508, 513. Considered as an original proposition, the weight of reason, as well as the authorities on kindred questions, sustain the view that an attachment lien, at least until a final judgment is rendered in the case, may be impaired, displaced, or destroyed by legislative enactments which are designed to have that effect, and that attaching creditors have no just ground to complain of such legislation. A writ of attachment is nothing more than a remedy afforded by law for the collection of a debt. It is like a capias ad respondendum, and a remedy of that nature may be abolished at any time by the legislature which created it. The same proposition holds good with respect to all laws which merely provide remedies for the enforcement of rights or the redress of grievances. They may be modified or repealed without reference to the effect of such legislation on pending actions, the only limitation on the power of the legislature in this respect being that an adequate remedy must remain or be provided for the enforcement of such existing rights as have their origin in private contracts. In actions ex contractu litigants are not entitled to insist that they shall be afforded the same remedies or be privileged to plead all of the defenses that were available when the contract was made, or that have accrued subsequently under existing laws; the rule being that remedies, and those rights pertaining to the remedy which are purely of statutory creation, may be altered or abolished, even after an action is instituted, provided an adequate remedy remains for rights founded on contract, and that some defenses, such as those existing under usury laws and those that have accrued under statutes of limitation, may be withdrawn, and rendered of no avail. These principles are so familiar that a few cases only need be cited in their support. Terry v. Anderson, 95 U. S. 628, 633, 24 L. Ed. 365; Campbell v. Mining Co.,

83 Fed. 643, 645, 27 C. C. A. 646, 55 U. S. App. 150; Wilson v. Simon (Md.) 45 Atl. 1022; Campbell v. Holt, 115 U. S. 620, 628, 6 Sup. Ct. 209, 29 L. Ed. 483; Ewell v. Daggs, 108 U. S. 143, 151, 2 Sup. Ct. 408, 27 L. Ed. 682; Morley v. Railway Co., 146 U. S. 162, 168, 13 Sup. Ct. 54, 36 L. Ed. 925; Von Hoffman v. City of Quincy, 4 Wall. 535, 553, 18 L. Ed. 403; Butler v. Palmer, 1 Hill, 324, 329, 330; Curtis v. Leavitt, 15 N. Y. 1, 152, 153; Suth. St. Const. § 482. We are of opinion, therefore, that a legislative body like the congress of the United States, which is not prohibited from passing retrospective or retroactive laws, has an undoubted power to devest or impair an attachment lien, at least until there has been an adjudication that adequate grounds for the attachment exist, and that the lien of the attachment be enforced. The power of congress to deal with a remedy which it has provided for the collection of a debt does not cease as respects a suitor who has simply taken the initial steps to avail himself of the remedy, but whose rights have not been finally adjudicated. The power in question continues, in any event, until such time as, by making use of the remedy, the suitor has acquired a title to or an interest in specific property which the parties to the action are no longer privileged to deny. It is only at such period that his rights can be said to have become vested. Prior thereto they are merely conditional or inchoate.

It is insisted, however, in behalf of the attaching creditors that they acquired a vested right or a vested interest in the cattle by the rendition of the judgment by default on January 29, 1897, which could not be impaired by a subsequent legislative enactment, and that this proposition is tenable, even if it be true, as last above held, that prior to that time the lien of the attachment might have been displaced by an act of congress. With reference to this contention it may be said that it is undoubtedly true that by the rendition of the judgment by default Blocker, the defendant in the attachment suit, lost his right to challenge the existence of the grounds of attachment on account of which the writ had been obtained, as well as the right to deny the fact of his indebtedness to the attaching creditors, or the amount thereof. These were issues which the defendant in the attachment suit, and he alone, was entitled to raise. The Evans-Snider-Buel Company was not concerned therein; and it is doubtful, to say the least, if it was entitled to be heard with respect thereto, since its right to the cattle depended on other considerations. But, be this as it may, the judgment by default did not determine, as against the party last named, who had intervened in the attachment suit, as it had a right to do, and had denied the right of the attaching creditors to subject the attached property to the payment of their claims, that it could be so appropriated. That was an issue which remained to be tried when the act of congress of February 3, 1897, was approved, and it was in no wise affected by the judgment by default. It is difficult to understand, therefore, why the entry of that judgment changed the status of the case eo instanti as respects the interpleader, and deprived congress thenceforth of the power to enact a law which prior thereto it possessed the power to enact. The interpleader's rights were not ad-

judicated, since the judgment by default did not determine that the lien asserted by the attaching creditors upon the cattle in controversy was superior to the lien which was asserted by the interpleader. That question remained undecided, and was left open, after the judgment by default, for future consideration and decision. The phrase "a vested right" has no very precise signification. It is an expression which is not used in the federal constitution, nor in any of its amendments; the language of the fifth amendment being that "no person * * * shall be deprived of * * * property without due process of law." In the law of real property—where it is most frequently employed—the word "vested" is used to define an estate, either present or future, the title to which has become established in some person or persons, and is no longer subject to any contingency. And when the phrase "a vested right" or a "vested interest" is used in other relations it may with reasonable precision be held to mean some right or interest in property that has become fixed or established, and is no longer open to doubt or controversy. If the words in question are understood in that sense, it cannot be said that the attaching creditors acquired a vested right to the cattle, as against the interpleader, by the judgment in their favor against Blocker. Instead, however, of seeking for an exact definition of the phrase in question, we think it will be more profitable for present purposes to refer to some of the cases, and particularly to those which are of controlling authority here, where it has been held that rights acquired in virtue of existing laws, and claimed to be vested, were not so far vested as to become property within the meaning of the federal constitution, and to be for that reason beyond the reach of legislative action. Thus, in the case of Morley v. Railway Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925, a judgment had been obtained, which, under existing laws, bore interest at a given rate. After its rendition the legislature reduced the rate of interest on judgments, doing so in language which made the act applicable to judgments that had been recovered before the act was passed. It was held that this law neither impaired the obligation of a contract nor deprived judgment creditors of their property without due process of law. In Campbell v. Holt, 115 U. S. 620, 628, 6 Sup. Ct. 209, 29 L. Ed. 483, the right to plead the statute of limitations against a personal indebtedness had accrued in favor of the debtor when the bar of the statute was removed by the adoption of a new constitution. It was held that the debtor had no right to complain. The court said, "We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right so as to be beyond legislative power in a proper case." In Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682, a right which had accrued to a debtor to plead usury as a defense under a law that was in force when the contract was entered into was taken away by a subsequent enactment, and it was held that no valid objection could be urged against such legislation. In Butler v. Palmer, 1 Hill, 324, it appeared that at the time of the sale of a judgment debtor's land under an execution the law allowed him a certain time to redeem, and the master's deed specified this period of redemption on its

face. A subsequent statute repealed the law granting such period for redemption, and prescribed a shorter period within which the right must be exercised. It was held that the right to redeem within the period named in the master's deed was not so far vested that it could not be shortened by legislative action. See, also, People v. Livingston, 6 Wend. 526. In Green v. Abraham, 43 Ark. 420, a mortgage improperly acknowledged had been placed of record, which, by reason of a defective acknowledgment, was not notice to subsequent purchasers or lienors. Afterwards the mortgaged property was attached under a writ against the mortgagor, and thereafter the legislature validated the record of the mortgage. The mortgagee having brought replevin to recover the attached property from one who claimed it under the attachment, it was held, in substance, that the interest of the attaching creditor in the attached property was not vested, but could be, and that it was in fact, displaced by the subsequent enactment validating the record of the mortgage. The following cases are similar to those already cited, and, as we think, uphold the same doctrine: Freeborn v. Smith, 2 Wall. 160, 175, 17 L. Ed. 922; Baker's Ex'rs v. Kilgore, 145 U. S. 487, 12 Sup. Ct. 943, 36 L. Ed. 786; Terry v. Anderson, 95 U. S. 628, 633, 24 L. Ed. 365; Garrison v. City of New York, 21 Wall. 196, 205, 22 L. Ed. 612; Louisiana v. Mayor, etc., of City of New Orleans, 109 U. S. 285, 289, 3 Sup. Ct. 211, 27 L. Ed. 936; Grinder v. Nelson, 9 Gill, 299, 309; Town of Danville v. Pace, 25 Grat. 1, 15; Satterlee v. Matthewson, 16 Serg. & R. 169; Wilson v. Simon (Md.) 45 Atl. 1022. It may be difficult in some cases to fix the precise date at which a right can be said to be fully vested, and for that reason to have become property within the meaning of the federal constitution, when the right in question is purely of statutory creation, or has been acquired by pursuing some remedy which the law affords to suitors, and is in no sense an obligation arising out of contract; but we are of opinion that the right invoked in the case at bar was not vested on February 3, 1897, in any such sense as to be outside the sphere of legislative control. When called upon to resolve questions like the one in hand, the courts have never deemed it necessary to close their eyes to the equities of the case, but have frequently permitted their judgments to be influenced by the consideration that that which the legislature has done in the way of disturbing rights acquired under existing laws was morally right, and in accordance with justice and fair dealing. In an early case (Foster v. Bank, 16 Mass. 245, 273), Parker, C. J., remarked, "The truth is, there is no such thing as a vested right to do wrong;" and this remark has been quoted with approval by the supreme court of the United States and other courts. Freeborn v. Smith, 2 Wall. 160, 175, 17 L. Ed. 922; Freeland v. Williams, 131 U. S. 405, 420, 9 Sup. Ct. 763, 33 L. Ed. 193; Goshorn v. Purcell, 11 Ohio St. 652; Town of Danville v. Pace, supra; Satterlee v. Matthewson, supra. And in Randall v. Kreiger, 23 Wall. 137, 149, 23 L. Ed. 124, the supreme court said, speaking with reference to a legislative act which impaired an existing title: "Claims contrary to justice and equity

cannot be regarded as of that character [that is to say, as vested rights]. Consent to remedy the wrong is to be presumed."

It is our privilege and duty, therefore, in determining whether a vested right has been violated and whether congress exceeded its just power in validating the interpleader's mortgage, to consider whether its action was dictated by a sense of justice, and was right when viewed from a purely moral standpoint. If it was, a more liberal view may well be taken of its power to displace the attaching creditor's lien than would be permissible if its action was partial, or arbitrary, and without just cause or excuse. Viewing the case for the purpose last indicated, it is manifest at a glance that congress was influenced by the highest considerations of public policy to pass the act of February 3, 1897, and that, in so far as the interpleader and others in a like situation were concerned, it was justified in stretching its constitutional powers to their utmost limit to prevent the consummation of a grievous wrong. The cattle in controversy had been bought and paid for with the money of the interpleader, with the understanding that they should be mortgaged to secure its repayment. Such a mortgage was executed. The transaction was fair and honest, and all the publicity was given thereto which the circumstances permitted. We understand the local law to be that the mortgage so executed was, in any event, good as between the mortgagor and mortgagee, for such was the decision in Main v. Alexander, supra. The attaching creditors' debt was contracted long prior to the purchase of the cattle and the execution of the mortgage, and they had actual knowledge of its execution, and of the record thereof, before they caused the writ of attachment to be levied. The attaching creditors seem, therefore, to have made a deliberate attempt to appropriate the property of the interpleader to the payment of another's debt by taking advantage of a defect in the law, doing so in utter disregard of the doctrine which has been generally accepted by courts of equity since the decision in Le Neve v. Le Neve, 3 Atk. 646, 2 White & T. Lead. Cas. Eq. 35, that one who purchases property with full knowledge of another's interest therein, and with intent to deprive him of that interest, is a purchaser mala fide. Under these circumstances it was the duty of congress to afford all the relief against the threatened wrong which could be afforded by a liberal interpretation of its legislative powers; and it is likewise the duty of the courts in such a case to construe those powers liberally, to the end that a wrong may not be perpetrated through the forms of law. It may be that there is a legal presumption that, when congress extended the chapter of the Arkansas statute concerning mortgages over the Indian Territory, it was aware of the interpretation that had been placed upon the various provisions of that chapter by the supreme court of that state; but a legislative body is not omniscient, and, whatever may be the presumption, we are unable to believe that congress possessed such knowledge in fact, and that it intended to deprive nonresidents of the territory of the power to make a mortgage on personal property there located which would be effectual to protect mortgagees against the claims of third parties. We can conceive of no reason which

would be liable to influence congress to enact a law of that character, and are, therefore, constrained to believe that the peculiar construction placed on sections 4742 and 4743 of the mortgage act by the supreme court of Arkansas was unknown to congress when they were made applicable to the Indian Territory, and that it made haste to cure what it deemed to be an obvious defect or omission in the law as soon as its attention was directed to the defect. The act of February 3, 1897, stands on the same plane, therefore, as a curative act, and should be treated as a statute which was enacted for the purpose of remedying a mistake theretofore inadvertently made by the lawmaker. When the attention of congress was directed to the peculiar construction that had been placed on the aforesaid sections of the mortgage act in the state from which it was borrowed, it found the controversy between the attaching creditors and the interpleader still pending and undetermined. The rights of the former were in fieri. No court had at that time decided that they were entitled, as against the interpleader, to subject the mortgaged property to the payment of their judgment against the mortgagor; and believing, doubtless, that such an adjudication, if made, would defeat, rather than promote, the ends of justice, it undertook to forestall a possible decision of that nature by validating the record of the interpleader's mortgage. We are of opinion that the concluding clause of the act of congress of February 3, 1897, which was designed to accomplish that end, was a lawful enactment, and not in conflict with any provision of the federal constitution, because at the date of its enactment the attaching creditors had no such vested right or interest in the cattle in controversy as the constitution was intended to protect against legislative action.

Learned counsel for the interpleader have argued at some length that the United States courts in the Indian Territory were and are under no obligation to construe sections 4742 and 4743 of the chapter concerning mortgages as they were construed in Main v. Alexander, supra, because that decision is in conflict with other decisions of the supreme court of Arkansas on kindred questions, and because it has been discredited by judicial criticism in the state of Arkansas, and cannot be regarded as settling the true construction of the statute in controversy, even in the state where it originated. They also claim that the attachment writ only operated upon such interest in the cattle as the mortgagor had at the time the writ was levied, and that this interest was a mere equity of redemption, the mortgage being, in any event, good as against the mortgagor. Some other propositions are also advanced, all of which have been noticed, but, without expressing an opinion thereon, we prefer to rest our decision on the ground heretofore stated, that the act of congress operated to validate the interpleader's mortgage. The judgment of the United States court of appeals in the Indian Territory is accordingly reversed and annulled, and the judgment of the United States court in the Indian Territory for the Northern district thereof, which was rendered at its March term, 1899, being for the right party, is in all things affirmed.

SANBORN, Circuit Judge (dissenting). The validity of the act of February 3, 1897, as construed by the majority of this court, in view of the basic principles of the social compact and of the fifth amendment to the constitution, which declares that "no person shall be deprived of life, liberty or property without due process of law," is best tested by a candid look at its legal effect upon the property of the parties to this action. It is conceded by the opinion of the majority, and it was settled by the statutes then in force in the Indian Territory and by the uniform decisions of the supreme court of Arkansas interpreting those statutes from 1843 to 1891 (Main v. Alexander, 9 Ark. 112, 117; Hannah v. Carrington, 18 Ark. 85, 105; Jacoway v. Gault, 20 Ark. 190, 193; Haskell v. Sevier, 25 Ark. 152, 158; Ford v. Burks, 37 Ark. 91, 94; Dodd v. Parker, 40 Ark. 536, 540; Watson v. Lumber Co., 49 Ark. 83, 87, 4 S. W. 62; Cross v. Fombey, 54 Ark. 179, 184, 15 S. W. 461), that on the morning of February 3, 1897, the defendants in error had a first and specific lien impervious to the attacks of the mortgagee, the Evans-Snider-Buel Company, either at law or in equity, for the amount of the judgment which they had obtained in their attachment suit against Blocker,—$55,875.71,—upon the cattle that had been seized under the attachment, which were found to be worth $75,000. When that day closed, if the conclusion of the majority is right in this case, the congress of the United States had, by the act of February 3, 1897, devested the defendants in error of all beneficial interest in the cattle or in the lien which they held upon them, and had granted to the Evans-Snider-Buel Company a first lien for $130,000 upon these cattle, and had thereby deprived the defendants in error of all real interest in the stock. In other words, before the act of February 3, 1897, was approved, the defendants in error had a first lien upon the cattle which was worth $55,875.71, and the mortgagee had an inferior lien which was worth only the difference between the amount of this first lien and $75,000, or $19,124.29. The instant that act was approved, the mortgagee had a first lien on the cattle for $130,000, which was worth $75,000, and the defendants in error had nothing. The act of congress had the effect to transfer instantly property of the value of $55,875.71 from the defendants in error to the plaintiff in error the Evans-Snider-Buel Company. It is not pretended that this was accomplished by any process of law, due or undue. It was done, if done at all, by the arbitrary act of the congress of the United States, without notice, trial, or hearing. In my opinion, an act of congress or of a state legislature which has such an effect not only violates the fifth amendment of the constitution, but is beyond the powers of the legislative department of a republican government. Calder v. Bull, 3 Dall. 383, 388, 1 L. Ed. 648; Tyrrell v. Rountree, 7 Pet. 463, 468, 8 L. Ed. 749; Gunn v. Barry, 15 Wall. 610, 622, 21 L. Ed. 212; Fletcher v. Peck, 6 Cranch, 87, 135, 3 L. Ed. 162; Tillotson v. Millard, 7 Minn. 513 (Gil. 419); Grinder v. Nelson, 9 Gill, 299, 307; Regents v. Williamson, 9 Gill & J. 365, 408; Bank v. Ballou (Va.) 32 S. E. 481, 483; Wade, Retro. Laws, §§ 159, 191; Gilman v. Tucker (N. Y. App.) 28 N. E. 1040; Ratcliffe v. Anderson, 31 Grat. 105; Murphy v. Gaskins' Adm'r,

28 Grat. 207, 222; Alter's Appeal, 67 Pa. St. 341; McCarty v. Hoffman, 23 Pa. St. 507; Greenough v. Greenough, 11 Pa. St. 489; Wap. Attachm. (2d Ed.) §§ 17, 736; 1 Shinn, Attachm. §§ 322, 452; Frellson v. Green, 19 Ark. 376; Bergman v. Sells, 39 Ark. 97, 101; Cole v. Cunningham, 133 U. S. 107, 116, 10 Sup. Ct. 269, 33 L. Ed. 538; Richardson v. Adler, 46 Ark. 49; Wade, Retro. Laws, §§ 171, 173. In the discussion of the question at issue it must be borne in mind that it was not a mere judgment against the person, or the right to enforce such a judgment, or a mere general lien to secure it, of which the defendants were here deprived. But it was a specific and absolute lien, fixed by the judgment of the court upon personal property which had been reduced to the possession of the officer of that court, and which was property owned by the defendants in error, and worth more than $55,000.

In Calder v. Bull, 3 Dall. 388, 1 L. Ed. 648, Mr. Justice Chase said:

"There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law, or to take away that security for personal liberty, or private property, for the protection whereof the government was established. * * * A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B.,—it is against all reason and justice for a people to intrust a legislature with such powers; and therefore it cannot be presumed that they have done it."

In Tyrrell v. Rountree, 7 Pet. 466, 8 L. Ed. 749, after a judgment had been rendered in an attachment suit, and a writ of venditioni exponas issued to sell land which had been attached, the county was divided by a legislative act, and the claim was made that this devested the lien upon the property in the new county, so that a sale thereof could not be made. Chief Justice Marshall said:

"The counsel for the plaintiffs in error has argued the cause as if the process under which the sale was made had been the usual execution awarded on a judgment rendered against a person brought into court by regular process. Without inquiring whether his objections to the charge would have been well founded had that been the character of the case, it is sufficient to observe that in the actual cause the land itself was attached. Not having been released, it remained in the custody of the officer, subject to the judgment of the court. An interest was vested in him for the purposes of that judgment. The judgment did not create a general lien on it, but was a specific appropriation of the property itself to the satisfaction of that particular judgment. The process which issued did not direct the officer to levy it on the property of the defendants, but to sell that specific property which was already in his possession by virtue of the attachment, and was already condemned by the judgment of the competent tribunal. The subsequent division of the county could not devest this vested interest, nor deprive the officer of the power to finish a process which was rightly begun."

In Gunn v. Barry, 15 Wall. 610, 622, 21 L. Ed. 212, a case was presented in which a creditor had obtained a judgment against a defendant, which was a lien upon a large portion of his land, and before that judgment was enforced by execution sale the state of Georgia adopted a constitution, which, by its terms, exempted from

execution sale all the land of the defendant in the judgment. Mr. Justice Swayne, in delivering the opinion of the supreme court, said of this constitution:

"The effect of the act in question, under the circumstances of this judgment, does not, indeed, merely impair, it annihilates, the remedy. There is none left. But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property, and giving it to another, without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact."

No further authority would seem to be required to establish the propositions that the specific lien upon the cattle which the defendants in error had perfected by their judgment against Blocker was a "vested right of property," and that its transfer from them to the mortgagee was "taking one person's property, and giving it to another, without compensation." If, however, other authority is desired it will be found in the decisions to which reference has been made above.

A careful perusal of the authorities referred to in the opinion of the majority discloses no decision of the supreme court, and no persuasive opinion of any court, which sustains the proposition that the legislative department of our government may by an arbitrary act deprive one of a specific and perfected lien upon property which is worth more than $50,000, and vest it in another without compensation. The decisions of the supreme court cited by the majority, to the effect that interest on a judgment is a penalty for its nonpayment, and that from the time of the passage of a law it may be reduced by legislative enactment, even upon judgments rendered before the act passed (Morley v. Railway Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925); that the remedy for the enforcement of a personal judgment (which created no lien) against a municipality for damages resulting from mob violence may be lawfully taken away because the collection of such damages is a mere matter of public policy, while the removal of the remedies for the collection of an ordinary judgment for tort by legislative act would be unconstitutional (Louisiana v. Mayor, etc., of City of New Orleans, 109 U. S. 285, 291, 3 Sup. Ct. 211, 27 L. Ed. 936); that the removal of the bar of the statute of limitations against a personal debt does not impair any contract of the debtor, or deprive him of any property which he possessed, while the removal of the bar of such a statute against the assertion of a claim to either personal or real property is a violation of the fifth amendment to the constitution, and a taking of property without due process of law (Campbell v. Holt, 115 U. S. 620, 623, 628, 6 Sup. Ct. 209, 29 L. Ed. 483); that a debtor has no vested right to plead and recover the penalty prescribed by a statute for usury, and that a law repealing such a statute may well apply to prior contracts (Ewell v. Daggs, 108 U. S. 143, 150, 2 Sup. Ct. 408, 27 L. Ed. 682),—seem to me to have no tendency to show that the supreme court has ever sustained or intimated that it would permit the bald taking of $50,000 worth of private prop-

erty from one person to give it to another without compensation. It would be unprofitable to review the cases cited from the state courts in the opinion of the majority, because the decisions of the supreme court to which reference has been made are conclusive upon this question, and render the consideration of other authorities unnecessary. It may, however, be remarked in passing that the decision in Butler v. Palmer, 1 Hill, 324, that, after the sale of a judgment debtor's land under execution, a statute may be lawfully passed curtailing the period of redemption, is by no means the settled law of the land, and that the counter proposition is well sustained by reason and authority. Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373; O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458; Heyward v. Judd, 4 Minn. 483 (Gil. 375); Hillebert v. Porter, 28 Minn. 496, 11 N. W. 84, and the cases there cited. Attention may also be called to the fact that the decision of the supreme court of Arkansas in Green v. Abraham, 43 Ark. 420, 425, is inapplicable to the questions presented in this case, because it rests upon the proposition that the mere levy of an execution upon personal property under a personal judgment which creates no lien vests no right of property in the judgment debtor, and therefore a curative act validating a mortgage upon the property seized did not constitute the taking of private property for private use. The decision rests upon the proposition that the levy of the execution vested no right of property. The later decisions of that court, however, conclusively hold that the entry of a judgment against the debtor in an attachment suit completes and perfects the lien of the attachment, and vests a right of property in the judgment creditor. Richardson v. Adler, 46 Ark. 49; Frellson v. Green, 19 Ark. 376; Bergman v. Sells, 39 Ark. 97, 101.

The argument that this specific lien upon the cattle evidenced by the attachment and judgment might be stricken down by an arbitrary act of congress because there are authorities which hold that the repeal of a statute allowing attachments subsequent to the levy of a writ and before judgment against the debtor lawfully destroys the inchoate lien of the attachment is a non sequitur, is supported by no authority, and is contrary to all the decisions upon the question which have come under my notice. The lien of an attachment is inchoate, and conditional upon the entry of a judgment against the debtor until that judgment is entered, but perfect, absolute, and unassailable after such a judgment, and a judgment sustaining the attachment, have been rendered. There is respectable authority upon each side of the question whether or not a legislative act impairing or destroying the inchoate lien of an attachment before judgment destroys a vested right of property within the meaning of the fifth amendment to the constitution. Hall v. Stephens, 65 Mo. 670, 681; Hannahs v. Felt, 15 Iowa, 141; Day v. Madden, 9 Colo. App. 464, 48 Pac. 1053; Mulnix v. Spratlin, 10 Colo. App. 390, 50 Pac. 1078. It is useless to consider or discuss that question here, for the lien of the defendants in error is not of that character. On January 29, 1897,—three days before the act of February 3d was passed,—they obtained a judgment against the defendant Blocker not only that the latter was indebted to them in the sum of $55,875.71, but also that their attachment of

these cattle be sustained. The amount of the claim of the defendants in error had been adjudicated, their lien by attachment upon the cattle, which were then in the custody of the court, and their right to the sale of these cattle and to the application of their proceeds to the payment of their judgment, had been adjudged to be perfect and absolute by a competent court having jurisdiction of their case three days before the act of February 3, 1897, was passed. The property of the defendants in error in the cattle was strictly analogous to and as great as the property of a mortgagee in mortgaged real estate after a decree of foreclosure of his mortgage and of sale of the land to satisfy his debt has been rendered against the mortgagor.

May the legislative department of the government lawfully deprive such a mortgagor of his lien, his property, and transfer it to a stranger, or to the holder of an inferior lien, by its mere fiat? If not, then congress could not lawfully deprive these defendants in error of their lien, their vested right, their property in these cattle, and transfer it to the Evans-Snider-Buel Company, by the act of February 3, 1897. The lien which they acquired by their attachment and their judgment was impervious to attack, either at law or in equity. It was absolute, perfect, enforceable, assignable, and salable. It was a complete and vested right. It was property worth $55,875.71, and was as completely vested in the defendants in error, and as perfectly protected by the law of the land, as acts of parties, laws, and decisions can vest or protect any property. All the authorities are that, while the lien of an attachment is inchoate and contingent until a judgment against the debtor is rendered, yet, after that judgment has been rendered, the lien of the attachment is merged in the judgment, which relates back to the date of the attachment, and evidences a perfected and absolute right to apply the attached property to the payment of the judgment; and that this is a vested right of property, as sacred and as valuable as it is possible to secure under the laws of our land. Cole v. Cunningham, 133 U. S. 107, 116, 10 Sup. Ct. 269, 33 L. Ed. 538; Bank v. Reithmann, 79 Fed. 582, 583, 25 C. C. A. 101, 102, 49 U. S. App. 144, 146; Richardson v. Adler, 46 Ark. 43, 49; Wap. Attachm. (2d Ed.) §§ 17, 736; 1 Shinn, Attachm. §§ 452, 322; Frellson v. Green, 19 Ark. 376; Bergman v. Sells, 39 Ark. 97, 101; 1 Black, Judgm. 298; 1 Freem. Judgm. § 90; Tillotson v. Millard, 7 Minn. 513 (Gil. 419); Lyon v. Sanford, 5 Conn. 545, 547, 549; Wade, Retro. Laws, §§ 171, 173.

In Bank v. Reithmann, 79 Fed. 582, 583, 25 C. C. A. 101, 102, 49 U. S. App. 144, 146, this court said:

"An attachment is an ancillary remedy provided by statute, by means of which a contingent lien is obtained and impressed upon property of a defendant, which becomes vested and perfected on entry of judgment and levy of execution."

In Richardson v. Adler, 46 Ark. 49, the supreme court of that state said:

"The lien relates back to the levy of the attachment, creating from that moment an inchoate charge, which was perfected by the rendition of judgment, and which could not be devested by any change in the status of the parties."

Mr. Shinn, in his work on Attachment, at section 572, declares that:

"A judgment sustaining the attachment and subjecting the property to execution perfects the lien created by the attachment, or, rather, it takes the place of such lien, and relates back to the time of the levy, and takes priority over all subsequent attachments, liens, or conveyances."

Mr. Waples, in his work on Attachment, at section 17, says:

"By the law of relation an attachment judgment retroacts to the time the property was first attached; to the time it was first subjected to garnishment; so that no incumbrances put upon it by its owner since that time can have higher rank than the attaching creditor's lien. Such retroaction makes the lien perfect from its first inception, as though created by the contract of the parties; as though it were a mortgage lien voluntarily put upon the property by the defendant himself."

There is no conflict in the authorities upon this question. The principles which have been adverted to are indisputable, and it follows from them inevitably that, if a vested right or a vested interest in property is, as the majority are willing to concede, "some right or interest in property that has become fixed or established, and is no longer open to doubt or controversy," then the defendants in error had such a right and interest in the cattle in the custody of the court on January 29, 1897, after their judgments against Blocker had been rendered, and until the act of February 3, 1897, was approved.

The suggestion of the majority that the judgment against Blocker did not evidence a vested right in the cattle in the defendants in error as against the Evans-Snider-Buel Company does not seem to be founded in fact, because, while that judgment did not estop the company from claiming the cattle from the defendants in error, and from litigating their claim, it did vest in the defendants in error an established lien and interest in the cattle superior to that of the Evans-Snider-Buel Company, which was no longer open to doubt or controversy in the courts or under the law of the land. The Evans-Snider-Buel Company was unable to doubt or to controvert it by any proceeding at law or in equity. The only way which they found to open this vested right and interest to doubt or to controversy was to secure this arbitrary act of congress boldly taking it from the defendants in error and transferring it to this mortgagee. If the suggestion of the majority was intended to be that this act of congress does not violate the constitution because there was no adjudication of a court which estopped this mortgagee from claiming the property of these defendants and litigating its unfounded claim, that suggestion proves too much, because it would establish the proposition that congress could lawfully take this property from the defendants in error, and give it to any one of the inhabitants of the United States except Blocker, and the still broader proposition that congress may lawfully deprive any man of his property, provided only that it does not transfer it to some party who has been estopped from litigating an unfounded claim against it by the judgment of some court. Judgments in favor of the owners and against all the world are not indispensable to the existence of vested rights of property, and the fact

that the defendants in error had no judgment against the Evans-Snider-Buel Company did not detract from the existence or the inviolability of their vested property in these cattle, since their right to them was established, and was impervious to the attacks of the mortgagee under the law of the land.

Nor does the argument that this act of congress, which takes from the defendants in error a vested right of property worth more than $55,000, and gives it to the Evans-Snider-Buel Company, should be held to be no violation of the prohibition of the constitution because "it was morally right, and in accordance with justice and fair dealing," seem persuasive to me. The moral right or wrong of an act of congress which takes the property of A, and transfers it to B, is not, in my opinion, the true, nor is it a safe, test of the violation of the fifth amendment to the constitution. A fatal objection to such a test is that the standard of moral right or wrong in the minds of men is variant. An act taking some of the property of a bad man and giving it to a good man, one taking part of the property of a rich man and giving it to a poor man, might be thought to be morally right, and in accordance with justice and fair dealing, by some, while it would be thought unjust and morally wrong by others. This very case illustrates the objection to this rule. To the majority of this court it seems to be morally right, and in accordance with justice and fair dealing, to take from these judgment creditors an established lien upon property which they had acquired in strict accord with the law of the land to secure a just debt, and which was worth more than $55,000, and to transfer this right of property to a mortgagee which had taken mortgages that under that law were fraudulent and void as against these judgment creditors; while to the minority this act seems to have been morally wrong, and subversive of the basic principles of a government established to protect the rights of person and of property. To me the fraudulent mortgagee seems to have no equitable or moral right to the cattle in question superior to that of the holder of the lawful lien. There was certainly nothing in the consideration or purpose of the loan made by the mortgagee to give it a superior equity over that of the judgment creditors. One has no higher right to the repayment of money loaned to enable a debtor to purchase cattle than he has to the repayment of money loaned to enable him to buy horses, or land, or bread. The consideration and purpose of the debt of Blocker to the defendants in error does not appear in this record, but the presumption is that it was a valuable consideration, and a worthy purpose, for the debt is evidenced by the judgment of a competent court of the state of Texas rendered in 1887. These defendants in error had waited for the payment of their debt more than 10 years when they acquired their lien upon these cattle, while the Evans-Snider-Buel Company had made its loan within a year preceding that date. So far, then, as the consideration and purpose of these two debts are concerned, those of the defendants in error must be deemed to be as meritorious as those of the mortgagee, and, as the defendants in error had waited more than 10 years for their money, while the mortgagee had not waited a year, certainly it was not unjust or inequitable for them to

secure the payment of their debt first. Nor is it perceived that there is anything in the character and the acquisition of the liens of these parties which gave to the mortgagee any higher right or superior equity to the payment of its debt over those which the judgment creditors held. The judgment creditors, in violation of no law or public policy, but in strict accord with the statutes and the decisions of the courts interpreting them, established by the judgment of a competent court a first and unassailable lien upon the cattle to secure their debt. The Evans-Snider-Buel Company took mortgages upon the cattle unaccompanied with any change of possession, which were, under the common law, prima facie fraudulent and void as against the defendants in error (Pyeatt v. Powell, 51 Fed. 551, 2 C. C. A. 371, 10 U. S. App. 200), and which, under the statutes in the Indian Territory and under the uniform interpretation of them for 48 years by the courts of Arkansas which came to the Indian territory as a part of those statutes, were conclusively fraudulent and void as against the defendants in error and as against all creditors of the mortgagor, although the latter had actual notice of their existence. Main v. Alexander, 9 Ark. 112, 117; Jacoway v. Gault, 20 Ark. 190, 193; Hannah v. Carrington, 18 Ark. 85, 105; Dodd v. Parker, 40 Ark. 540; Watson v. Lumber Co., 49 Ark. 83, 4 S. W. 62; Cross v. Fombey, 54 Ark. 179, 184, 15 S. W. 458. Now, has a creditor who has procured mortgage liens from his debtor which are fraudulent and void as against other creditors a moral right to the mortgaged property so much higher than that of judgment creditors who have established a valid and superior lien upon it of the value of $55,000 in accordance with the law of the land that a court ought to sustain an arbitrary act of the legislative department of the government which takes this $55,000 worth of property from the lawful lienholder without compensation, and gives it to the fraudulent mortgagee, in the teeth of the fifth amendment to the constitution, which declares that "no person shall be deprived of life, liberty or property without due process of law"? I think this question should be answered in the negative, and, whether or not this should be the answer, it seems to me that the constitutionality of an act of congress which deprives men of their property without any process of law is not to be determined by a consideration of the moral right or wrong of the act or of the equities of those who lose and those who gain by the fiat. Constitutions and laws are enacted to declare and command the right and to forbid the wrong. Any theory that their violation may be permitted, or excused, or overlooked because in the varying opinions of any man or set of men that violation was morally right or in accordance with justice and fair dealing is subversive of the fundamental principles of government and ought not to be sustained. The adoption of such a theory would be, in effect, to add to the inhibition of the constitution an exception which it does not contain, so that it would read: "No person shall be deprived of life, liberty or property without due process of law except in cases in which it is morally right and in accordance with justice and fair dealing to do so." When the people adopted the constitution, they determined that it was morally wrong to deprive any person of his property without due process of law,

under any circumstances. They ingrafted no exception upon this prohibition, and it is not the province of the courts to do so. The inhibition is clear, imperative, and without exception. It prohibits the deprivation of any man of his property without due process of law. The act of February 3, 1897, as it has been construed by the majority of the court, did, in my opinion, deprive the defendants in error of their property to the amount of more than $55,000, and was, therefore, to that extent unconstitutional and void.

For the reasons which have now been stated,—perhaps too much at length,—I am unable to concur in the opinion and conclusion of the majority in this case. I agree with the unanimous opinion of the court of appeals of the Indian Territory in which Judge Clayton has so logically, forcibly, and, to my mind, convincingly, presented the reasons why the act of February 3, 1897, had no effect upon the rights of the parties in this action, and why the judgment lien of the defendants in error was superior to the claims of the fraudulent mortgagee. McFadden v. Blocker (Ind. T.) 48 S. W. 1043, 1046–1053. The true construction of the act of congress probably is, as the court of appeals of the Indian Territory held, that it merely validated mortgages made by nonresidents from the date of the passage of the act, and had no retroactive effect. 48 S. W. 1048, 1053; Suth. St. Const. § 463; Chew Heong v. U. S., 112 U. S. 536, 539, 5 Sup. Ct. 255, 28 L. Ed. 770; Summer v. Mitchell (Fla.) 10 South. 562. But, if this is not the proper construction, the act falls under the ban of the fifth amendment to the constitution, and is violative of the fundamental principles of republican government; and in either event it was ineffectual to take away the established lien of the defendants in error, and to transfer their property to the mortgagee. For these reasons, the judgment below should, in my opinion, be affirmed.

## CLARKE v. TOWN OF NORTHAMPTON.

(Circuit Court, N. D. New York. December 18, 1900.)

No. 3,346.

MUNICIPAL BONDS—ESTOPPEL TO CONTEST VALIDITY—JURISDICTIONAL DEFECTS.

Where it has been authoritatively determined by the courts that certain averments required by the statute in a petition presented to a county judge as the basis of proceedings authorizing the issuance of municipal bonds are jurisdictional, and that their omission renders all subsequent proceedings void, bonds issued in pursuance of proceedings based on a petition which does not contain such averments cannot be validated by estoppel, and the municipality may plead their illegality as against any holder, notwithstanding it continued to pay interest thereon for 20 years.

Action at Law. Tried by the court, a jury having been waived by written stipulation.

William C. Mills, F. B. Tiffany, and H. J. Cookinham, for plaintiff.

Fred L. Carroll, Robert P. Anibal, and Andrew J. Nellis, for defendant.

COXE, District Judge. This is an action to recover $2,912, with interest, upon coupons cut from bonds, purporting to be issued by the

defendant in the year 1872. The petition presented to the county judge stated that the petitioners were a majority of the taxpayers of the town of Northampton, but omitted the language of the act of 1871—"not including those taxed for dogs or highway tax only."

The case of Rich v. Town of Mentz, 134 U. S. 632, 10 Sup. Ct. 610, 33 L. Ed. 1074, is authority for the proposition that this omission renders the entire proceeding coram non judice, null and void. It matters not that in fact no one taxed only for dogs and highways appears upon the petition, it matters not that the county judge has expressly adjudged that the petitioners are a majority of the taxpayers exclusive of the prohibited class, the omission of the negative averment from the petition, which is the foundation of the whole bonding proceeding, renders all subsequent proceedings nugatory.

In Town of Mentz v. Cook, 108 N. Y. 504, 15 N. E. 541, which was quoted and approved by the supreme court, the court of appeals of this state say regarding the omission of the words quoted from the petition: "The fatal character of the defect has been so adjudged in this court as to end further discussion." And, again, "The defect, therefore, was fatal, and the special term correctly decided that bonds were invalid."

There is nothing in any of these decisions to indicate that a finding in the judgment can be regarded as curing this jurisdictional defect in the petition. The entire argument against the validity of the bonds proceeds upon the theory that in order to give the county judge jurisdiction the averment as to dogs, etc., must appear in the petition and if omitted the proceeding is void ab initio. If the judge never obtained jurisdiction for any purpose he could not create jurisdiction by his decree. Counsel may, perhaps, be permitted to doubt the logic of the Mentz Case, but not the point decided.

But it is argued that the defendant by reason of its inexcusable laches and the ratification of the acts of its agents is now estopped from asserting the invalidity of the bonds. The bonds were issued July 1, 1872, and the semiannual interest was paid regularly until January 1, 1893, a period of 20 years. During this period the county judge, the three commissioners and almost all of the persons actively engaged in the bonding proceedings have died. The petition presented to the county judge has been lost and resort has been had to oral testimony to verify the copy which has been used to supply the omission. The judgment of the county judge is still in existence and finds specifically that the petitioners are a majority of the taxpayers of the town "not including those taxed for dogs or highway tax only."

The argument is entitled to great weight that in these circumstances the town should not be permitted at this late day to take advantage of the omission of the quoted words from the petition, and that a bona fide holder of municipal bonds should not be required to go beyond the judgment of the appointing tribunal. These general provisions seem to be sustained by a long line of authorities in the federal courts, among the more recent being the following: Town of Andes v. Ely, 158 U. S. 313, 15 Sup. Ct. 954, 39 L. Ed. 996; Town of Orleans v. Platt, 99 U. S. 676, 25 L. Ed. 404; Lyons v. Munson, 99 U. S. 684, 25 L. Ed. 451; City of Evansville v. Dennett, 161

U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; Association v. Perry, 156 U. S. 692, 711, 15 Sup. Ct. 547, 39 L. Ed. 585; Whiting v. Town of Potter (C. C.) 2 Fed. 517; Hughes Co. v. Livingston (C. C. A.) 104 Fed. 306; Ray Co. v. Vansycle, 96 U. S. 675, 24 L. Ed. 800; Commissioners v. Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; Clapp v. Otoe Co. (C. C. A.) 104 Fed. 473. These authorities, and many more that might be quoted, appear to establish the proposition that the defendant should not be permitted to take advantage, nearly 30 years after the event, of the omission now relied on, but here again the decision in the Mentz Case stands directly across the plaintiff's path to recovery. The only difference between the two cases is that in the Mentz Case interest was paid for a shorter period. The court say: "As on the face of these proceedings there was an entire want of power to issue the bonds, no reference to the doctrine of estoppel need be made." In Cowdrey v. Town of Caneadea (C. C.) 16 Fed. 532, which preceded the Mentz Case and involved the same question, the court, speaking of the plaintiff's contention that the payment of interest on the bonds amounted to a ratification by the town, said: "But this doctrine is not applied in cases where there is a total want of authority on the part of the town to issue the obligations." The law being thus established it is clearly the duty of this court to follow it faithfully and loyally. With every inclination to distinguish the case at bar from Rich v. Town of Mentz the court has been unable to do so. It follows that the complaint must be dismissed.

## GRUBBS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 19, 1900.)

No. 1,390.

1. PUBLIC LANDS—CUTTING TIMBER FROM HOMESTEAD—INTENT.

Rev. St. § 2461, originally enacted in 1831, which makes it a criminal offense to cut or remove timber from any lands of the United States, has no application to the cutting of timber by a bona fide homesteader, and in a prosecution thereunder for the cutting of timber from a homestead by, or under authority from, the homesteader, the vital question is as to whether the homestead was taken and is being held in good faith, with intent to acquire title thereto by a compliance with the requirements of the homestead act.

2. SAME—PROSECUTION—INSTRUCTIONS.

There is no provision of law limiting or restricting the right of a homesteader to cut timber on his homestead, and while such cutting or the removal of timber must be for a legitimate purpose, having some connection with the cultivation or improvement of the land, a court cannot lay down specific rules governing his rights in that regard, and instruct a jury that, if a homesteader has failed to keep within the limits so fixed, the law conclusively presumes him guilty of a criminal trespass, for which he is subject to fine and imprisonment, but the question whether timber was cut for legitimate and proper purposes is one of fact, which depends on all the circumstances in each particular case, and in determining which the situation and financial condition of the homesteader are proper matters to be taken into consideration.

## In Error to the District Court of the United States for the Eastern District of Arkansas.

The United States district attorney preferred an information against Jesse M. Grubbs, the plaintiff in error, for an alleged violation of section 2461 of the Revised Statutes of the United States, which, so far as it is applicable to this case, reads as follows: "If any person shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting any live-oak or red-cedar trees, or other timber on, or shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing any live-oak or red-cedar trees or other timber, from any other lands of the United States, acquired, or hereafter to be acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the navy of the United States; every such person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed or removed, and shall be imprisoned not exceeding twelve months." The information charged that the defendant cut the timber from land belonging to the United States. The defendant entered a plea of not guilty. There was a trial, and verdict and judgment against the defendant; whereupon he sued out this writ of error.

On the trial it appeared the defendant had purchased the timber he was charged with cutting from one Joel B. Hickman, who had entered the land from which the timber was cut as a homestead. Hickman, the homesteader, testified as follows: "The homestead consisted of 160 acres. Have known this property for 14 years. Have no other home than this homestead. About 14 years ago I attempted to homestead this property, but my wife would not agree to come back into the woods to live. Since her death I have drifted along from place to place with my little children, until I lost one, and one went to Texas. I wanted a home. I was tired of drifting. Had no home during six years. Took this place in good faith, to make a home for myself and children. I have been sick more or less for seven years, and have to support myself and family by hard labor, working on farms, chopping wood, or working in mills, or anything I could get to do. I took up this property in August of last year. Had two children with me at the time of going on the place. Was at that time working for defendant at his mill by the day, and I entered into an arrangement with the defendant shortly after I took up the property to cut the timber and put the lumber back so that I could make a building to go into and shelter my little children. I let the defendant have the timber at 50c. per thousand in the tree, and he was to return me lumber, nails, hinges, and other material for building the house and other buildings. There is probably five or six thousand feet of lumber in the house, part of it first and part of it second quality. He returned, as near as I know, as much or more material in value than I let him have. I have about one acre cleared and ready for the plow and fenced. There are three and one-half acres deadened. Rail timber sawed, and part of the rails laid, and the underbrush and tree tops burned. Have done all in my power to improve the land, considering the condition of my health, finances, etc., and could not have built this house at all except for the arrangement I made with Mr. Grubbs, unless I made the same arrangement with some other mill man. He was to take this timber at 50c. a thousand, and turn back lumber and furnish material, such as nails, hinges, etc., and I also made about 5,000 rails. Some of them are laid up. Expect to cultivate the land. Have a man employed to work on the place. He is to exchange with my little boy. He will cultivate the land for me for my boy to plow for him. I have no such thing as a plow, mule, or agricultural implement on the place, except a couple of hoes. Mr. Grubbs, the defendant, was to cut enough timber to put up my dwelling and barn, and the balance of the timber was to stand on the land. It was my intention to farm the place as soon as I was able. If I had not been bothered by fever, I would have had eight or ten acres in cultivation by this time. There are thirty acres on the homestead fit for cultivation. It is different patches. When I made the entry of these lands I got the money from Mr. Grubbs, the defendant, on my labor. There was nothing said about the timber on the homestead by Mr. Grubbs at the time I got the money to make the entry. He was allowed 50c. a thousand for the timber, and returned the lumber to

me at ranging prices. I told them not to cut the timber where it was rough, for it would be too expensive for me to handle the lands where the timber was cut. There was no talk between the defendant and myself at the time I made this arrangement with him as to whether or not I had a right to cut the timber. Afterwards we had a talk about it, and he said I had the right. I instructed them to cut the timber on the land which was smooth, so it could be used for agricultural purposes. They were simply removing the timber from these parts of the homestead so that later on it could be used for agricultural purposes. The logs had to be drawn one mile and a half or two miles to the mill, and the lumber had to be drawn back. The hands of Mr. Grubbs picked out the lands where to cut, and cut all the trees over twelve inches. He drew the logs away, and delivered the lumber. Some of the lumber was dressed,—the flooring and ceiling. I personally did a month or more work on the place,—such work as I was able to do. Whenever I could get enough ahead I would work on the land, cutting rail timber, making rails, cutting down trees, or in clearing the land. I continued working for Mr. Grubbs until I got sick. I worked one time seven days on the land, and at odd times parts of days. When arrested, in June, none of the land was cleared,—about one acre brushed, and the rails made." James N. Corbett, another witness, testified substantially to the same facts.

The court charged the jury, in part, as follows: "But if a man of limited means goes upon a claim, and is able during the first years to cultivate only a few acres, he is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber off the 40 acres, it should be in pursuance of a definite plan that the plow should follow the ax, and that the entire forty acres shall be put to use for the purpose of cultivation, or in such manner as a farmer makes use of land; that is, tillable land. The balance of the timber on the homestead, if it is a claim covered by timber, should remain as a preserve,—a timber preserve,—for the future benefit of the land, and should be removed only and so fast as the settler finds it necessary to remove it in order to put in cultivation the land he intends to cultivate in good faith. The declaration and settlement must be in good faith, and supported by a compliance with the requirements of law by making a home upon the land, actually living upon it, and actually proceeding in good faith in the regular way, by regular process of improving the land and putting it in cultivation, and until he has perfected his right by full compliance with the law, and received his patent, he has no right to cut down and sell the timber on other portions of the land, which he is not intending to immediately put into cultivation. Now, in regard to the intention, I want to state to you that that cannot always be ascertained by what the parties say, but may be more correctly found by what the parties do. The question is not whether the parties believe that the cutting of the timber off the land homesteaded was right under the law, for all persons are presumed to know the law, and to intend the natural results of their acts; so if you find in this case from the evidence that the defendant, knowing the condition of these lands, that they were recently homesteaded, and that the timber that they obtained permission to cut was cut off lands not put in cultivation, and not to be put immediately into cultivation, then the law presumes that they intended to violate the law." Due exception was taken to the quoted parts of the court's charge. The defendant requested the court to give the following instructions: "If Corbett and Hickman having homesteaded these lands, in good faith cut and removed, or authorized the defendant to cut and remove, timber from such parts of the lands as they in good faith intended to improve, and exchanged such timber with defendant for lumber and other materials which have been in good faith placed on the homesteads, and that this lumber and other material was necessary to enable Corbett and Hickman to live upon and improve their homesteads, and that the timber was not sold to simply get the purchase price thereof, and denude the lands, then you will find the defendant not guilty. If you find Hickman and Corbett were poor men, without means to buy lumber and other materials for building upon and improving their homesteads, and that the timber removed was exchanged for lumber and other materials to build houses upon these lands, and that this lumber and other material was put into houses and improvements upon these lands, and

that Corbett and Hickman and their families have resided in these houses since they were erected, these would be very strong circumstances tending to prove the good faith of the transaction. The law does not contemplate that the homesteader must plow all the land he improves, but he may use it for pasturage or any other purpose to which it can be put to assist in making him a home and living for his family. The law does not contemplate that the poor homesteader shall let his family starve while he clears the land, 'that the plow may follow the ax,' but he may work out by the day to earn a living for himself and family, and improve the land as rapidly as he can in his circumstances. Neither does the law rob a homesteader of his homestead because he may be sick, and unable to improve the land as rapidly as his well neighbor. The law is reasonable, and only requires that he act in good faith; and if Corbett and Hickman acted in good faith in taking the homesteads and improving them, and exchanged such timber for lumber and other material as was necessary for the improvement of the homesteads, and that this exchange was necessary in order to build houses and make the homestead tenable, and did this in good faith, then the defendant is not guilty." To the refusal of the court to give these instructions due exception was taken.

E. H. Vance, H. F. Auten, and W. F. Hill, for plaintiff in error.
Jacob Trieber, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The acts of congress relating to the settlement upon and acquisition of the title to public lands by actual settlers, and the practice of the land department under them, are controlling in determining the rights of such settlers. Although this case arises under the homestead act, it will be profitable to advert briefly to an earlier statute, which gave to actual settlers the preference right to purchase the public land on which they had settled, upon conditions which, so far as relate to the occupancy (except the period of its duration) and improvement of the land, are in substance identical with the later act, known as the "Homestead Act." In 1841 congress passed what is commonly called the "Pre-emption Act." That was the first act which recognized the superior claims of actual settlers to the public lands. The act gave to the actual settler on the public land the preference right for one year to purchase at the minimum price the public land, not exceeding one quarter section, upon which he had settled. The grant was in these terms: "Every person being the head of a family * * * who has made or hereafter makes a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same and who has erected or shall erect a dwelling thereon is authorized to enter. * * *" Section 2259, Rev. St. U. S. The act gave the pre-emptor the right of occupancy, use, and enjoyment of the land, and everything growing thereon, for one year, during which time the settler had the exclusive right to enter the same at the minimum price of the public lands. The purpose to give this right to the settler was to enable him, by the use of the land and its products, to raise the money to enter the land. The act imposed no restrictions on the pre-emptor in relation to cutting timber on his pre-emption, or the use he should make of the timber he did cut, nor

did it prescribe the materials out of which the pre-emptor's "dwelling" should be constructed, or how or where or by what means such material should be procured. In actual practice, a log cabin, such as a settler with no other implement than an ax could erect, satisfied the requirements of the act. In the case of pre-emptors without means,—and there were many such,—the land was made to support his family, and to pay for itself by its products, whether crops, timber, stone, or coal. In actual practice in a good many cases a single year proved too short a period in which to raise the entrance money, but the early settlers supplemented the act of congress with laws enacted by themselves, known as "claim laws," which, while they did not have the sanction of any legally constituted legislative body, proved entirely effectual to protect the settler in the enjoyment of his pre-emption until he could, by utilizing every source of revenue the land afforded, raise the purchase money to enter it. The lands in the Western states were largely taken up by settlers whose want of resources and necessities compelled them to avail themselves of the beneficent provisions of the pre-emption act. It is matter of history, as well as a fact within the personal knowledge of many now living, that the settlers who availed themselves of the provisions of the pre-emption act made such use of the land and the timber growing thereon as their interests and necessities demanded; and it is not believed a single instance can be found where a bona fide pre-emptor was criminally prosecuted for cutting timber on his pre-emption, although instances were not rare where the pre-emptor procured the money to enter his pre-emption by selling saw logs and other timber cut therefrom. When the land was situated on or near navigable streams, saw logs were frequently floated hundreds of miles to market. The idea of prosecuting criminally a bona fide pre-emptor for cutting timber to procure the money to enter his pre-emption never entered the brain of any man, and would not have been entertained for an instant by any department of the government. Congress knew all these practices of the settlers, and never legislated against them, but by its silence acquiesced in them, and no department of the government ever presumed to regulate by rule the mode or manner in which the pre-emptor must proceed in clearing and improving his pre-emption.

In time it was found that the minimum price of $1.25 per acre, which the settler was required to pay under the pre-emption act, operated to prevent men of families, without means, from acquiring homes on the public lands. It was also perceived that the public lands were rapidly passing into the hands of speculators and capitalists, who held them at prices which precluded men of moderate means even from purchasing them for homes, and removed them entirely beyond the reach of men of families without means. It was to remedy these conditions that congress in 1862 passed the homestead act. This act adopted a much more liberal policy towards settlers on the public lands than the pre-emption act. The act declares: "Every person who is the head of a family * * * shall be entitled to enter one quarter section * * * of unappropriated public lands. * * *" Section 2289, Rev. St. U. S. "The

person applying for the benefit of the preceding section shall make affidavit * * * that such application is made for his exclusive use and benefit and that his entry is made for the purpose of actual settlement and cultivation and not either directly or indirectly for the use or benefit of any other person. * * *" Section 2290, Id. Section 2291 provides that no certificate or patent shall be issued for land entered under a homestead act until after the expiration of five years from the date of the entry, and the homesteader "proves by two credible witnesses that he * * * has resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated. * * *" Section 2297 provides that if at any time before the expiration of the five years it is proved that the person making the entry "has changed his residence or abandoned the land for more than six months at any time, then in that event the land so entered shall revert to the government." It will be noted that, like the pre-emption act, the homestead act imposes no restrictions on the homesteader in relation to cutting timber, or the use he shall make of the timber he does cut, nor does it prescribe the materials out of which the settler's dwelling and other improvements shall be constructed, or how or where or by what means such materials shall be procured. Nor does the act expressly or by implication prescribe how the bona fide homesteader shall open, clear, cultivate, or use the land and the timber growing thereon, or the character or extent of the improvements he shall make, or how rapidly and to what extent he shall put the land to cultivation, and particularly it does not require that he shall not clear land for any purpose except to plow it, and that the "plow must follow the ax." The leading object of the act was to afford men of families, having little or no estate, an opportunity to acquire a home on the public lands. But to the settler without means the acquisition and establishment of a home on the public lands is no holiday affair. He and his family are frequently subjected to great hardships and trials, and sometimes to actual want and suffering. With no resources or capital but the labor of his own hands, the homesteader is compelled to provide shelter and support for himself and family, and open and improve his homestead as fast and as best he can, under the conditions surrounding him. Such was the condition of the homesteader in this case. Opening a homestead under these conditions is a slow and laborious task, and the homesteader is necessarily restricted to the methods compatible with his resources. All these facts were within the knowledge of congress, and it is highly improbable that that body contemplated that the bona fide homesteader should be denied the use of the timber on his homestead to prevent starvation or procure medicine for his sick family, while honestly striving and intending to make a permanent home for himself and family on the land. Cognizant of the wants and necessities of the homesteaders who possessed limited or no estates, no such restriction was imposed by congress.

The fundamental and the only restrictions or conditions imposed on the bona fide homesteader by the act of congress are that he

shall enter the land for his own exclusive use, and with the honest purpose and intention of residing upon and cultivating it for five years. There is not a word in the act restricting or limiting his use of the land or the timber on it, and it was not the intention of congress that the bona fide homesteader should be limited or restricted in this regard. Such a homesteader who actually resides upon the land, and cultivates even so much as a garden patch, with the fixed intention of maintaining and continuing that residence for five years, for the purpose of acquiring the title to the land as a home for himself and family, satisfies the requirements of the act of congress, and no department of the government is authorized to impose others. The act of congress provides that the homesteader, upon making proof that he has "resided upon or cultivated" the land for the term of five years, shall receive a patent. And the rules and regulations of the land department adopted by the commissioner of the general land office, and approved by the secretary of the interior, provide that "in grazing districts stock raising and dairy productions are so nearly akin to agricultural pursuits as to justify the issue of patent upon proof of permanent settlement and the use of the land for such purposes." Circular from General Land Office, etc., issued July 11, 1899, p. 14. There are lands in the mountainous regions of the West whose altitude is such that crops cannot be grown on them at all, and yet they are valuable for grazing and stock raising. There are ranches of this character whose surfaces were never touched by a plowshare. Would the rule laid down by the lower court that "the plow must follow the ax" apply to such homesteads, and would the settlers be denied the use of the ax because the plow could not follow it? If it were permissible to prescribe rules for the guidance and control of every homesteader in opening and cultivating his land, it would be a grave error to suppose that all homesteads are alike, and that a rule could be framed equally applicable to all. It is no less an error to suppose that all homesteaders want to open their land at the same time, or in the same way, or put it to the same use, or that they are equal in resources and ability, and could, if they desired, conform to a uniform rule or method.

It is worthy of notice that the act upon which the information in this case is based was passed in 1831, and could, therefore, have had no reference to the cutting of timber by a homesteader on his homestead under the act of 1862. If a bona fide homestead entry is not taken out from under the operation of the act of 1831, it is not perceived why the homesteader may not be prosecuted for cutting the logs for building his cabin on his homestead. There is not a word in the act subjecting the bona fide homesteader in any case to the pains and penalties of the act of 1831; but this was done in the lower court in this case, who took it upon itself to say what a homesteader may and may not do, and what he must do in relation to the timber growing on his homestead, and to say when the act of 1831 shall and when it shall not be enforced against him for cutting timber on his homestead, without regard to his good intentions and honest purpose to comply with all the obligations imposed

on him by the law in reference thereto. This was ignoring the vital question in the case.

At the threshold of every case of this kind the crucial question is, was the declaration of the homesteader, made under oath at the time he entered the land, that his entry was made for his exclusive use and benefit, and for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person, true and made in good faith? If it was, then the entry was a valid entry, and invested the settler with all the rights of a bona fide homesteader; and so long as he continues in good faith to observe this declaration, by residing upon and cultivating the land with the bona fide intention of perfecting his entry by the required five years' residence, he cannot be deprived of his homestead, convicted of a criminal trespass, and incarcerated in jail, because, in making his improvements and clearing his land and disposing of his surplus timber, he did not conform to some ideal method or rule conceived by those who probably never felled a tree or plowed a furrow. Such rules have the sanction of no law, and no citizen can be criminally punished for not observing them. On the other hand, if the entry was made in bad faith, and with no intention of residing upon and cultivating the land for five years, but with the formed design of using the entry as a mere screen, while he cut and removed the timber from the land or caused it to be done, or if the entry was made, in the language of the law, "either directly or indirectly for the use or benefit of another," in either case the entry would be fraudulent and void from its inception. It would in law be no entry, and the cutting of a single tree by such fraudulent homesteader for any purpose whatever would be a criminal trespass. And so, too, if, after making an entry in good faith, the homesteader reconsiders his good intention, and proceeds to denude the land of its timber, and put the avails in his pocket, intending, as soon as he has accomplished his fraudulent purpose, to abandon his entry, he is guilty of a criminal trespass. The guilt or innocence of the defendant in this class of cases turns upon these questions of fact. It is a question of good faith and honest intention.

It is argued, however, that there are cases in which it is difficult to prove the homestead entry was fraudulent, or made for a fraudulent purpose, and that to meet such cases the court should lay down rules so stringent and exacting as to absolutely preclude all fraud. This argument calls for a few observations. If the existing law is defective,—which is not admitted at all,—its amendment rests with congress, and not with the courts. The courts cannot frame rules which will supply the want of statutory enactments in criminal cases. Again, in an effort to punish fraudulent and dishonest homesteaders, the court should not lay down rules which will effectually exclude honest and bona fide homesteaders, with little or no means, from successfully availing themselves of the benefit of the homestead act. Some of the rules suggested would deprive the very class of people for whose benefit the law was enacted from all benefit under it, and only a full-handed farmer possessed of teams, plows, and all kinds of farming implements, and ample

means to live on, until the homestead was brought into cultivation and made productive, could safely venture to enter a homestead. Under these rules, "the man with the hoe" and an ax, which seem to have been the only farming implements the homesteader in this instance possessed, though he act in perfect good faith, and with an honest purpose and desire to acquire a homestead, in which he would have succeeded had he been let alone, will inevitably land in jail as a criminal trespasser. The honest and bona fide homesteader should not be deprived of his homestead, and criminally punished, lest some guilty man should escape punishment.

But such rules are not necessary in order to convict the guilty. The bona fide settlers and owners of land, who largely compose the juries in federal courts, have no sympathy with timber thieves, and are quick to detect all their disguises. They know how to draw the line, and can, when the facts are laid before them, readily distinguish between an honest homesteader and a dishonest one. For a quarter of a century the writer of this opinion tried all this class of cases in the district from which this case comes, and he does not recall a single instance where a fraudulent homesteader, or his vendee with guilty knowledge, who had stripped the land of its timber, was not convicted.

The doctrine we have announced is not new in this court. In the case of Conway v. U. S., 37 C. C. A. 200, 95 Fed. 615, Judge Adams, in delivering the unanimous judgment of the court, said:

"It is a well-settled construction of the homestead statute that while a settler acquires no title to the lands entered by him until the issue of the patent, at the expiration of five years after the entry, he has nevertheless a right during these five years to treat the lands as his own, in a certain qualified sense,—to the extent, at least, of performing those acts which are required under the law to entitle him to a patent therefor. He must reside and continue to reside upon the lands entered, and cultivate and continue to cultivate the same for a period of five years. To perform these conditions necessary to the acquisition of title, he clearly has the right to utilize the timber growing upon the land for the purpose of building himself a house to live in, and such outhouses and fences as may be reasonably necessary for his initial and progressive farming operations. He may also, and must, in the performance of the condition of cultivation, first prepare the land therefor. If there be growing trees or dead timber, which are impediments to successful husbandry, he may clearly remove the same, or cause them to be removed, so far as the legitimate purpose of cultivation reasonably warrants; and he may, subject to such limitations, sell the same, and appropriate the money realized therefrom. While a settler may avail himself of these necessary privileges, he must at all times act in good faith in the exercise of them. He cannot invoke or pretend to exercise them as a cover to despoil the lands of their timber, or to make profit out of them, without regard to the legitimate purpose of building him a home, outbuildings, and fences, and fitting the soil for cultivation and use. * * * These averments, in our opinion, are the equivalent of saying that the timber was caused to be cut by the settler in order to fit and prepare the land for cultivation. If these averments are true,—and we must so treat them for the purposes of this case,—and if the defendant was engaged in doing the work of clearing in good faith, for the purpose of preparing the land for cultivation, then, even though the settler was to receive in money the value of the timber so cut, the act would be justifiable under the law, and the person employed to do it would not be liable to the United States therefor. As has been frequently expressed in judicial utterances found in the cases above cited, the question is one of good faith on the part of the settler. The cutting, to be justifiable, must be fairly and reasonably an incident to real

cultivation and improvement, as distinguished from a denuding of the land of its timber merely for the purpose of selling the timber and securing the purchase price. The portion of the answer already considered was intended to state a complete defense or a bar to the cause of action; but there is another feature of the answer which sets forth, in our opinion, a partial defense. That is the portion of the answer averring that Conway was to employ and did employ the timber cut, either directly or indirectly, in erecting a dwelling house and necessary outbuildings for the settler. To the extent to which the logs cut went into the construction of such dwelling house and outbuildings, under the authorities already cited, or to the extent to which the money received for the logs was in good faith employed to construct a dwelling house and outbuildings, there could be no recovery in this case."

The law as laid down in the opinion from which we have quoted was not regarded by the lower court in charging the jury in this case. The jury were told that the timber could only be cut "in pursuance of a definite plan that the plow should follow the ax." This is said to be an extract from a judicial opinion. It is entirely admissible to embellish judicial opinions with metaphors, figures of speech, and flowers of rhetoric, but such scraps of judicial exuberance are not to be laid before a jury as cast-iron rules of law, by which they are to be bound in forming their verdict. They leave too much to the imagination, and are far too elastic, for instructions to a jury. But in this instance, that there should be no misunderstanding as to when the plow should follow the ax, the jury were told, in another instruction, that if the timber "was cut off lands not put in cultivation, and not to be immediately put in cultivation, then the law presumes they intended to violate the law." In these two instructions the jury were told, briefly and in substance, that the "plow must follow the ax * * * immediately," and, if it did not, "then the law presumes they intended to violate the law." No matter that the homesteader acted in good faith; no matter that the failure to follow the ax with the plow arose from the homesteader's limited resources and present inability to do so, or from other causes which would excuse or justify it; no matter that the land was being cleared for pasture or grazing land, and not to be plowed at all,—none of these facts were of any avail against the positive and absolute presumption of law that the defendants intended to violate it. It will be observed that the court did not tell the jury that the failure to follow the ax with the plow was a circumstance to be considered by them in determining with what intent the timber was cut, or that it was prima facie evidence of the defendant's guilty intention, but the jury were told, in round and unqualified terms, that from that fact alone the law presumed a guilty intention. It is needless to say that there is no such presumption of law. A sounder view of the law is expressed in the volume of instructions prepared by the commissioner of the general land office, and approved by the secretary of the interior, addressed to those charged with the duty of administering the land laws of the United States, and to instruct the citizens as well, where it is said: "But the question whether the land is being cleared of its timber *for legitimate purposes* is a question *of fact* which is liable to be raised any time." Circular from General Land Office, etc., 1899, p. 275. The italics are in the book. With what in-

tent the timber was cut was a question of fact for the jury to determine from a consideration of all the facts and circumstances in the case. There is no more a conclusive legal presumption of guilt arising from failing to plow land immediately after the timber is cut off than there is a conclusive legal presumption of innocence when the land is plowed. A fraudulent homesteader might the better to screen his fraudulent design, while stripping the land of its timber, plow it, but that would not condone his offense. The instructions asked by the defendant, which are set out in the statement, express the law applicable to the case as we have declared it, and it was error to refuse them; and the charge of the court, so far as it conflicted with the views we have expressed and the instructions asked by the defendant, and which should have been given, is erroneous. The judgment of the district court of the United States for the Eastern district of Arkansas is reversed, and the cause remanded, with instructions to grant a new trial.

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MONARCH CYCLE MFG. CO. v. ROYER WHEEL CO.

(Circuit Court of Appeals, Sixth Circuit. December 4. 1900.)

No. 741

1. APPEAL—REVIEW—INSTRUCTIONS.

The charge of a trial court upon a particular issue cannot be reviewed where no exception was taken thereto, nor to the refusal of a special instruction on the subject, or where the special instruction was erroneous because of other matters embodied therein which justified its refusal as a whole.

2. SALES—ENTIRETY OF CONTRACT—RENUNCIATION BY PURCHASER.

A contract for the sale and purchase of 2,000 bicycles at specified prices, monthly shipments to be made as should be specified by the purchaser, is an entire contract; and the failure of the purchaser to pay for deliveries made, within the time stipulated, is not a renunciation of the contract which justifies the seller in treating it as abandoned, and absolves him from his obligation to make further deliveries thereunder, in the absence of a provision therefor in the contract, unless there is a refusal by the purchaser to pay, in such terms as to evince a purpose on his part to renounce the contract.

3. SAME—ACTION BY PURCHASER FOR NONDELIVERY—PLEADING.

Under the provisions of the Ohio Code, requiring a liberal construction of pleadings, a counterclaim by a purchaser for the recovery of damages because of the alleged failure of the seller to deliver goods under a contract is sufficient, after judgment, to sustain a recovery of such damages, although it does not allege that the purchaser was ready and willing to receive and pay for the goods, where, under the contract, he had 10 days after delivery in which to settle for the goods either by cash or note.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

On the 10th day of October, 1895, the Monarch Cycle Manufacturing Company entered into a contract with the Royer Cycle Company, at Cincinnati, Ohio, by a certain memorandum of agreement, as follows:

"That in consideration of the prices, terms, and conditions hereinafter named on bicycles manufactured by said Monarch Cycle Manufacturing Company,

party of the second part agrees to, and does hereby, purchase of the said party of the first part, for delivery as hereinafter specified, 1,500 bicycles, at the following prices, viz.:

Deliveries.

| Nov. Dec. Jan. Feb. Mar. Apl. | | Total, 750. |
|---|---|---|
| Model No. 31, at | $40 00 | 50 |
| Model No. 30, at | 37 50 | |
| Gent's Defiance, No. 29, at | 36 00 | 20 |
| Ladies' Defiance, No. 25, at | 37 50 | 20 |
| Youths' Defiance, No. 26, at | 30 00 | |
| Misses' Defiance, No. 26, at | 30 00 | 10 |
| Boys' Defiance, No. 24, at | 26 00 | |
| Girls' Defiance, No. 24, at | 26 00 | |

"Balance of machines to be shipped within the season of 1896. Specifications, etc., to follow later. F. o. b. Chicago.

"Terms: Net 60 days, less discount for prompt cash, in ten days, as follows: On November deliveries, 5 per cent.; on December deliveries, 4 per cent.; on January deliveries, 3 per cent.; on February deliveries, 2½ per cent.; on March deliveries, and thereafter, 2 per cent. Full settlement of all invoices must be made within ten (10) days from date of same, either by cash, less the cash discount, or by notes, the maturity of which shall conform to the maturity of the respective invoices. Party of the second part agrees to settle all accounts according to the terms above specified; pay transportation charges on all advertising matter furnished by the party of the first part, and also on goods sent for repairs.

"Any verbal understanding or agreement had with any traveling man or salesman representing the party of the first part, which is not set forth in this agreement, shall be void and of no effect whatever. This contract must be approved by an officer of the Monarch Cycle Manufacturing Company, countersigned by such officer, before it can go into effect and become binding on either party."

On December 30th the parties entered into a further agreement as follows:

"That in consideration of the prices, terms, and conditions hereinafter named on bicycles manufactured by said Monarch Cycle Manufacturing Company, party of the second part agrees to, and does hereby, purchase of the said party of the first part, for delivery as hereinafter specified, 2,000 bicycles, at the following prices, viz.:

| | |
|---|---|
| Ladies' Defiance, No. 32a | $41 50 |
| Gent's Defiance, No. 31a | 40 00 |
| Gent's Defiance, No. 30 | 35 00 |
| Gent's Defiance, No. 29a | 35 00 |
| Ladies' Defiance, No. 25a | 35 00 |
| Misses' Defiance, No. 23a, 26-in. wheels | 30 00 |
| Girls' Defiance, No. 23a, 24-in. wheels | 26 00 |
| Youths' Defiance, No. 22a, 24-in. wheels | 30 00 |
| Boys' Defiance, No. 22a, 24-in. wheels | 26 00 |

"An additional charge of $1.50 for brake on Model No. 25. Party of the second part agrees to specify monthly shipments to be made up to July 1, 1896, covering the entire number of wheels purchased. F. o. b. Chicago.

"Terms: 60 days net, less cash discount if paid at our office strictly within ten (10) days, as follows: On December deliveries, 4 per cent.; on January deliveries, 3 per cent.; on February deliveries, 2½ per cent.; on March deliveries, and thereafter, 2 per cent. Full settlement for all invoices must be made within ten (10) days from date of same, either by cash, less the cash discount, or by notes, the maturity of which shall conform to the maturity of the respective invoices. Party of the second part agrees to settle all accounts according to the terms above specified; pay transportation charges on all advertising matter furnished by the party of the first part, and also on goods for repairs.

"This agreement shall go into immediate effect when approved as hereinafter provided, and remain in effect until November 1, 1896, unless sooner terminated by mutual consent, or failure of either party hereto to keep agree-

ments herein contained. Any verbal understanding or agreement made with any traveling man or salesman representing the party of the first part which is not set forth in this agreement shall be void and of no effect whatever. This contract must be approved by an officer of the Monarch Cycle Manufacturing Company, and countersigned by such officer, before it can go into effect and become binding on either party."

The plaintiff, alleging default in failure to pay for certain goods sold and delivered to the defendant, brought suit in the circuit court of the United States to recover upon two causes of action: First. Upon an account for goods sold and delivered, copy of which is attached to the petition. Second. Upon alleged breach of the agreement of December 30, 1895, in that defendant had refused to specify the months in which shipments were to be made, as therein agreed, and had only specified 219, leaving 1,781 bicycles to be specified prior and up to July 1, 1896; that defendant was frequently requested to give such specifications, which it did not do, and refused to receive any more bicycles; that defendant violated said contract by canceling all orders for shipments given by defendant to plaintiff which had not been filled, and also terminated said contract as to the 1,781 bicycles not specified or delivered, and refused to accept any more bicycles under said contract. There was a general allegation that plaintiff had performed all the terms and conditions of said contract on its part to be performed, and that it had been damaged by reason of the refusal of defendant to take said 1,781 bicycles in the sum of $17,810, wherefore plaintiff prays judgment in the sum of $3,313.68, with interest from September 27, 1896, and on $17,810, with interest from July 10, 1896. The defendant's answer claimed some small credits on the first cause of action, and, for answer to the second cause of action, says that the agreement of December 30th was simply a modification of the contract of October 10, 1895, and denies that the plaintiff complied with the contract, but avers that it refused to deliver wheels, to the great damage of defendant, as set out in the answer. Defendant claims that, by reason of the failure and neglect to keep the agreement, defendant is absolved from the contract. By way of counterclaim, defendant claims 100 wheels, by the agreement of October 10, 1895, were to be shipped during the month of November, and also alleged a breach of an agreement on the part of plaintiff to furnish catalogues and printed matter to enable the defendant to carry on its business of selling said wheels; and certain allegations are made in the counterclaim as to the contracts made and expenditures incurred on the strength of plaintiff's agreement. It is averred that plaintiff neglected and refused to send the printed material, and did not fill the orders sent to it by defendant; did not ship wheels of the kind ordered; that the defendant frequently called upon the plaintiff, without success, for the wheels ordered and demanded. Defendant further alleges that, after trying in vain to get its orders filled, it was compelled to abandon the contract, and notified plaintiff of so doing. Defendant further alleged its loss under said contract for wheels not furnished in the sum of $10,000, for which it prays judgment. The reply takes issue upon the allegations of the answer and counterclaim, and avers: That defendant wrongfully canceled orders for wheels under the contract on or about the 1st of May, 1896. Prior to said date the defendant refused and neglected to pay for said wheels delivered by plaintiff, and neglected to specify the monthly shipment of wheels according to the contract. That the plaintiff refused to deliver any more wheels until the ones previously sent had been paid for according to contract, and that the cancellation of the contract was wholly due to the default of defendant. Denies that it ever agreed to furnish printed material, and denies the allegations of special damages contained in defendant's answer and counterclaim. Upon these allegations the parties went to trial, and a verdict was returned finding upon the first cause of action in favor of plaintiff, on the second cause of action in favor of the defendant, and also in favor of defendant upon the counterclaim set up against the plaintiff. At the trial testimony was introduced on the part of plaintiff tending to show that defendant had failed to make settlement for wheels shipped, or to promptly pay for same, and that defendant was indebted to plaintiff on account of the contract, for wheels shipped, in the sum set up in the first cause of action, and that about the 20th of April, 1896, defendant having failed to make settlement for previous shipments, the plaintiff declined

to make any further shipments; that on or about the 1st of May the defendant notified plaintiff that it would make no further orders, and canceled any unfilled orders, because of the alleged breach of contract on part of plaintiff in not furnishing wheels. The defendant offered testimony tending to show repeated demands for wheels, and nonfulfillment of orders to plaintiff to furnish wheels, and that finally, because of the failure to obtain wheels demanded by it, on the 1st day of May, 1896, it terminated any further obligation under the contract.

Lawrence Maxwell, Jr., for plaintiff in error.

John W. Herron and Charles W. Baker, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

As to the verdict on the first cause of action, for wheels sold and delivered by plaintiff to defendant, there is no assignment of error, and the verdict and judgment in that respect are not complained of.

Under the second cause of action set up in the petition, the plaintiff, having failed to recover, alleges that certain instructions of the court in respect thereto were erroneous. It is alleged that the court erred in charging the jury as to the effect of failure of the defendant to specify the wheels to be shipped under the contract with plaintiff. An examination of the record discloses that the plaintiff, in its eighth request, asked the court to charge the jury upon this subject that if the defendant violated said contract, in neglecting to furnish specifications for monthly shipments up to July 1st, it could not complain of either delay in deliveries, or the refusal to make shipments. This is the only request separately made upon the effect of the failure to furnish specifications, and is the only reference to the matter, except in the twelfth request, wherein the court was requested to charge the jury that if the delay in shipments was due to the default of the defendant in not properly sending specifications under the contract, or in not making settlements for wheels already furnished, as provided in the contract, that the plaintiff was justified in not making further shipments, and the defendant had no right to cancel the contract on May 1st, and in that event the plaintiff was entitled to recover damages for the breach of the contract in refusing to accept the 1,781 wheels. There is no exception to the refusal to give the eighth request, nor do we find any to that part of the charge of the court covering the subject. On that matter the court charged the jury as follows:

"Now, as to the matter of specifications. Plaintiff's complaint in this respect is that the delay in deliveries was due to the want of specifications. That is a question of fact for the jury to determine from the evidence. You will remember the evidence upon both sides bearing upon that point. I believe it was stated in substance by the witness Herron that at some time he gave a general direction, which could always be followed unless there were special specifications and directions. On the other hand, you heard what the witness for the plaintiff stated,—that they were embarrassed and hindered in making deliveries upon orders for want of specifications. It is for you to determine whether there was any delay caused thereby. I should say, too, that there is testimony tending to show that the plaintiff from time to time suspended deliveries for nonpayment,—for failure to pay in accordance with the terms of the contract; and it is for you to look to the evidence and determine whether there

was any delay which was caused by a failure to make specifications, or whether it was caused by the failure to comply with the terms of the contract in regard to payments."

This manner of submitting the questions to the jury seems to have been satisfactory to the parties. Request 12 embodied other matters, which we will have occasion to consider later, justifying the court in refusing to give it. It is well-settled that unless a request is entirely sound the court does not err in refusing it. As the record does not present the question in due form, we do not deem it necessary to consider the construction of the contract as to the requirement for specifications in advance of wheels required by defendant.

Another question involved in considering plaintiff's second cause of action arises upon the ninth request of the plaintiff, which is as follows:

"That if the defendant violated said contract, in neglecting or refusing to make remittances from time to time for wheels already furnished, and as required by the contract, that the plaintiff was not required to make further shipments until settlements were properly made under said contract; and, if the defendant violated the contract in either of the above particulars, the plaintiff was justified in stopping shipments."

Upon that subject the court said to the jury:

"In the first place, gentlemen, we will turn to the plaintiff's case. It was the duty of the plaintiff to deliver these goods, under the terms of the contract, upon the orders of the defendant; and it would not be justified in refusing to deliver goods upon the orders of defendant because of the failure of defendant to make any particular payment for goods delivered, or to always conform to the strict requirements of the contract with reference to payments. In other words, gentlemen, the plaintiff could not excuse itself from delivering the goods because of some particular payment which the defendant had not made in compliance with the terms of the contract, nor because in other instances defendant had not complied strictly with the terms of the contract. It could not excuse itself on that ground. But if the defendant failed to make payments, failed to comply with the terms of the contract, and this failure was accompanied by conduct indicating an intention on the part of the defendant to abandon the contract,—in the language of the books, to set the plaintiff free and put an end to the contract,—then the plaintiff would be warranted in refusing to make further deliveries. Now, I want you to understand that, gentlemen, if in the refusal to make payments, taking into consideration all the circumstances of the case, looking at the surroundings, looking at the conduct and behavior of defendant, at what it did and what it said, through its agents and officers and correspondence, and all that, it was apparent that the defendant intended to abandon the contract, to put an end to it, if it was refusing payment because it did not want to go on with the contract; if that appears, if that is shown by the conduct of the defendant, and by the circumstances under which these payments were refused, or not made in strict conformity with the contract,—then the plaintiff would be warranted in refusing to make any further deliveries under the contract. But unless that appears,—if it was only a dispute about some particular payment, or if the requirements of the contract were not strictly complied with, and there was nothing to indicate an intention to abandon the contract on the part of the defendant,—the plaintiff would not be justified in refusing to deliver, but must go on and deliver under the contract, and seek its remedy, if necessary, in some other way."

And again:

"Now, gentlemen, you are to look carefully at this testimony, and it is for you to say, and not the court, whether on the 19th of April, 1896, when deliveries were suspended,—and, I believe, it is conceded, ended,—whether the plain-

tiff was justified in ending the delivery of goods, in putting an end to the delivery of goods under this contract. If the evidence does not show an intention of abandonment by the defendant, growing out of his conduct with reference to these payments; if, notwithstanding the failure to make payments at the times and in the manner stipulated in the contract, the evidence shows that it was the intention of the defendant to go on with the contract,—then the plaintiff was not justified in stopping deliveries, and, if it was not justified in stopping deliveries, it will not be entitled to recover damages on the second cause of action set forth in the petition. If, on the other hand, the evidence convinces you—and the burden of proof is on the plaintiff to show it—that the conduct of the defendant was such that the plaintiff was warranted in assuming that the defendant intended to abandon this contract, and that he did abandon it without cause or justification, then the next question for you to consider will be the question of damages which the plaintiff should recover upon the second cause of action."

As the jury found in favor of the defendant upon this branch of the case, it is not necessary to consider the charge of the court upon the measure of damages. In seeking to recover upon its second cause of action, the theory of plaintiff's case was that the defendant, by its wrongful failure to make remittances and payment for wheels shipped under the agreement, and in accordance with the terms thereof, was guilty of a breach of contract, and the plaintiff was entitled to treat it as such, and sue for damages for nonfulfillment on the part of the defendant. The defendant claims this failure to make prompt remittance was not a breach of the contract, and that plaintiff, by not shipping wheels, broke the contract. These divergent claims make it necessary to examine the law of the subject. In this connection numerous cases have been called to our attention, but, having a decision of this court directly in point, we are content to rest our conclusion upon it. In Cherry Valley Iron Works v. Florence Iron River Co., 12 C. C. A. 306, 64 Fed. 569, where a contract had been entered into for the sale of 10,000 tons of ore, deliverable in seven equal parts, in each of the seven months named, for the price of $37,500, and in which the vendor reserved the right to cancel the contract in reference to the undelivered ore if the vendee should fail to pay for the delivered ore, Judge Severens, in delivering the opinion as to the construction of this agreement, calling attention to the right of cancellation for nonpayment for partial deliveries, said:

"It will be convenient to consider, in the first place, what would have been the effect of the contract had that stipulation been omitted. In that case it would have been a contract simply for the sale of 10,000 tons of ore, deliverable in seven equal parts, in each of the seven months named, for the price of $37,500, payable in seven equal installments, payable during those months, respectively. The contract would have been entire, and would have bound the vendor to deliver the whole amount, and the vendee to pay the whole price. The fact that there were subordinate stipulations in regard to the dates of delivery and of payment would not break it up into separate contracts for each installment of the ore. It is sufficient to cite upon this point the cases of Iron Co. v. Naylor, 9 App. Cas. 434, in the English house of lords, and Norrington v. Wright, 115 U. S. 188, 203, 6 Sup. Ct. 12, 29 L. Ed. 366. And, the contract being entire, as soon as the parties had entered upon its performance by partial delivery and payment the mere failure of the vendee to make the subsequent payments would not of itself absolve the vendor from proceeding with the deliveries. It may be that a downright refusal to make payment, or other equivalent conduct evincing a purpose to renounce the contract, would entitle the other party to

treat the contract as abandoned, and relieve him from the obligation to proceed further in its execution. Winchester v. Newton, 2 Allen, 492. In respect to the obligation of the vendee to accept delivery of the goods under such a contract, where the vendor fails to comply with its stipulations with regard to the time and mode of delivery, it was held in Norrington v. Wright, supra, that he was entitled to insist upon a continued adherence to its terms. This was because they were of the substance of the thing contracted for. But the duty of the vendor, notwithstanding a mere failure of the vendee to make payment of money, not evincing a renunciation of the contract, stands upon a different ground, as pointed out in that opinion, and results, also, from a comparison of the actual decision in that case with other cases distinctly involving the vendor's duty in those circumstances,—among them the case of Iron Co. v. Naylor, which it recognizes as authoritative."

In the absence of a clause permitting cancellation of the agreement upon nonpayment for any given shipment of bicycles, the contract under consideration would be practically the same as the one supposed by Judge Severens, and would fall within the principles thus stated by the court. In the present case the contract was an entire one for the purchase and sale of 2,000 bicycles at certain given prices; monthly shipments to be specified, covering the entire number of wheels purchased. This contract bound the vendor to deliver the whole number of wheels, and the vendee to specify and receive the whole number. It was an entire contract, not a number of contracts for the sale and delivery of bicycles, and the stipulations for specifications and separate monthly shipments did not have the effect in this case to break the agreement into separate contracts for each shipment of bicycles specified. We are of opinion that the mere failure to pay for a number of bicycles specified to be delivered under the contract would not necessarily be a renunciation of the agreement which would authorize the plaintiff to treat the same as abandoned by defendant, and therefore absolve it from the obligations of the contract. The vendor is still bound by the terms of its agreement. It has agreed to furnish 2,000 bicycles. It is bound to fulfill the contract, in the absence of such emphatic refusal to carry out the terms thereof as would amount to a renunciation of it. These principles are substantially recognized in Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, cited in the opinion of Judge Severens. Examining the charge of Judge Thompson on this subject, above quoted, we are of opinion that it is in substantial harmony with the doctrine laid down in the Cherry Valley Iron Works Case. We therefore find no error in the submission of this case to the jury upon the second cause of action.

As to the recovery had upon the counterclaim set up by the defendant, the claim is made, that the same, as pleaded, does not state a cause of action upon which a recovery can be had. As no objection was taken in the court below to the form of pleading the counterclaim, nor any objection reserved as to the admission of testimony in support thereof, upon the principles of liberal construction established by the Ohio Code, especially after verdict and judgment, this objection is not well founded, if a recovery could have been had upon the counterclaim for any sum. The counterclaim avers the entering into the contract on October 10, 1895, and that said contract contained an agreement on the part of plaintiff that it would ship to the

defendant during the month of November, 1895, 100 wheels of certain models. It is said there is no averment that the wheels were not delivered, but we find in a subsequent part of the pleading the general allegation that "defendant frequently called upon the plaintiff, without success, for wheels ordered, and demanded that plaintiff fill the contract promptly, but without success." This may be considered to be equivalent to an averment that the wheels were not shipped or delivered. It is urged that this is an action, as far as the counterclaim is concerned, for an alleged breach of contract to deliver bicycles, and also certain printed material which it is alleged plaintiff had agreed to furnish. In either aspect it is an action for goods agreed to be delivered by the vendor, and the claim is that the essential averment that the vendee was willing and ready to receive and pay for the goods as provided for in the contract was not contained in the counterclaim. It is true, as a general rule, in an action by the vendee for nondelivery of goods, it is essential to aver and prove that the vendee himself is ready and willing to perform the contract on his part; the principle of such rule being that the vendee cannot enforce a contract against the vendor without averring performance on his part, or an offer to perform, averring readiness and willingness so to do. 2 Benj. Sales, 897; Simmons v. Green, 35 Ohio St. 104. In the present case the goods were not to be paid for in cash, but it is stipulated full "settlement of invoices must be made within ten days from date of same, either by cash, less the cash discount, or by notes, the maturity of which shall conform to the maturity of the respective invoices." The demands for the goods, as averred in the counterclaim, required the plaintiff to deliver the same. After such demand the plaintiff was in default until the goods were delivered. The principle requiring the averment of readiness and willingness to perform is established in cases where delivery and payment are to be concurrent acts. By the stipulations of this contract the defendant had 10 days in which to settle either by cash or giving a note. In the aspect of the case, as left by the pleading and the testimony, the plaintiff was in default for nondelivery of goods, which was an act required of it before the 10 days would begin to run in which the defendant might elect to settle by cash or note. This conclusion renders it unnecessary to determine whether the proof of demands, having been admitted without objection, would not be sufficient, under the Ohio Code, to establish readiness and willingness to perform, and support the judgment, where no error is assigned in the court below, based upon the failure of sufficient allegation in the pleading to justify the proof. Liberally construed at this stage of the case, we think the counterclaim contains allegations sufficient to support the judgment. Finding no error in the record and proceedings, the judgment of the circuit court is affirmed.

## FELTON v. NEWPORT.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1900.)

No. 813.

1. RAILROADS—PERSON KILLED UPON TRACK—ACTION FOR DAMAGES.

Plaintiff's intestate left a station in Tennessee in the night, walking upon the railroad track, and in the morning his body was found in pieces a short distance away, the trunk lying between the rails. During the time six trains had passed, going in different directions. There were indications that the body had been carried forward and back along the track by the passing trains, but there was no direct evidence as to how he came to his death, though there was evidence that he was intoxicated when he left the station. The engineers and firemen of all the trains testified that they kept a vigilant lookout, that the headlights were burning, and that none of them saw the man on the track, either living or dead. Shannon's Code Tenn. § 1574, subd. 4, relating to railroads, provides for the keeping of a lookout on all locomotives, and that "when any person, animal or other obstruction appears upon the road the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident." *Held*, that upon such evidence it was a question for the jury whether the deceased had "appeared upon the road," and whether the railroad company had discharged its duty of maintaining a proper lookout, and had taken the other prescribed precautions.

2. SAME—CONTRIBUTORY NEGLIGENCE—TENNESSEE STATUTE.

Under Shannon's Code Tenn. § 1574 et seq., which prescribes the precautions to be taken on railroads to prevent accidents or injury to persons on the track, and provides that a failure to observe such precautions shall render the company liable for all damages to persons or property injured as the result of any accident or collision, but that contributory negligence may be considered in estimating the damages, contributory negligence does not necessarily restrict recovery to nominal damages, but the jury are given a wide discretion to fix the damages in accordance with their estimate of the relative negligence of the parties, where both are negligent.

3. SAME—CARE REQUIRED—LOOKOUT.

The mere fact that a lookout was maintained on an engine, as required by statute, and that he did not see a person on the track, does not exonerate the railroad company from liability for the killing of such person, but it must further appear that the lookout could not have seen him in the exercise of due care and watchfulness.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Charles R. Head, for plaintiff in error.
Jerome Templeton, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. This case has been here once before. The opinion then given, and which is reported in 34 C. C. A. 470, 92 Fed. 470, related mainly to certain rulings made upon the former trial in reference to the question whether Helenwood, the place where the accident happened, was an incorporated town, the statute of Tennessee having prescribed certain duties to railroad companies when passing through such places. Special precautions in the blowing of whistles and the stoppage of trains are required in the circumstances enumerated in the statute. The result was that the judg-

ment was reversed mainly for error in that regard, and direction was given for a new trial. This has been had, and another verdict and judgment have been obtained in favor of the plaintiff. The case has been again brought here on writ of error by the defendant. The evidence upon the second trial was substantially the same as that upon the first, except that the actual incorporation of Helenwood was fully proven. The facts are quite fully stated in the former opinion, and they will not be further recited now otherwise than by references in what follows.

The errors assigned may be reduced to three:

First. That the court erred in not granting the request of the defendant below for peremptory instructions to the jury to render a verdict that the plaintiff was not entitled to recover.

Second. That the court erred in not granting the defendant's request to instruct the jury that:

"If the deceased voluntarily got drunk, and went upon the track, and lay down and went to sleep, then, although the jury may believe the precautions of whistling and putting down the brakes, etc., were not observed, then the jury should only give nominal damages in the case. This would be true if he, drunk, got upon the track, although he may not have gone to sleep."

Third. That the court erred in not granting the defendant's request to instruct the jury that:

"If Newport was upon the track in front of a moving train, and was not seen by some one upon the engine, but such person was upon the lookout ahead, and in a position to see, but did not see, then the plaintiff cannot recover."

1. We have had some doubt from the beginning whether the facts and circumstances disclosed by the evidence were such as to remove the case from the region of mere conjecture as to how the accident occurred, and particularly whether it was shown with sufficient certainty that Newport, the deceased, appeared upon the road as an "obstruction," within the meaning of subdivision 4, § 1574, Shannon's Code Tenn., which requires that, "when any person, animal or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an accident." The accident occurred in the night. Six trains passed over the road between the time when Newport was last seen going north from the depot on the track and the discovery of his body between the rails, not far away, early next morning. Some of these trains went north, and others south. The first went north. One of his feet was found drawn fast into the frog of a switch opening to the south. The body was mangled, and was recovered in pieces. The trunk was found at considerable distance from the switch, where the foot was found. There were indications that the body had been carried forward and back by the trains as they moved in opposite directions. The engineers and firemen of the several trains were produced as witnesses, and testified that they maintained a vigilant lookout in passing through the locality; that the headlights of the locomotives were in order, and burning; and that they, none of them, saw the man, alive or dead, anywhere upon the road. Upon this evidence counsel for the plaintiff in error contended, and contends here, that, as these witnesses are not contra-

dicted or impeached, and as the accident might have happened without Newport's having appeared upon the road,—that is, the track,—(as, for instance, by his stumbling before the engine or between the cars just as the train passed), it was the duty of the jury to have paid regard to the positive evidence of the trainmen, and found that the accident occurred in some of the other suggested possible ways, thus reconciling the proofs with the possibilities. But the testimony of some of these witnesses gave ground for thinking that they did not very clearly remember some of the important facts about which they testified; and, moreover, it cannot be ignored that their testimony was self-serving, in that it related to matters which it was their duty to attend to, the violation of which might result in their discharge, and even more serious consequences to them. Again, the jury might think that the fact that none of these witnesses saw the deceased, taken in connection with the indications upon the track and the body that the latter had been moved from place to place by successive trains, contradicted their testimony that they maintained a proper lookout. Perhaps the probabilities favored the conclusion that Newport had laid down upon the track intoxicated, and was struck while in that place and condition. While we freely admit as sound doctrine that juries ought not to be permitted to fasten, by their verdicts, liabilities upon parties, based upon mere conjecture, or where the probabilities are as easily reconcilable with freedom from fault as the contrary, and that it is the duty of the court to give instructions to the jury which will prevent such injustice, still we conclude, after mature reflection, that the evidence in the present case was such that it was necessary to leave the questions of fact whether the deceased had appeared upon the track, and whether the railroad company had discharged its duty of maintaining a proper lookout, and taken the other prescribed precautions, to the jury. We cannot say that fair-minded men could not have reached the conclusion which the jury has arrived at in two successive trials.

2. It is further insisted that the court should have instructed the jury, as requested, that, if the deceased got drunk, and went upon the track, and lay down there, even if the precautions of whistling and putting down the brakes were not observed by the railroad company, only nominal damages could be given. This instruction would have been erroneous. The result would not follow. Suppose the jury should have believed that Newport was seen upon the track, and, notwithstanding this, no precautions, or grossly inadequate precautions, were taken to avoid injuring him, it could not be that the damages must be nominal. Besides, we do not understand the rule in Tennessee, under this statute, to be that the damages in such cases must be either fully compensatory or merely nominal. After defining the duty of the railroad company, and imposing an absolute liability in case of its nonobservance, the statute goes on to declare that the contributory negligence of the plaintiff may be considered in estimating the damages. This gives the jury a wide range of discrimination, and they are left to fix the damages according to their estimate of the relative negligence of the parties where both are negligent.

3. Complaint is made that the court declined to instruct the jury that, "if Newport was upon the track in front of a moving train, and was not seen by some one upon the engine, but such person was on the lookout ahead, and in a position to see, but did not see, then the plaintiff cannot recover." The fault with this instruction would be that it attributes no measure of diligence to the person on the lookout. The premises assumed might all be true, and the lookout have been negligent and heedless. The statute contemplates an efficient and watchful lookout, and not one which is merely perfunctory. A lookout who does not see what, with due care, should have been seen, would not be in the proper discharge of his duty. The jury in the present case may have thought that, if the lookout had been observant, the man would have been seen.

We are therefore of opinion that none of the assignments of error can be sustained, and that the judgment should be affirmed.

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## PETERMAN v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Washington, E. D. December 13, 1900.)

1. WRONGFUL DEATH—RIGHT OF ACTION FOR DAMAGES—IDAHO STATUTE.
Rev. St. Idaho 1887, § 4100, giving a right of action for wrongful death to the "heirs or personal representatives" of the deceased, having been copied from the statute of California after the latter had been given a construction by the supreme court of the state sufficiently liberal to include as a beneficiary a parent who has suffered an actual pecuniary loss by the death of a son caused by the wrongful or negligent act of another, the legislature of Idaho must be presumed to have adopted the known judicial interpretation of the act as well as the text.

2. SAME—PARTIES ENTITLED TO SUE—PARENT.
A mother who is the sole heir of an unmarried adult son, and entitled to recover damages for his wrongful death, under a statute giving a right of action therefor to the "heirs or personal representatives" of the deceased, may maintain an action for the recovery of such damages in her own name.

At Law. Demurrer to complaint overruled.

Action at law to recover damages for the death of the plaintiff's adult unmarried son, which occurred in the state of Idaho, while he was working for the defendant as a locomotive fireman. In her complaint the plaintiff alleges that she is a widow, and the sole heir of her son; that she was dependent upon him for support; and that his death was caused by negligence on the part of the defendant. Her claim to damages is based upon a statute of the state of Idaho, which provides that, "when the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the cause may be just." Rev. St. Idaho 1887, § 4100.

Robertson & Miller, for plaintiff.
Stephens & Bunn, for defendant.

HANFORD, District Judge. The statutes of the state of Washington, as construed by the supreme court of this state and by this

court, give a right to damages for a wrongful act or negligence causing the death of a person not a minor, only when there is a surviving widow, or child or children, or widow and child or children, of the deceased to whom damages may be awarded. Noble v. City of Seattle, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; Nesbitt v. Railway Co. (Wash.) 61 Pac. 141; Dueber v. Railway Co. (C. C.) 100 Fed. 424. And the argument in support of the demurrer in this case is that, as the Idaho statute has not been judicially construed by the supreme court of that state, the restricted interpretation should be given to it which has been given to the Washington statute in the decisions above cited. This argument would have great force if the statutes of the two states were identical. But they are not identical. Section 4828, Ballinger's Ann. Codes & St., contains substantially the same provisions as the Idaho statute above quoted, and other provisions not found in the Idaho statute. Section 4838, Ballinger's Ann. Codes & St., relative to the same subject, also differs from any provision of the Idaho statutes; and the decisions above referred to show plainly that the courts in this state adopted a narrow definition of the words "heirs" and "personal representatives," in order to so interpret the statutes that claims of equal merit would be established or defeated by the application of one uniform rule. If the provisions of the Washington statutes, which are not found in the Idaho statutes, should be eliminated, the decisions referred to would cease to have any virtue as precedents, because the reasons upon which they are based would cease to be. The Idaho law appears to have been copied from the Code of California after the decision by the supreme court of California of the case of Taylor v. Railroad Co., 45 Cal. 323. This being so, the rules for the interpretation of statutes justify an inference that the legislature of Idaho intended to adopt the known judicial interpretation of the act as well as the text. Tucker v. Oxley, 5 Cranch, 34, 42, 3 L. Ed. 29; Pennock v. Dialogue, 2 Pet. 1, 18, 7 L. Ed. 327; Railroad Co. v. Moore, 121 U. S. 558, 572, 7 Sup. Ct. 1334, 30 L. Ed. 1022; Warner v. Railway Co., 164 U. S. 418, 423, 17 Sup. Ct. 147, 41 L. Ed. 495; Willis v. Banking Co., 169 U. S. 295, 311, 18 Sup. Ct. 347, 42 L. Ed. 752. The California statute, as construed by the supreme court of California, is sufficiently liberal to include as a beneficiary a parent who has suffered an actual pecuniary loss by the death of a son, caused by the wrongful act or neglect of another person; and a mother who is the sole heir of the decedent, and entitled to damages for his death, may sue in her own name. 8 Am. & Eng. Enc. Law (2d Ed.) 891; Munro v. Reclamation Co., 84 Cal. 515, 24 Pac. 303. It is my opinion that this plaintiff has the same rights under the laws of Idaho. Demurrer overruled.

MORSE v. MONTANA ORE-PURCHASING CO.

(Circuit Court, D. Montana. December 10, 1900.)

No. 531.

1. NEW TRIAL—DISQUALIFICATION OF JUROR—WAIVER OF OBJECTION.
A new trial will not be granted because of the disqualification of a juror who was not challenged or examined as to his qualification, although the failure to examine was due to a mistake of fact not induced by the juror or the adverse party.

2. SAME—MISCONDUCT OR BIAS OF JURORS—SUFFICIENCY OF PROOF.
Proof of misconduct on the part of jurors during a trial, or of statements made by jurors showing their bias or prejudice, alleged as grounds for a new trial, must be sufficient to overcome the denials of such allegations by the jurors affected, and to sustain the burden of proof which rests upon the party making them.

3. SAME—EVIDENCE—TESTIMONY OF JURORS.
On a motion for a new trial on the ground that jurors were prejudiced by newspaper articles published during the course of the trial, the testimony of a juror is admissible on the question whether or not he read any such articles, but not as to whether, or to what extent, he was influenced thereby.

4. SAME—PREJUDICE OF JURORS—NEWSPAPER PUBLICATIONS.
Where a trial lasted a greater part of two months, during which a leading newspaper of the city in which it was held, and where nearly all of the jurors resided, continued to publish articles apparently intended to influence the determination of the case, and calculated strongly to prejudice public sentiment against one of the parties, and to present the other in a most favorable light, some of which articles were admittedly read by some of the jurors, such facts afford ground for a new trial on behalf of the party against whom the articles were directed, without regard to the question by whom such articles were instigated.

5. SAME—WAIVER OF OBJECTION.
A party is not precluded from assigning the prejudice of jurors by newspaper articles published during the trial of a cause as a ground for new trial, because he failed to have the publishers cited into court for contempt, where the power of the court to punish for contempt on account of such publications was doubtful, nor because he did not ask a continuance on the ground of the publications.

On Motion for New Trial.

John F. Forbis, William Scallon, T. J. Walsh, L. O. Evans, Henry G. McIntire, Wilbur F. Sanders, and William Wallace, Jr., for plaintiff.

Cullen, Day & Cullen, F. E. Corbett, John B. Clayberg, John W. Cotter, Arthur P. Heinze, Elbert D. Weed, Robert B. Smith, and John J. McHatton, for defendant.

KNOWLES, District Judge. The plaintiff in this case has petitioned the court for a new trial. As grounds therefor, many alleged reasons are presented. In the argument made in support of the petition only a few of the reasons or grounds for granting the same were urged. The following were presented in the brief of counsel for plaintiff:

1. That the juror Passavant was disqualified for the reason that his name did not appear as a taxpayer on the assessment roll of Lewis and Clarke county, Mont., for the year 1899; that being the county of his residence. The plaintiff failed to interrogate this

juror upon that point, and made no challenge to him as a juror on that ground. Plaintiff has presented affidavits showing why he did not examine said juror Passavant as to his qualifications as a juror under the laws of Montana. Indeed, it is stated that they had examined the county records of Lewis and Clarke county, and found upon the assessment roll of the preceding year the name W. A. Passavant, and supposed that this was the name of the above-named juror. The general rule is that, if a party fails to challenge a disqualified juror, he waives all objections to the same. It is very easy for a party to interrogate a juror as to his qualifications, and because he has failed to do so upon a mistake of fact, not induced by the juror or the opposing party, he should not be entitled to a new trial, especially when the trial has been a long and expensive one, and where the party does not show, as in this case, that he would have challenged said juror had he known the fact concerning his disqualification. The fact that the juror was anxious that it should appear that he was a taxpayer in the county where he lived, in order that he might serve as a juror, is not sufficient ground of itself for a new trial. It has been often found that persons were anxious to become jurors for no other purpose than that of finding employment.

2. The second ground that I will consider is that it appears from the affidavit of one Tibbitts that the juror Farris made declarations before the cause was finally submitted to the jury showing that he was biased, and had been influenced by the publication in the Helena Independent newspaper of an article in regard to the result of a trial had in Judge Clancy's court in Silverbow county. The said affidavit details the conversation had with said juror in regard to said case, and its effect upon the case on trial in which he was a juror. Mr. Farris, in an affidavit, positively denies this conversation. The burden of proof as to the same was upon the plaintiff, and I am not willing to hold that he has established it.

3. The third ground presented is in regard to the furnishing of refreshments to the jurors in the cause. The affidavit of J. P. McCabe states that on the evening of the 24th of December, 1899, and during the trial of the cause, one Sam McMurran, an employé of the defendant, and the juror E. C. Perrett entered the Chamber of Commerce Saloon, in Helena, drank together at the bar, and entered into a conversation in a low tone of voice for some 15 minutes. This is positively denied in the affidavit of both McMurran and Perrett, and the statements contained in the affidavits of McMurran and Perrett are corroborated by the affidavit of O. B. Totten, the father-in-law of said Perrett, in this: He states that Perrett was at home at his house during all of the evening of said December 24th. In the affidavit of J. M. Hannigan it is stated that he was a barkeeper in the saloon of T. J. Cronin, in Helena, and that on the 24th day of December, 1899, said McMurran and the juror Perrett came into said saloon and drank together. There is some evidence as to a talk between Hannigan and McMurran about the matter of tampering with the jury. This is also denied in affidavits made by said Perrett and McMurran. There are also affidavits presented stating

that the reputation of the said McCabe for truth, honesty, and integrity, in the community where he resides, is bad. An affidavit is also filed attacking the reputation of the said Hannigan for truth, honesty, and integrity, made by one W. H. Orr. As the burden is on the plaintiff to establish these facts, I do not think the court could find them to be true.

4. It is also alleged that the juror Joseph N. Kenck received refreshments at the hands of McMurran and Crabtree, employés of the defendant. O. A. Kenck, a cousin of said juror, in an affidavit, states that his cousin, the juror, told him that during the progress of the trial of this cause one McMurran and one Crabtree, whom he knew to be employés of the defendant, had furnished him with money to play at nickel in the slot machines, and had also furnished him with drinks and cigars whenever he wanted them, and that he would even call on them from across the street when he wanted either drinks or cigars. The juror Kenck denies this statement, and also the fact of having such a conversation, and McMurran and Crabtree deny that any such occurrence took place. The fact, however, of the juror Kenck taking a nickel and playing it in another nickel in the slot machine, and of taking a cigar from McMurran, is admitted. The manner in which this was done indicates a considerable intimacy between said juror and McMurran. The juror, however, denies that he knew that McMurran and Crabtree were in the employ of the defendant. There is also a reported conversation between this juror and said McCabe, spoken of above. This conversation, if true, as reported, exhibited a corrupt state of mind on the part of said juror. The court, however, must consider, not what the juror Kenck said, but what he did, and the only fact established is the taking of the cigar and the playing of the nickel above referred to; and considering the fact that McMurran and Crabtree were in the employ of the defendant, and were in Helena during the trial of the cause, the matter presents a ground for suspicion, but would scarcely be enough by itself to overturn the verdict in the case.

5. The next ground for a new trial is the publication of a number of articles in the Helena Independent, a newspaper published in the town of Helena, having a tendency to prejudice the minds of the jurors against the plaintiff, or the party represented by him. In the issue of said newspaper under date of December 12th, 1899, referring to the trial of this cause, appears the following:

"The trial of the contention between what was indicated by the examination of the talesmen for the cause in court yesterday to be the Amalgamated Copper Company, on one side of the action (E. Rollins Morse, as trustee, being the nominal plaintiff), and the Montana Ore-Purchasing Company, on the other, over the ownership of valuable ore bodies in Butte, was begun yesterday in the United States court."

In the deposition of G. W. Sykes, the leading editor of the Independent, he was asked why he used the term "Amalgamated Copper Company versus Montana Ore-Purchasing Company" in the description of the cause on trial, and he replied:

"I can answer for myself, of course. That being my understanding that the Amalgamated Copper Company owned the property of the Boston &

Montana Company, the Butte & Boston Company, as well as the Anaconda; that they were all allied interests under the general name of the Amalgamated Copper Company."

And also to another question his reply was:

"Because very few of the people would know who E. Rollins Morse was, and who he represented, unless we explained it time and time again; and, in a general way, all our readers know what the Amalgamated Copper Company is."

This does give a clew as to whom and as to what was intended by the following articles published from time to time in said paper while this cause was on trial in this court.

In the issue of December 16, 1899, in a leading editorial, it is stated that certain parties, by means of the Amalgamated Copper Company, had swindled Eastern investors out of some $15,000,000, and that such parties will not recommend Montana as a place for the legitimate investment of honest capital, on account of this. In the issue of December 20, 1899, in a leading editorial entitled, "Their Blighting Methods," after abusing Marcus Daly, the president of the Amalgamated Copper Company, it is stated:

"He has of late undertaken to swindle confiding thousands of investors out of their honestly earned savings by manipulating the market for copper stocks, to his own profit and the ruin of scores. The Anaconda and Standard Oil gang, with Daly at their head, forced a consolidation of the properties of that company, the Boston & Montana, the Butte & Boston, the Parrot, and others, for purely stock-jobbing purposes, on the strength of previously honorable records of these companies. All over the East and the West and in Europe there were thousands of people with small savings who invested them in the stocks of the Amalgamated trust, and the stocks of other companies now composing the trust. By crafty manipulation these stocks were all boomed until the money of these small investors was in the pockets of the Daly and Standard Oil coterie. Then the bottom was knocked out, and the confiding investors are cursing the day they first heard the word 'Montana.' They were swindled outright, tens of thousands of them. * * * Furthermore, there are in the hills of Montana hundreds, perhaps thousands, of miners who have been squeezed out of their prospects by the rapacious Daly-Standard Oil outfit, by resorting to costly litigation, by terrorizing, by coercion, by trickery, by some of the various resources the rich are able to employ against the poor. As reckless and cruel a band of speculating pirates is now in control of the properties and their stocks of the Anaconda, the Boston & Montana, the Butte & Boston, and the Parrot as ever scuttled a ship or cut a throat."

In the issue of December 21, 1899, in an editorial entitled, "The Boston Financial Troubles," after referring to the business panic in Boston, and that the same was influenced by a shrinkage in the value of copper stocks, it goes on to say:

"On the strength of the operations of the past these same New Englanders bought Amalgamated stock, and the stocks of the Boston & Montana, the Butte & Boston, and the Parrot, when they were high, on the strength of positive representations that the stock was not held at fictitious value, but was a safe investment; but the unscrupulous manipulators of the Daly-Standard Oil combination had not been reckoned with. This malignant force—a force absolutely dominant in the copper stock market—now found it could make more money working the investors than it could working the mines, and the latter business was exceedingly profitable at that. The result is that the investors were thrown down the deep shaft of fallen quotations, and ruined as completely as if they had been thrown down the deep shafts of the

very mines. * * * Poor investors, with the savings of their lives tied up in copper stocks, will be squeezed into the poor houses, if necessary, that the gang who have already discredited Montana in the eyes of the honest portion of the world may make money, money, money, out of the transaction."

In the issue of December 22, 1899, in an editorial entitled, "Anaconda Coils Tighten on Butte," it is said:

"That the Amalgamated Copper Company is but an enlarged Anaconda is being demonstrated daily since the absorption of the Boston & Montana, the Butte & Boston, and the Parrot Companies into one corporation with the Anaconda. All the baneful and blighting methods of the latter concern have become features in the management of the others. Daly, re-enforced by the Standard Oil forces for evil, is as insatiable as he is unscrupulous and merciless, and the coils of the deadly snake are twining around Butte and other cities in a fearful manner. * * *"

Then, after giving an account of an incident in which it is claimed Mr. Hyams sought to coerce some insurance companies, it is said:

"The incident is not the only one of the kind that has come to notice, but it is the most shameful one of the last few weeks. It serves to show the depths of the tyranny the aggregated Daly forces are exerting in Butte, Anaconda, Great Falls, Missoula, and everywhere else in the state where these concerns have business relations. Anaconda methods, damnable and rotten clear through, are effective in the management of the Boston & Montana, the Butte and Boston, and the Parrot Companies."

In the issue of December 23, 1899, in commenting upon an incident that occurred in court, when Col. Sanders had called the court's attention to an article in the Independent, that paper, in an article entitled, "The Independent and the Courts," said:

"A crew of political cut-throats has been for years—is to-day—sailing around Montana, employing all the tactics of sea pirates to throttle and destroy the liberties and the property of all who do not bow the knee in abject servility to them and give tribute to their rapacity."

In its issue of December 29, 1899, the Independent prints a special dispatch from Butte, with the following headlines:

"Heinze Wins Suit!

"Silverbow county judge decides he is owner of ore claimed by the Amalgamated Company. Has apices in his ground. Ore bodies are continuous from surface to disputed ground. Veins run east and west, and north and south fissure is not a legal vein. Two millions involved. And result makes Heinze a formidable rival of copper trust. Issues same as in trial now pending in Helena."

In this dispatch is the following:

"The decision is the universal talk here to-night, as it makes brighter the future of interests outside of the Amalgamated Copper Company, and guaranties a long life for one competitor. As soon as certain forms of law are complied with, to raise an injunction, 500 more men will be put to work by the Montana Ore-Purchasing Company in this ground, which is already opened for the extraction of ore, but which has been idle nearly three years. * * * The controversy decided here to-day involves the same points as are involved in the suits now on trial before the United States court in Helena between E. Rollins Morse, the representative of the Amalgamated Copper Company, and the Montana Ore-Purchasing Company. The Michael Devitt adjoins the Pennsylvania on the east, and the ground beneath is worked as one mine."

It appears that this dispatch, which is a long one, was sent by Mr. John MacGinniss, the vice president of the Montana Ore-Purchasing Company.

In the issue of December 30, 1899, a comment is made upon the decision rendered by Judge Clancy, and above referred to. A part of the comment is as follows:

"The findings of fact rendered by Judge Clancy in his decision in the suit of the Montana Ore-Purchasing Company against the Amalgamated interests in Butte, for the possession of the ore bodies beneath the surface of the Pennsylvania lode claim, are interesting to mining men, not alone, but to all who have watched the course of proceedings in the big copper camp, and the fight that has been waged there by the Amalgamated Company for its own supremacy, and for the shutting out of the only rival who has seemed to be formidable to it. The effect of the decision is to add to the resources of the rival, and to make people realize that he is a man who proposes to have his rights, and whom the power of even one of the largest trusts in the country cannot destroy. As has already been told in the Independent, the decision will be followed by suits for damages; for during the time of the pendency of the action to determine the ownership of the controverted ore body, worth millions in ore taken out and yet to be hoisted, it will be claimed great damage has been done by the enforcement of the injunctions that have prevented Mr. Heinze and the Montana Ore-Purchasing Company from working what now proves to be theirs. The case is further of exceeding interest because the issues are practically the same in the Michael Devitt suit now pending in court. The Michael Devitt lies east of the Pennsylvania, both are south of the Johnstown and Rarus claims, and the lode which apexes in the latter dips southward, going under the Pennsylvania and Michael Devitt. * * *"

In the issue of December 31, 1899, I find the following:

"Butte, December 29. The Boston & Montana Mining Company to-day brought suit in the district court against the Montana Ore-Purchasing Company to recover $600,000, the value of the ore alleged to have been taken from veins in the Pennsylvania claim by the defendant concern in the last four years. This is looked upon as another phase of the big controversy between the two companies, which was decided in the district court yesterday in favor of the Montana Ore-Purchasing Company."

In commenting upon this dispute the Independent says:

"Is this suit a move in the effort of the Daly-Boston & Montana Department of the Amalgamated Copper Company, a trust, to crush a rival? An impartial observer could hardly reach any other conclusion. According to the dispatches, the suit begun Friday was but another phase of the suit decided against the combination the day before. It doubtless has just enough new features to give it a standing in court, and will be nursed along in the manner calculated to do the defendants the greatest harm. Trial will probably not be risked, as the decision rendered by Judge Clancy on Thursday would indicate the result. Each move of the character of Friday's suit is but another demonstration of the charge that the Amalgamated Copper Company, a trust, of which the Anaconda and Boston & Montana Companies are components, has planned to subdue the whole state of Montana, and that its first move in the extermination of rivals has been made in Butte."

In the issue of the 3d day of January, 1900, is the following:

"The Independent has received a letter from a well-known business man of this city, who has been in New York during the recent squeeze in copper stocks which resulted in a couple of broken banks in Boston, and the raiding of Boston & Montana, Butte & Boston, and Parrot stocks by the Standard Oil capitalists who are in the Amalgamated Copper Trust. Our correspondent declares the facts have not been overdrawn; that the squeeze compelled Bigelow, Clark, and other heavy owners of Boston & Montana to accept $200 for stock quoted at $385 but a few weeks before. The Standard Oil people got what they wanted of Boston & Montana stock, and are now in control of everything in Butte except the properties of W. A. Clark and

the Heinzes. Heinze will be the next to get the attention of the Standard Oil monopolists, adds our correspondent. * * *"

In the issue of the Independent of January 8, 1900, is a long article upon Marcus Daly and the Anaconda Copper properties; the head-lines of said article are as follows:

Marcus Took a Big Contract!

"Agreed to end the litigation over Butte Mines and run politics of Montana. So copper trust made him manager. Amalgamated schemers were anxious to secure everything, and something more, perhaps. It was a grand idea, but the proverbial slip 'twixt the cup and the lip came."

In this article is the following:

"In these days one hears in Wall street, on every hand, the expression that it is a fortunate thing that none of Clark's properties or those of the Montana Ore-Purchasing Company are capitalized and listed on the stock exchange or traded in on the curb. Both Clark and F. A. Heinze, the principal owners of the Montana Ore-Purchasing Company, own their properties as undivided or as close corporations. They cannot be reached through the methods of attack generally credited to the Standard Oil interests, and so aptly illustrated by the crash of the Globe National Bank of Boston, and the sacrifice of the heavy holdings of Boston & Montana stock by A. S. Bigelow and his associates. The Standard Oil Company brooks no rival. But how is it to reach one and bring him to terms if he has no known stock speculations, and has not put his securities on the market? The only other method, apparently, is to fight the matter in the courts, or to show the weight of its influence on the side of adverse litigation. Perhaps this explains, in part, the ruinous litigation involving the title of every mining property in Montana which is now pending in the state and federal courts of the country from New York to San Francisco; and an explanation, also, may be found in the threat to unseat Senator Clark. * * *"

In the issue of January 12, 1900, is an editorial upon Mr. Heinze, and in this it is stated:

"The New York Commercial of December 30, 1899, contains a discussion of the copper situation in this state, in which it prophesies that Mr. Heinze is a coming power in Montana. The Commercial comments approvingly upon an interview with a man familiar with the conditions, who told that newspaper that the copper kings—the Standard Oil people, Daly, Clark, the Lewissohns—should not overlook F. Aug. Heinze."

In the issue of January 13, 1900, in an article headed, "The Story of a Blind Pool," it is said:

"It appears from the unbiased accounts of the venture and its sequel, published in the Eastern newspapers, that between United States Senator Clark, who has refused to enter the pool on any terms, and F. A. Heinze, who has refused $5,000,000 to settle his suits against the trust properties because he believes that they have attempted to defraud him out of a great deal more that was rightfully his, have between them given the trust magnates some bad half hours since they made the mistake of not knowing the kind of men they had to deal with. The efforts to crush Heinze have failed, and the copper manipulators are playing a last card now in endeavoring to blackmail Senator Clark by presuming upon his political ambitions, and through that channel to reach a part of the settlement they have all along hoped to effect."

In that part of the article purporting to come from the New York Journal the following appears:

"Starting with control of the Anaconda mine, and with other investments about which little is known, the company found several problems of vital

importance to solve. One was the Butte Mountain situation. Now that it has obtained control of what properties it needs there, the Amalgamated finds that it has acquired also the enormous lawsuits, known as the 'Heinze Litigation,' which has heavy claims against its properties for alleged encroachments upon the property of the Montana Ore-Purchasing Company. Mr. Heinze has refused an offer of $5,000,000 to settle, and is believed to have placed his figure at $15,000,000. * * *"

In the issue of January 21, 1900, in commenting upon an article taken from the Boston News Bureau, it is stated:

"The News Bureau also gives some interesting data about the personality of the Amalgamated Company, the real party back of E. Rollins Morse, the nominal plaintiff in the suit now on trial in Helena."

In the article itself I find the following:

"A great litigation now being prosecuted by the Boston & Amalgamated Copper Companies over the properties on Butte Mountain begins with the litigation over Mr. Heinze's famous Rarus mine, which is declared to be on the great Anaconda lode, and worth, possibly, $10,000,000."

Then it is stated that Heinze had been sued for $720,000 for ore which it is claimed he has taken through the Rarus from the Boston & Montana Company's Pennsylvania claim and the Butte & Boston Company's Michael Devitt claim. The article then goes on to state that:

"Before Judge Clancy, Mr. Heinze and the Montana Ore-Purchasing Company has won on every point, and it was expected that an appeal would be taken to the supreme court; but, instead of so doing, the plaintiffs have just begun a new suit for $600,000, basing their claim upon some points made in the decision of Judge Clancy."

After describing the mines and the litigation in this case, and the amount of copper he is able to produce, it concludes:

"He has also, we understand, in contemplation the erection of another smelter on the other side of the valley, or at Helena, through which he has hopes of rivaling the great Boston & Montana smelter at Great Falls. * * *"

In the issue of January 22, 1900, there is an article entitled, "Cheering News from Boston," in which I find the following:

"From the Boston News Bureau confirmation is had of the report, freely circulated in this state for months, that Mr. Heinze would build a smelter on one of the desirable sites near Helena. From the mines he owns and controls, Mr. Heinze is now taking out, the Boston News Bureau tells us, 2,000,000 pounds of pure copper a month, and expects soon to increase the output to 40,000,000 a year. To take care of this immense increase, additional smelter facilities will be required, and Mr. Heinze will, no doubt, locate his new works in this vicinity. The efforts of the Standard Oil-Daly gang to crush Mr. Heinze have not abated, though defeated at every turn; and conditions in Butte are becoming more intolerable every day, for which reason Mr. Heinze would not think of erecting larger works in that vicinity. The most available place in the state is right here. The completion of the great dam across the Missouri river, and the successful operation of the fine electric plant there, affording desirable and cheap power for smelting purposes, and the presence of an unlimited supply of coal near by, combine to make this an ideal location for a smelter, such as Mr. Heinze will require for his increased copper production. The information gleaned from the Boston News Bureau, which is a recognized authority upon the subject of copper mining and smelting, is good news for Helena."

These excerpts represent but a limited portion of the editorials and articles from which they were taken. They are, perhaps, the most pointed and objectionable portions of the same. Taken all together, the editorials and articles were well calculated to arouse prejudice against the plaintiff in this cause,—not to him personally, but as a representative of the Amalgamated Copper Company and some of the owners of stock in the same; and they were intended to present the defendant and its president, F. A. Heinze, in a most favorable light. It is represented that said Heinze is fighting a most unequal battle against large, dominating, and tyrannical corporations; that he has been offered $5,000,000 to settle his disputes with them, and this he refused, claiming that he has been defrauded out of a much larger sum. It was further stated that he was about to erect large smelting works in the neighborhood of Helena, in which place the cause was being tried, and from whose inhabitants a large number of the jurors had been selected. The most of these jurors were property holders and taxpayers in said city. That these articles were written with the view of influencing in some way the determination of this cause is apparent. The publication thereof was commenced very soon after the commencement of the trial of the cause, and appeared in many of the issues of that newspaper until the trial was terminated, when they ceased. The power of the press to create and mold public sentiment is generally recognized, and cannot be doubted. Public and great private enterprises often resort to it for this purpose. The Independent was a leading newspaper at Helena, and possessed a large circulation in the community where nearly all of the jurors in this case resided, pursued their avocations, and conducted their business ventures. It cannot be doubted but that a public sentiment was created favorable to the defendant in this community by these articles, and experience has demonstrated that jurors are influenced much by the views of the community wherein they live. Some of the jurors acknowledge in their affidavits that they read some of these articles, but deny that they were influenced by them, and one states he considered them as advertisements. The fact as to whether or not the jurors read these articles could be established by their affidavits, but as to what influence these articles had upon their action as jurors could not be so established. In the case of Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917, the supreme court discussed this question. In it the following is quoted with approval from the decision in Woodward v. Leavitt, 107 Mass. 453:

> "That, on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations is inadmissible, either to impeach or support their verdict,"—and adds: "But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind."

Under this authority it was not competent for jurors to prove by their affidavits what influence these articles they read had over them, or what motives actuated them in rendering their verdict. It does not appear what articles the jurors read, but any of the

articles from which the above quotations are taken would have had a tendency to influence a juror and make him partial to the defendant. Some of the jurors, in their affidavits, state that they purposely avoided reading the objectionable articles. How, as to most of them, they could have known that they were objectionable, without reading their headlines, or reading a portion of the articles themselves, it is difficult for the court to apprehend. Take, for instance, the editorial article headed, "Good News for Helena." How could any one have learned that it had a bearing on the case without reading it partially or entirely?

In the case of Meyer v. Cadwalader (C. C.) 49 Fed. 32, where, upon a petition for a new trial, had under consideration, it appeared objectionable articles concerning the case on trial had been published against the plaintiff, the court held that, as the articles were published in leading newspapers and widely circulated, it would be presumed they had been read by the jury, and it was held that this presented a proper ground for a new trial.

It should be noted in connection with this case that the trial lasted for the greater part of two months, and the jury were allowed to separate when not actually in attendance upon the court.

In the case of People v. McCoy, 71 Cal. 395, 12 Pac. 272, it was held:

"That the reading by a juror, during the progress of the trial, of a newspaper containing any matter in connection with the subject-matter of the trial, which would be likely to influence him in the performance of his duty, is sufficient misconduct to warrant a new trial."

In Thompson on Trials (section 2561) it is stated:

"Jurors may be permitted to read the current newspapers, unless such papers contain reports of the trial, or other prejudicial matter in the form of editorial comment or otherwise."

In the case of U. S. v. Reid, 12 How. 361, 13 L. Ed. 1023, cited by the defendant, it is stated that the articles in the newspaper read by the jurors had no tendency to prejudice them. In this case the court holds that the articles above referred to were well calculated to prejudice and influence the jury, and were written and published, undoubtedly, for that purpose.

In the case of People v. Durrant, 116 Cal. 179, 48 Pac. 75, it does not appear that the jury were allowed to separate during the trial, or had any opportunity to read the newspaper comments on that case, and it did not appear that any of them had read any of the newspaper comments thereon. I do not consider that a case in point, and to be followed in this case.

As to whether or not the defendant instigated the publication does not appear, except as to the dispatch stating and commenting upon the decision of Judge Clancy in the case of Montana Ore-Purchasing Company against Boston & Montana. That dispatch, as stated, was sent by the vice president of the defendant. It is not always requisite, however, that any undue influence brought to bear upon a juror should be the act of either party. In the case of Mattox v. U. S., supra, a bailiff in charge of the jury presented to it the damaging

publication. In Hayne on New Trial and Appeal (section 48) it is stated:

"It cannot be doubted that, where attempts to influence jurors are made with the knowledge or acquiescence of a party, they must be considered as made by himself, and necessitate a new trial. The cases, however, go further, and hold that attempts to tamper with a jury, made by the relatives or friends of a party without his knowledge, are causes for setting aside the verdict."

Considering the circumstances of this case, it would be presumed that counsel for the defendant had knowledge of these publications. Their attention had been called to one of them by one of the attorneys for the plaintiff in open court. Any one who read the daily papers of Helena at that time could hardly escape reading them. That they were written or instigated by persons friendly to the defendant, their contents leave no room to doubt. I would go further, and hold, however, that if it can be established that the verdict of a jury was influenced by any one, even though not a party to the suit, or a relative or friend of such party, it ought not to stand. The verdict of a jury should be the result of its unbiased action. When a jury is influenced by such articles as are presented in this case, it is difficult to prove who instigated them. It is claimed, however, that the plaintiff ought to have had the parties publishing these articles brought into court and punished for contempt, or ought to have applied to the court for a continuance of the cause on account of the prejudice created by them, and by a failure so to do waived the right to present this question upon a petition for a new trial. It was extremely doubtful as to the right of plaintiff to ask that the publishers of this newspaper be brought into court and examined upon the charge of contempt. Section 725 of the Revised Statutes provides:

"The said courts shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice; the misbehavior of any of the officers of said courts in their official transactions and the disobedience or resistance by any such officer or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of said courts."

This statute has received an interpretation by the supreme court in the case of Ex parte Bradley, 7 Wall. 364, 19 L. Ed. 214. That court says:

"That this statute in express terms restricts the power of the court to punish, as contempts, misbehavior in the presence of said courts, or so near thereto as to obstruct the administration of justice."

In the case of Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205, it is stated that this power of a court to punish for contempts is limited to cases where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice, or as to the misbehavior of an officer, or as to resistance of a writ of the court.

The Independent's publishers seemed to have been advised of the limited power of the court in this matter; for, in the publication of that paper made immediately after Col. Sanders had called attention

to its article, it refers to the fact that it had not brought its paper into court, or hawked it in the presence of the court. To require a party to a suit, when a newspaper publishes an article calculated to prejudice the jury and community against him, to apply to the court for a continuance, or to be deemed to have waived all complaint on account of such publication, would require an act which I think no court would impose. It ought not to be that a newspaper could force a party to continue his cause by a scurrilous attack upon him, and one calculated to bias a jury against him. He might never be as fully prepared for trial again as at that term. And what guaranty would he have that the same tactics would not be again resorted to at the next term? The time, perhaps, has arrived when the courts should say that the dominating and powerful public press should not be used to influence judicial proceedings,—to bias its jurors and intimidate its officers.

There was a substantial conflict in the evidence in the case upon the material questions at issue, and hence, on the ground that the verdict was against the evidence, this court cannot set aside the verdict, although it might have come to a different conclusion than that of the jury upon the facts. But, upon the ground that there was undue influence exerted as to the jury by the objectionable publications hereinbefore referred to, the court will grant a new trial. The verdict is set aside, and a new trial is hereby granted.

## In re MUDD.

(District Court, W. D. Missouri, W. D. October 6, 1900.)

1. BANKRUPTCY—OBJECTIONS TO DISCHARGE—PERMITTING AMENDMENT.
The bankruptcy act contemplates a speedy discharge of the bankrupt, and it is the duty of creditors who desire to object to advise themselves of the requirements of the statute, and bring themselves strictly within its terms. When they have long delayed a hearing on the application for discharge by reason of their insufficient objections, it rests largely within the sound discretion of the court whether or not amended specifications shall be permitted; and especially it will require that such amended specifications, to be allowed, shall conform strictly to the statutory requirements.

2. SAME—SUFFICIENCY OF SPECIFICATIONS.
Creditors will not be permitted to file amended specifications of objection to the discharge of a bankrupt, after their first specifications have been held insufficient, on the ground that the bankrupt has committed an offense punishable by imprisonment under Bankr. Act 1898, § 29b, by concealing property from his trustee, where such specifications do not allege that such acts were "knowingly and fraudulently" done, or specifically describe the property charged to have been omitted from his schedules, when such description, if the charge is well founded, could have been ascertained by reasonable effort.

In Bankruptcy. On application for leave to file amended specifications of objection to discharge.

Silvers & Silvers, for creditors.

PHILIPS, District Judge. The Bates County Bank and others, creditors of the bankrupt, made objections to the discharge of the

bankrupt. These objections were referred to Thomas T. Crittenden for examination and report, who has reported against the objections, on the grounds that the specifications were wholly insufficient in law. This the objectors virtually concede, as they now come into court and ask leave to file additional and amended specifications. The bankruptcy act contemplates a speedy discharge of the bankrupt; and when the time for his discharge has elapsed, until his application is made in due form and duly published, objecting creditors ought, in simple justice, to advise themselves of the requirements of the statute, and to bring themselves strictly within its terms. And when they have, as in this instance, long delayed the hearing of the application for discharge, by reason of their insufficient objections, it rests largely in the sound discretion of the court as to whether or not amended specifications shall be permitted. And especially ought the court, in such second attempt to defeat the application for discharge, to hold the objectors to a strict compliance with the requirements of the statute in the matter of their specifications. The only objections which the statute permits to be made to the discharge of the bankrupt are specified in section 14 of the bankruptcy act:

"(1) If the bankrupt has committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of account or records from which his true financial condition might be ascertained."

The specifications propounded in these amended objections are attempted to be brought within the first ground. Section 29b, which defines the offenses, requires that the acts shall be "knowingly and fraudulently" done; that is, that he shall have knowingly and fraudulently concealed, while a bankrupt, from his trustee any property belonging to his estate in bankruptcy, or made false oath or account in or in relation to any proceeding in bankruptcy. The first specification is that the bankrupt, in his original petition, did not truthfully fully disclose all of his assets, as required under the laws of the United States, in neglecting to exhibit fees that were due him as sheriff. This is fatally defective, in that it does not allege that the act was "knowingly and fraudulently" done. The objection shows on the face of it that the bankrupt has filed an amended schedule covering the fees not specified in his original schedule. And it is quite apparent to the court that they were of such a character that the fact as to whether or not they had then been earned, so as to constitute an asset at the time the petition in bankruptcy was filed, might easily persuade a reasonable person that the bankrupt innocently overlooked them, or was not then informed of their existence. The second specification charges that the bankrupt, "with fraudulent intent to conceal his true financial condition," etc., "knowingly, willfully, and for the purpose of defrauding his creditors, failed to report and disclose therein fees that were due, a portion of which have been collected by him from the state of Missouri, amounting to two hundred dollars." Even if it could be said that this language is equivalent, in legal contemplation, to the words "knowingly and

fraudulently," the specification is insufficient, in that it does not specify what fees were so earned, but states them in a lumping way, leaving the bankrupt quite at sea as to what particular fees he is called upon to account for in meeting such issue. The third specification is that the bankrupt, in the original petition and schedules, and the amended schedules, with intent to conceal his true financial condition, and with intent to defraud his creditors, etc., knowingly and willfully refused and failed to disclose real estate owned by him in the town of Sumas, in Whatcom county, state of Washington, the particular description of which, as well as the value thereof, is unknown. Again the words "knowingly and fraudulently" are omitted, and, if they had been employed, the property alleged to have been withheld from the schedule is not sufficiently described. Certainly these creditors, in all this time, in the exercise of the most ordinary diligence, should have been able to describe this property, whether it was a house and lot, or a block, or land by the acre; but the specification refers the inquiry to property situated in a town in a distant state, without having taken the trouble to locate it. The specification shows on its face that the objectors are guessing at something. The fourth specification charges that the bankrupt, within five days prior to the filing of the petition in bankruptcy, sold to the Missouri State Bank, in Butler, Mo., fees belonging to him, as sheriff, amounting to the sum of $470, for the sum of $460, and that he had other moneys. Again are the words "knowingly and fraudulently" omitted from the charge, nor does the specification allege that these moneys were "concealed while a bankrupt from his trustee." It is a simple charge that he refused to report them to this court as assets belonging to his estate. Neither is there any specification or description of what fees were so sold. The fifth specification, on its face, is mere guesswork. It charges, in a general way, that the bankrupt, as sheriff, had owing to him as fees for services performed by him as sheriff before the 2d day of June, 1898, the sum of $200, which fees were not included in the matters hereinbefore set out, "the specific cases and matters in which the same were earned, and the specific amounts of which, are to these creditors unknown, and for which reason they cannot itemize the same." This is so obviously insufficient as not to require comment. The sixth specification is merely argumentative, and states no fact within the provisions of section 29b. The seventh specification charges that the bankrupt knowingly refused and failed to schedule household and kitchen furniture, "the particular items of which are to the creditors unknown," and that he failed to schedule certain guns, pistols, handcuffs, and other implements used by him in his office. Aside from the objections that it fails to charge that this was "knowingly and fraudulently" done, the objectors admit that they are unable to particularize what household and kitchen furniture was concealed. Naturally, these creditors, before making such serious charges, and before they can ask the court to keep this application for discharge longer in abeyance, ought to have advised themselves as to what these articles were, and the number of them. The objection, on its face, shows that the objectors are again making general charges, and are casting simply a dragnet in

the dark. The eighth specification is a general allegation that in the original schedule the bankrupt stated that other fees besides those scheduled were worthless, and that this "was untrue, as the said Elijah C. Mudd at said time then and there well knew." And then it is alleged that in the amount scheduled it is stated that most of the fees therein scheduled are worthless, and that this was untrue, which he well knew. This, to say the least of it, is frivolous. The mere statement of the bankrupt that any assets of his estate were worthless would not make them so, and would not affect the title of the trustee, nor affect their real value in his hands. It would open a wide field of inquiry for the court to undertake to ascertain what was the real opinion of the bankrupt as to the worth or worthlessness of the fees. The creditors of the estate could lose nothing by reason of the alleged failure of the bankrupt to schedule certain assets, as it would be the duty of the trustee to go after and recover them. This is especially so in respect of household and kitchen furniture, and any other tangible personal property of the bankrupt. In other words, the discharge of the bankrupt in no wise affects the right of the trustee to recover any and all fees due the bankrupt, nor the power of the court to compel the bankrupt to turn over to the trustee any money shown to be in his hands belonging to the estate. What the court decides, and what it wishes to emphasize, is that, when creditors come to object to an application for a discharge, they must bring themselves within the positive requirements of the statute. The application for leave to file amended specifications is denied.

## In re RELIANCE STORAGE & WAREHOUSE CO.

(District Court, E. D. Pennsylvania. December 18, 1900.)

No. 382.

BANKRUPTCY—AMOUNT OF CLAIM—ESTOPPEL.

Where the fund to be distributed among the creditors of a bankrupt storage company consisted entirely of the proceeds of insurance on the property of such creditors burned while in storage, the amount of which was determined by an agreement between the insurers and the respective owners as to the value of the property of each, the creditors are bound by such valuations, as between themselves, and one cannot be permitted to prove a larger claim on the ground that his valuation was intended to cover only his interest in the goods after deducting the amount of a lien thereon in favor of the bankrupt.

In Bankruptcy. On certificate of referee concerning rejection of claim of William Karer.

Benjamin Alexander, for bankrupt.
Furth & Singer, for trustee.
Faber & Bernheimer, for creditor.

J. B. McPHERSON, District Judge. I think there is much force in the referee's position that as the fund now being distributed is entirely the proceeds of insurance policies, and as the amount of the

fund was determined by an agreement between the companies and the respective parties insured concerning the value of the property lost,—an adjustment of the loss having been made on the basis of this appraisement,—no party should be permitted to increase now the valuation of his own property, and thus gain a larger share of the fund. It is the misfortune of the creditor now complaining that, when he agreed to put a certain value upon his property, he supposed he should receive in cash the full amount of such valuation; but I see no way to relieve him. The other creditors did not agree that his consent to value his property at $125 should be treated as the repayment of the loan of $30 that had been made to him by the bankrupt when the piano was stored; and, in the absence of such an agreement, they have a right to insist that the loan shall be deducted from his dividend.

The decision of the referee must be affirmed.

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## In re SHAEFFER.

(District Court, E. D. Pennsylvania. December 18, 1900.)

No. 444.

1. BANKRUPTCY—SALE OF BANKRUPT'S REAL ESTATE—DOWER INTEREST.
Under Bankr. Act 1898, the sale of a bankrupt's real estate by his trustee does not bar his wife's right of dower therein.

2. SAME—REALTY SUBJECT TO LIENS.
A court of bankruptcy will not order the sale of a bankrupt's real estate by his trustee free from liens to which it is subject, unless satisfied that the interests of the general creditors will be thereby advanced.

In Bankruptcy. On certificate of referee concerning order to sell the bankrupt's real estate.

Wm. U. Hensel, for creditor.

A. J. Eberly, Coyle & Keller, and Wm. R. Brinton, for trustee.

J. B. McPHERSON, District Judge. The evidence laid before the court does not satisfy me of the probability that any sum for the general creditors would be obtained by the sale of the bankrupt's realty. The estimated value of this property is so near the amount of the bank's judgment—this being the only lien—that even upon a sale made under execution against the bankrupt from the state court, by which his wife's inchoate right of dower would also be sold, it is doubtful whether more than the amount of the judgment could be had. A sale by the trustee in bankruptcy would not bar the wife's dower (Porter v. Lazear, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865), and therefore the sum bid at such sale would almost certainly be materially less than if the sale were held under execution from a court of the state. Even if the reasoning of the decision in Porter v. Lazear, which was made under the act of 1867, should be regarded as inapplicable now,—a position to which I do not assent,—section 8 of the act of 1898 expressly saves the wife's inchoate right of dower, and such a provision was not found in the preceding act.

Following the rule stated in Re Styer (D. C.) 98 Fed. 290, the order of sale made by the referee must be set aside, because the court is unable to come to the conclusion that the interest of the general creditors would be advanced by such a sale.

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## In re MEYERS.

(District Court, S. D. New York. December 14, 1900.)

1. BANKRUPTCY—APPEAL—FINDINGS OF FACT.
   Under Bankr. Act 1898, a district court is not required to make findings of fact for the purposes of an appeal from its decision to the circuit court of appeals.
2. SAME—RIGHT TO DISCHARGE—FRAUD OF AGENT.
   A fraudulent concealment of assets by the husband of a bankrupt, as manager of her business, without her privity or knowledge, does not constitute ground for refusing her a discharge, nor, it seems, does the husband's failure to keep proper books of account, showing the true condition of her business.

In Bankruptcy. On motion for findings of fact.

Black, Olcott, Gruber & Bonynge, for the motion.
Stillman F. Kneeland, opposed.

BROWN, District Judge. The report of the referee in the above matter in favor of the discharge of Amelia A. Meyers having been confirmed, the opposing creditors have submitted certain statements of fact which they ask the court to find for the purposes of a hearing on appeal.

I am unwilling to introduce a precedent for such a practice, as it is not required by the act of 1898 as respects appeals from the district court to the circuit court of appeals. It would impose additional burdens upon the court, and is not ordinarily essential; since in cases of reasonable doubt, the grounds of the decision usually appear sufficiently either in the report of the referee or in the opinion or memorandum of the judge thereon.

Most of the findings which I am now asked to make are substantially the same as were stated in the opinion rendered in August, 1899 (96 Fed. 408). The subsequent testimony does not change my view of the facts, either as to the character of the failure of Meyer Bros., the transfer to Meyer Bros.' Cloak Company, or of the intentional destruction or concealment of the books of account of the latter concern. Nor considering the previous explicit testimony that no cash book was ever kept by Meyer Bros., have I any doubt that their cash book subsequently produced was intentionally withheld by Abraham and George Meyer until after the decision of the court above referred to, finding that there had been such a book; after which its concealment would be of no further benefit.

On referring again to the referee's opinion on the present application for a discharge, I find that I mistook the referee's allusion to the books of Meyer Bros.' Cloak Company as including the Meyer Bros.' cash book, as to which in fact he says nothing. My previous memorandum as respects the discharge is, therefore, hereby cor-

rected by striking out the intimation of a doubt by the referee whether there was any intentional concealment of that cash book. Upon the evidence, however, I agree with the referee that Amelia A. Meyers had no personal knowledge of any fraud or concealment of either books or assets.

I agree with the decision in the case of In re Hyman (D. C.) 97 Fed. 195, 3 Am. Bankr. R. 169, so far as respects the granting of a discharge to the wife, notwithstanding a concealment of assets by her husband in managing her business; since in order to make any concealment a bar to a discharge, the facts must constitute under section 14b (1) "an offense punishable by imprisonment"; that is, a crime, to which personal guilt is indispensable. As respects the destruction or concealment of books of account, "with fraudulent intent to conceal the true financial condition and in contemplation of bankruptcy," under subdivision b (2) of section 14, if the question were before me de novo, I should be inclined to consider, as no "offense" or penal element exists in the requirements of this subdivision, that the principal is responsible, as respects a discharge in bankruptcy, for the fraudulent conduct of the agent to whom the whole business has been committed, as in civil cases generally, where the fraud has been committed for the principal's benefit. But as that point seems to have been involved in the case last cited, and a contrary decision was then made by Judge Thomas sitting in this district, it will be followed until otherwise ruled upon appeal.

The above sufficiently indicates the ground of the discharge. Motion denied.

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## In re HOOVER.

(District Court, E. D. Pennsylvania. December 14, 1900.)

No. 549.

BANKRUPTCY—REVOCATION OF DISCHARGE—GROUNDS.

A discharge cannot be revoked under Bankr. Act 1898, § 15, on account of fraud alleged to have been committed by the bankrupt long prior to the adjudication, where the discharge itself was not obtained through fraud.

In Bankruptcy. Rule to revoke discharge of bankrupt.

Hargest & Hargest, for creditors.
Frank P. Snodgrass, for bankrupt.

J. B. McPHERSON, District Judge. This is an application, under section 15 of the act, to revoke the discharge of a bankrupt; but there is this fatal defect in the proceeding: Neither by averment in the petition, nor by proof in the testimony that has been laid before me, does it appear that the discharge was "obtained through fraud of the bankrupt," and that "the knowledge of the fraud has come to the petitioners since the granting of the discharge." The averments of fraud contained in the petition relate to events occurring several years before the adjudication, and could properly be considered, if at

all, only upon objection to the granting of the discharge. No doubt the petitioners intended to interpose such objections at the proper time, namely, within 10 days after the time fixed for hearing the bankrupt's application to be discharged; but for some reason no objections were filed, and the discharge was granted in due course. But it was not obtained by the bankrupt's "fraud," in any sense of that word, and therefore is not subject to be revoked under the section now being considered.

The rule is discharged, and the petition is dismissed.

In re STOEVER.

(District Court, E. D. Pennsylvania. December 17, 1900.)

No. 466.

BANKRUPTCY—NOTICES OF SPECIAL MEETINGS—DUTY OF REFEREE.

Under Bankr. Act 1898, § 58c, which provides that "all notices shall be given by the referee unless otherwise ordered by the judge," it is the duty of the referee to send out the notices of a special meeting called upon petition of a creditor under General Rule 21, par. 6 (32 C. C. A. xxiii., 89 Fed. x.), for the purpose of having a re-examination of certain claims.

In Bankruptcy.

Joseph Greenwald and Clinton O. Mayer, for creditors.

J. B. McPHERSON, District Judge. I am of opinion that the notice in question, namely, of a special meeting called upon the petition of a creditor, under paragraph 6 of general order 21 (32 C. C. A. xxiii., 89 Fed. x.), to have a re-examination of certain claims, should have been sent out by the referee, and that this duty did not rest upon the petitioner. Paragraph 6 provides that "due notice [of such meeting] shall be given by mail addressed to the creditor" whose claim is to be re-examined, but does not specify by whom the notice shall be given. I think, however, that this omission is supplied by the bankruptcy act in clause "c" of section 58, which declares that "all notices shall be given by the referee unless otherwise ordered by the judge." It was suggested that this clause should be confined to the eight notices enumerated in clause "a" of the same section, but I am unable to assent to the correctness of this construction. As the language is "all notices," and there is no other qualification than this: "unless otherwise ordered by the judge," I can see no reason to limit the meaning of the word "all." General Order 10 (32 C. C. A. xiii., 89 Fed. vi.) seems to afford sufficient indemnity to the referee against the expense of mailing the notices.

I think, therefore, that the petition for re-examination should be reinstated, and another day fixed for a hearing thereon, of which due notice should be given by the referee to the creditors.

## In re FERRIS.

(District Court, N. D. Iowa, E. D. December 11, 1900.)

BANKRUPTCY—DISCHARGE—EVIDENCE TO SUPPORT OBJECTIONS.

To sustain objections to the discharge of a bankrupt based upon a transfer of property in payment of an indebtedness alleged to have been fictitious, which left the bankrupt with an equitable interest in the property or its proceeds, which he failed to schedule, the fictitious nature of the indebtedness must be affirmatively shown, and it is not sufficient that the bankrupt's examination tends indirectly to support the claim.

In Bankruptcy. On petition for discharge, and objections thereto.

Dunham, Norris & Stiles, for bankrupt.

Bronson & Carr, for creditors.

SHIRAS, District Judge. No other evidence has been submitted in support of the specifications filed in opposition to the petition for discharge than the examination of the bankrupt had at the first meeting of the creditors. The specifications in opposition to the petition are mainly based upon the giving by the bankrupt to his brother and sister of certain mortgages on his realty and personalty in June, 1898; it being claimed that the indebtedness secured by these mortgages was not in fact due or owing from the bankrupt. There is much in the evidence given by the bankrupt upon his examination which tends to support the contention of the opposing creditor. As I understand the facts, all the property owned by the bankrupt was absorbed in the payment of sums named in these mortgages, and in the prior mortgages resting on the land; and, therefore, to sustain the objections to the discharge, it must be made to appear that the bankrupt, when he filed his petition in bankruptcy, held some legal or equitable interest in the mortgaged property or its proceeds, which he should have scheduled as part of his estate. It is sought to do this by claiming that the amounts due to the sister and brother of the bankrupt, to whom the mortgages were given, were largely increased by allowing an unfounded claim of $1,400 for work done on the farm by the brother, and by allowing many years' back interest on notes held by the sister and brother, without making proper deduction for the board and lodging of the parties, who had lived with the bankrupt since 1891. As is said above, there is much in the testimony of the bankrupt that indirectly lends support to this position, yet it is not affirmatively proven that the debts due the brother and sister were unfounded. The testimony given by the bankrupt is in a very unsatisfactory condition, and it is impossible for the court to ascertain therefrom the exact position of the affairs of the bankrupt, or to find with any certainty that in truth when the proceedings in bankruptcy were filed the bankrupt retained any interest in the mortgaged property or its proceeds. The opposing creditor having failed, therefore, to sustain the specifications by sufficient evidence, the same must be overruled, and a discharge must be granted.

## UNITED STATES v. ONE PEARL NECKLACE et al.

(District Court, S. D. New York. June 12, 1900.)

CUSTOMS DUTIES—ENTRY OF PERSONAL BAGGAGE—FORFEITURE.

Where the form of declaration for entry of the personal baggage and effects of a passenger prescribed by the treasury department, and used by the customs officers, does not call for an enumeration of the contents of packages, as provided for in Rev. St. § 2799, it must be regarded as a waiver of such enumeration, and an election to proceed by the alternative method of examination provided by section 2801; and, unless there is fraud or intentional concealment by the passenger, he cannot be subjected to the forfeiture of articles which are in fact personal baggage or effects, under section 2802, because they are not specifically described in such declaration, although they may be dutiable on account of excessive value, as the penalty of forfeiture prescribed by such section applies only to entries required under section 2799 to obtain a permit for the landing of the articles specified therein without examination.

This was an information against a pearl necklace and other jewelry, to obtain forfeiture thereof. The alleged grounds of forfeiture were: (1) That said articles were smuggled into the United States in violation of section 3082 of the Revised Statutes; (2) that they were imported without having been declared to the collector, in violation of said section 3082; (3) that they were not declared to the collector, contrary to section 2802; (4) that they were unladen and delivered without a permit, in violation of sections 2872 and 2874. The goods were claimed by Mrs. Phyllis E. Dodge, who, in her answer, traversed the causes of forfeiture, admitted her neglect to declare the articles, but denied that such neglect was illegal; alleged that she believed they were not dutiable; that they were in use by her on her journey, and were not intended for sale; that they were not concealed, but were shown to the customs officers upon inquiry. Claimant asked that certain articles be adjudged free of duty, and delivered to her, and that the balance of the jewelry be surrendered to her upon payment of the proper duties.

H. L. Burnett, U. S. Atty., and E. E. Baldwin, Asst. U. S. Atty., for the Government.

Hoadly, Lauterbach & Johnson (W. Wickham Smith and Mr. F. R. Minrath, of counsel), for claimant.

At the opening of the case, the district attorney announced that the government would introduce no evidence under the first count. He then called customs officers, whose testimony tended to show that claimant had failed to include the jewelry in question among the articles named in her declaration; that she carried the jewelry with her in a satchel; that upon landing she was approached by an officer, to whom she handed the satchel for examination, and who found the articles within it; that claimant told the officer she had taken with her from the United States everything in the satchel; that the jewels were subsequently seized, and two of her trunks detained; that the trunks were subsequently released.

Claimant's counsel then moved to dismiss the information, or that the court direct a verdict in favor of claimant.

BROWN, District Judge (orally). This subject has been discussed in a very full manner, and in all its general bearings; but it seems to me that the disposal of this motion, having reference to the facts in this case alone, does not involve the subject as a whole, and that the decision of it might be gravely misunderstood.

In my judgment the proper determination of the really material and important questions in the case depends upon the intent and the motive of the passenger; whether there has been intentional concealment or not; whether there is an intention to introduce merchandise in the guise of baggage and to evade the payment of the duties which are known or believed to be chargeable upon the jewels or other property brought in as baggage. This case as presented here, as I understand it, eliminates that side of the question. The first count in the information alleges knowledge, intentional fraud, concealment; but that question is practically withdrawn. It was stated in the opening that no evidence would be given upon that subject. The other counts in the information do not allege anything whatever on the subject of knowledge that the goods were dutiable, or any intent to conceal, or to evade the payment of duties, or even the knowledge of the passenger that they were in fact dutiable. The answer avers in several places that they were not dutiable at all, or that the passenger believed them not to be dutiable; that there was no concealment in fact and no intent to conceal anything. The counts on which the forfeiture is based are counts resting upon the naked fact that some articles, which the custom-house authorities decided to be dutiable, were not named in the baggage declaration (Exhibit 1)—upon the simple fact that they were not mentioned there specifically. That is, that on an examination of the baggage of this person, they found in a valise articles which had not been mentioned to the collector, and by "mention" is meant had not been specifically mentioned. The articles are such as I should rule might come within the class of personal effects. The answer alleges that they were not merchandise; were not designed to be bought and sold. There is no averment in either of the three last counts of the information that they were intended to be bought and sold, although they are called goods, wares and merchandise, and as such are said to have been found in the baggage. That is true. In a general sense everything that is capable of being bought and sold may be merchandise. The opening section of the title of the Revised Statutes pertaining to this subject recognizes this, and says they may be construed as merchandise. Whether they are or not specifically to be considered as merchandise depends upon the circumstances. I have no doubt that personal effects, not designed for sale, and not designed as presents, are not merchandise in the sense of the statutes relating to baggage; and those statutes are what we are considering here.

Now the question submitted is, as I understand it, whether there shall be a forfeiture from the naked fact that certain articles were not specifically mentioned in a declaration like this, because they are adjudged afterwards on examination by the customs authorities to be dutiable.

As I have said before, I should have no hesitation on that subject, provided there had been an entry, intended to be an entry as provided by the act of 1799, or as provided in sections 2799 and 2802 of the Revised Statutes, and there had been nothing else to modify that action. I consider it abundantly settled, that where a statute imposes a duty upon a citizen, for the protection of the revenue, or for any other specific purpose, to do specific acts, and establishes penalties or forfeitures as a part of the consequences of not doing the required acts, the motive of the person incurring the penalty has nothing to do with it. Therefore in this case this penalty would be incurred, and the goods would be forfeited, provided this were such an entry as was intended by the statute, and there had been nothing else to modify its effect.

These four sections of the Revised Statutes (sections 2799–2802), read by themselves, lead to hesitation and doubt as to precisely how they are to be construed and what they mean; but they are all taken from one section of the act of 1799, and if that act can be resorted to for their interpretation, or as a means of reconciling apparent opposition, there will be little difficulty. The difficulty I refer to is in the apparent inconsistency and incompatibility between 2802 and 2801 as regards the consequences of the omission of an article in the entry. Section 2801 provides for an examination of the baggage in the discretion of the collector and naval officer by an inspector or surveyor to be appointed by them, who are required to make a return to the collector; and if, on an examination by those officers, they shall find something which, in their opinion, should not be exempt from duty, that section requires that due entry shall be made and the duty paid; and that imports that such articles should not be forfeited, while section 2802 has no such exception. The latter standing alone with 2799 would require, absolutely, that they should be forfeited.

It seems to me, therefore, we are required to look at the procedure which has been adopted by the custom-house authorities to see what has been done in regard to personal baggage. If the customs authorities are acting in fact under section 2801, I think they are bound by it so far as it extends. On the other hand, if their proceedings are for an entry under 2799, and the examination made is nothing more than such an examination as might be made to test the truth of the entry, 2801 has no application. The forfeiture would become absolute under section 2802 if there was any error, even if a mistake only, and no matter how honest.

Under the Revised Statutes, as these four sections stand succeeding each other, there is a difficulty from the omission of what was said in the act of 1799, namely, that the procedure by examination was in lieu of the procedure by entry. Under the act of 1799 it is plain that the landing of baggage by permit was a landing of specific articles, and it is so stated. That is repeated in section 2801 of the Revised Statutes—the permit is for landing such articles. That does not mean a general permit to land all baggage. If we look at the regulations of the treasury to see what is intended,

the doubt is not altogether cleared up. For nearly 100 years after the Revised Statutes were passed, the regulations of the treasury, like the statutes, recognized that there were two modes of entry of passengers' baggage—one by regular entry, the other by an examination in the form provided for. That was expressly repeated in the regulations so late as 1884. I do not find it in those of 1892 or 1893. In the regulations of 1893 there seems to have been contemplated the use, to some extent, at least, of both these procedures conjoined. It is stated that no goods shall be allowed to pass—no baggage—without entry, and still further, that none shall be passed without examination. At the same time, the kind of entry that is required and the statements to be made are provided for to some extent by the forms, which it is stated in the regulations would be furnished, and one of which was used in this case and is here (Exhibit 1). Now, it is my judgment that this form of declaration was intended as a waiver, upon the part of the department, of the particular enumeration of the contents which it was provided by section 2799 and by the act of 1799 should be given. Section 2802 must be construed in connection with section 2799, to which it relates, and the forfeiture pronounced by 2802 must be referred to the failure to particularize in accordance with the particularization required by 2799.

The forfeiture of articles together with treble their value, as I said before, is a very severe punishment for a mere mistake. Much less complaint may be made of it, where the omission to mention is the result of design, through any concealment or intent to defraud the revenue. Now it seems to me the intention of 2799, like that of the act of 1799, the same words being used, was to require the passenger to enumerate, or, in the language of the act, to particularize the contents of the baggage, in that way calling the attention of the collector to the contents to enable him to say whether these particular designated articles were dutiable or not. That is the professed object of the section as it was in the law of 1799, so that on an inspection of that particular statement of contents the collector could note what was dutiable and what not. Then naturally comes the consequence that where all nondutiable articles are mentioned, and some other dutiable article has not been mentioned to the collector, the presumption of intent to cheat is so strong that the statute makes the omission conclusive and forfeits that article with triple its value. That is a fair and reasonable explanation of the severe penalty imposed by section 2802. Whether this is the reason of this severe penalty or not, there is no doubt that the forfeiture under section 2802 depends on such a nonmention of the particular article, as is required by the particularization of contents under section 2799. So that if the declaration or entry that the passenger is called upon by the customs officers to make is not of the kind contemplated by section 2799, and particularly if the passengers are in any way led by them not to make such a particularization, the entry made cannot be said to be the entry to which 2802 refers. Otherwise the effect would be that the pas-

senger would be really misled, and then advantage taken of the omission of the particularization which the statute required, but which the department waived.

Now what the department has done is, as I have said before, to establish a system for the very rapid examination of every piece of baggage that comes here; to release nothing without being examined and being marked "Passed," together with the responsibility of the officer, with a provision for the payment of duties upon such articles as are, on examination, found dutiable; upon an entry which is called "informal" in the regulations, for articles not exceeding $500 in value; other articles to go to the custom house, and to be detained for that purpose. That, it is evident, is a different thing from a mere special examination of particular baggage or of a trunk which for any reason the officers may have cause to examine. It is evidently a part of the mode of disposing of the passenger's baggage as it arrives, and I must say it seems to me to be precisely such as 2801 contemplates.

So that, when 2801 is followed, it is a procedure by which I think the government should be bound throughout; and if you take that in connection with the department's own voluntary variation of the requirements of 2799 in respect to the particular mention of specific articles, it seems to me very important, and ought to be considered as decisive upon the question whether the government was proceeding, in landing these goods and collecting duties, if they were dutiable, under section 2801, rather than through a mere entry under section 2799, with the consequent right of forfeiture of nonmentioned articles under section 2802.

Therefore my conclusion on that subject is, that in cases free from fraud or intentional concealment in a passenger's baggage of articles which belong to the class of personal effects or wearing apparel, the forfeiture should not be imposed under the method of procedure which the government is acting on, and which is shown to have been acted on in this case, for the reason that section 2801 applies and requires the allowance of the payment of duties instead of forfeiture. I should add that I regard this as having no application to articles which are not within the class of personal or wearing apparel, or implements of trade. It is strictly confined to articles which are within the general description of baggage, such as clothing or articles of personal adornment, or personal effects, whatever they may be, as usually recognized.

Under this distinction all the cases cited by both sides are inapplicable. All of them without exception have been cases in which there was endeavor to substitute merchandise in the ordinary sense of that word—goods designed for sale in the market—for personal baggage, and to bring them in free as baggage; they were evident frauds or concealment of some sort.

I shall rule, therefore, that articles belonging to the class of personal baggage, or personal effects, although they may be dutiable under the ruling of the collector by reason of their amount, are not to be forfeited under the present practice of the department, unless there

is some concealment or fraud which brings them within some other provision of the Revised Statutes than 2802.

Unless some further evidence that is competent is desired to be given on the question of fraud or intentional concealment I shall grant this motion. If the government desires to give any further evidence on that subject, or to go to the jury on these points, I will deny the motion for that purpose.

After calling one further witness, the government rested its case. Claimant's counsel then renewed his motion to dismiss the information; and the assistant district attorney moved the court to find, as matter of law, that probable cause had been shown for the prosecution for forfeiture, under three counts. After discussion, the court ruled that the circumstances were such as to furnish probable cause of intended concealment, if no explanation were supplied. Mr. Smith then opened the case for claimant, and offered testimony tending to show that the jewelry had not been purchased abroad; and also as to the value of the articles, and that there had been no concealment of same from the officers.

BROWN, District Judge (charging jury). After the very considerable discussion, gentlemen, that has been had in this case yesterday and the day before, most of which you heard, it seems to me not important to dwell upon the evidence at any great length.

I have thought it incumbent upon me, under the request of the government, to rule that there was probable cause to submit the question to you whether the introduction of this jewelry in the way stated, considering its very large amount and the very natural suspicions which would arise, had been explained to your satisfaction in such a way as to lead you to believe that the claim of Mrs. Dodge, as she has stated it to you, is substantially correct; or whether it was only another of those tricks and fraudulent schemes by which, from time to time, as we all know, persons are endeavoring to introduce goods into the country for the purpose of sale, and to deprive the United States of the proper duties upon them.

In the first part of the discussion, I was under the impression that no question was made upon the latter point, and that in withdrawing from consideration the first count in the information the government did not intend to present that question to you; being under the impression in that regard that by the subsequent facts ascertained by the government, as I assume, they were sufficiently satisfied not to do that. The waiver, however, of the district attorney did not go to that extent. On the motion made last evening, to direct, or to find, under section 21 of the administrative act, June 10, 1890 (26 Stat. 140), that there was probable cause for the course of the officers, as things appeared on arrival at the dock, that act throwing, under such circumstances, the burden of proof or of explanation upon the claimant, with some hesitation I have concluded that it was my duty to find, as that section requires the court to pass upon that subject, that there was, prima facie, probable cause at that time; that it was

a case which called for explanation, and in one aspect called loudly for explanation; and where that is the case, probable cause exists. The circumstances, as they appear in evidence thus far, disclose that a person not of any known standing, and not known to be of great wealth, had a large amount of jewelry other than this, which she was carrying, claimed by her to be old, which she had taken out and brought back again; and having in addition to that other articles, such as shown to you here, which have been seized, of very great value, and apparently out of all proportion to anything in the circumstances of the passenger, and therefore open to the very gravest suspicion. I should regard the officers of the customs as very derelict in their duty if they had not looked upon a claim of that kind at the start with very grave suspicion. If a free hand were left for the introduction of jewelry for sale in that manner, you can perceive that dealers in jewels would stand very little chance of a fair competition in trade in New York.

I therefore felt it my duty, under the provisions of the administrative act, which had not been called to the attention of the court before, to find that there was a doubt fairly presented by the case as it stood originally, without explanation (and so far as had appeared on the stand here nothing in the shape of proof had been put in on the claimant's side), that required the matter to be more fully explained to you. You have heard Mrs. Dodge's explanation; and now the substantial question, as I view it, is whether this importation was a trick and a ruse to bring in merchandise for sale, or whether the things brought here were bona fide articles of personal baggage, or personal effects, which possibly may be dutiable, because they were in excess of the amount of such kind of things which the law allows to come in free of duty, but which nevertheless were of the class of personal baggage and personal effects in truth and in reality; and whether there was any such fraud as an attempt to introduce merchandise into the market under the guise of baggage. The substance of the declaration (Exhibit 1) is that there was not. To that point, Mrs. Dodge's attention was clearly drawn in the declaration submitted to her. She was not asked for an enumeration of articles, but she is distinctly warned as to goods intended for sale. The declaration says that her baggage "contains only such wearing apparel and personal effects, and include only such articles as are of use in and necessary and appropriate for the immediate purpose of the journey and present comfort and convenience of myself and of my (blank), and are not articles intended for other persons or for sale."

Now, as I said before, I consider the substantial question for you, and which by my ruling of yesterday I required should be submitted to you, is whether that is substantially true or not. If from all the circumstances you have heard you believe this is only a trick and device to get merchandise imported for sale, then this is not personal effects or personal baggage, but is merchandise; and there are at least two counts in this information which are sufficient to warrant a confiscation and forfeiture of these goods if you find that they

are merchandise. A general baggage permit such as is in proof, authorizes the landing of baggage and articles that belong to the class of personal effects. It does not warrant the landing of merchandise—that is to say, in the sense of goods for sale. This has been repeatedly held; and although landing without a permit in such a case may be a technicality in form, it is good enough to serve the purposes of the government, if there is fraud and an intention to introduce merchandise under the guise of personal effects or baggage.

Now, on that point, perhaps I do not need to say very much, and yet as there has been no summing up in the case it is perhaps my duty to say a word to you that might otherwise be wholly unnecessary. It is necessary that juries should be cautious on this subject as well as the officers of the government, because the amount capable of being saved in duties is so great, the injury to honest merchants is so great, that there ought to be very great care not to permit any kind of tricks or devices by which merchandise can be introduced under the guise of baggage. You heard Mrs. Dodge's story. The circumstances which have been drawn from her may in one view tend to detract somewhat from the confidence you might place in her, yet on the main point, so far as respects the probabilities of the case, they may perhaps make equally strong or stronger for her. If this was a device of persons who were aiming to introduce jewelry for the purposes of sale, to make a quick turn and make ten or fifteen thousand dollars by saving duties due to the government, and getting the goods imported free in this way if they could, they would not naturally take the course which the evidence shows was taken in this case. Ordinarily the whole proceedings in such a transaction are kept secret, covered and concealed. Persons who are employed in it do not generally make a show and display of what they are getting. They do not expose such goods even to the risks of loss which such a course involves. You have heard not only the testimony of Mrs. Dodge that these presents were given to her, but there are other circumstances that go to substantiate that. The evidence that this was worn in Paris is undoubted. It is evident from the testimony that one of the weaknesses of this woman was her fondness for jewelry, the fondness for its display is shown in her testimony. For it apparently she was willing to sacrifice everything. Was she dealing in jewelry as a dealer, or was it her fondness for jewelry and display which explains her transactions? I will not say any more upon that point. There is no serious attack upon that.

I ruled yesterday that in cases free from fraud no forfeiture would be incurred where the government is proceeding by examination under section 2801, as I understand was done in this case. They are authorized to make that forfeiture in cases of fraudulent pretenses where the articles do not belong to the class of personal effects or personal baggage. These articles, in my judgment, are dutiable. The officers claim that they are. The case involves that question. I should rule, for the purposes of this trial, that these articles are dutiable if you find that they are excessive in amount. If you find that these articles were bona fide presents to the claimant, Mrs. Dodge,

and that she held them as such, then they belong to the class of personal baggage, or personal effects, and there was no such fraud as warrants a forfeiture for landing without a permit. It is the duty of the government, in such cases, where they are free from fraud, and the government is proceeding under section 2801, to assess and receive the duties instead of forfeiting dutiable baggage. The value of the articles was large. If you find that they were excessive in amount, they were dutiable. That, however, does not warrant a confiscation of them if there was no such fraud as I have spoken of. I can easily imagine that it may be your judgment that they were very much too great in value to pass as things which were appropriate or necessary for a journey from Paris to New York. The question therefore as I said at the outset, is whether this is a false pretext, or whether her story is substantially true.

I do not think slight differences in detail in regard to some of the articles in the account given by the officers here and the story of Mrs. Dodge as to their conversations on the dock are very material, except in so far as affects this main question. It is very easy in a considerable conversation, where there are different articles, that as to some of them the statements made are perfectly correct, while as to some others they are not strictly correct. There is abundant opportunity for misrecollection or misunderstanding of what is intended. As an illustration of that I might mention that this morning, in looking over one of the papers in coming down, my eye lighted on a reference to this case and a reference, in a short paragraph, to Mrs. Dodge's testimony. There was not one thing—scarcely one thing—in the narrative of Mrs. Dodge's testimony that was not stated directly opposite to what her testimony was. The reporter did not intend it. He did not intend to make a misstatement. He did not hear correctly. There was preoccupation of mind; he had got one thing in place of another, so that the result of it was that it was quite wrong.

Now in this case there was a large amount of jewelry that was taken by Mrs. Dodge, as she says, abroad. The custom house officers subsequently returned it on that ground. Taking the articles in bulk, a great proportion of them had been taken abroad and brought back again. Of the pieces seized, her own rose diamonds had entered into the manufacture of two of them. She had taken them abroad, and they were made up for her there. It is easy to misapprehend what the witness has referred to in parts of the conversation. The differences do not necessarily import that there is any intentionally false statement on either side.

Unless I am requested to state something more I shall leave the main question with you in the form I have stated. If these things were brought in here in good faith as things that were hers by right and part of her personal effects, and in accordance with the story in substance as she has stated it, then there should be no forfeiture upon the last three counts of this information.

Mr. SMITH: I ask your honor to inform the jury, so that there shall be no misunderstanding about it, that a verdict in favor of the

claimant in this case is not going to in any way do away with any right of the United States to duties on these goods, and that that question will be settled in a separate and different proceeding; that the government after this case is over will have a lien on these goods for whatever lawful duties it is entitled to recover.

THE COURT: Yes; that is correct, gentlemen.

The jury, after remaining out for 35 minutes, rendered a verdict for the claimant.

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## BURROUGH v. ABEL.

(Circuit Court, E. D. Pennsylvania. December 17, 1900.)

No. 10, October Term, 1897.

INTERNAL REVENUE—RECOVERY OF TAXES PAID—INTEREST.

Where there was such delay in the prosecution of a claim for the repayment of internal revenue taxes alleged to have been illegally exacted by the collector that nearly 30 years elapsed before action was brought thereon, the plaintiff will not be allowed interest during such time, but he is entitled to interest on the principal recovered from the time the suit was commenced.

Case Stated. Action to recover internal revenue taxes alleged to have been illegally exacted.

For former opinion, see 100 Fed. 66.

T. W. Neill and D. W. Sellers, for plaintiff.

James B. Holland, for defendant.

J. B. McPHERSON, District Judge. The parties having agreed upon an estimate of the quantity of distilled spirits that were actually in the bonded warehouse on July 20, 1868, it now appears that the sum paid by the plaintiff upon so much of the spirits as had then been lost by evaporation and leakage was $12,473.65. For this sum, therefore, as principal, the plaintiff is entitled to judgment. Is he also entitled to interest? Certainly not during the whole period, as I think, because of the long delay in the prosecution of the claim (Redfield v. Iron Co., 110 U. S. 174, 3 Sup. Ct. 570, 28 L. Ed. 109; Same v. Bartels, 139 U. S. 694, 11 Sup. Ct. 683, 35 L. Ed. 310); but I think an allowance is proper from October 28, 1897, the day when this action was begun, and accordingly that sum, namely, $2,347.08, should be added to the principal amount, making a total of $14,820.73, for which amount the clerk is directed to enter judgment.

PENNSYLVANIA CO. FOR INSURANCES ON LIVES AND GRANTING ANNUITIES v. McCLAIN, Collector.

(Circuit Court, E. D. Pennsylvania. December 17, 1900.)

No. 45, April Sessions, 1900.

1. INTERNAL REVENUE—LEGACY TAXES—CONSTRUCTION OF WAR REVENUE ACT.
Section 29 of the war revenue act of 1898, which imposes a tax upon "any legacies or distributive shares arising from personal property, * * * passing after the passage of this act from any person possessed of such property, either by will or by the intestate laws of any state or territory," applies only to the estates of persons dying after the passage of the act. A trustee who at the time of the passage of the act held personal property upon a testamentary trust, to be distributed at a future date between the then surviving members of a class of legatees named by the testator, is not a "person possessed" of such property, within the meaning of the statute, so as to render it subject to the tax when it passes from him to the distributees.

2. SAME—RECOVERY OF TAXES PAID—INTEREST.
One from whom internal revenue taxes have been illegally exacted, and who pays the same under threats of distraint, and acts promptly in prosecuting his claim for their recovery, is entitled to recover interest from the time of their payment.

Action to Recover Internal Revenue Taxes Paid. On demurrer to declaration.

John G. Johnson, for plaintiff.
James B. Holland, U. S. Atty., for defendant.

J. B. McPHERSON, District Judge. This is an action to recover back a sum of money collected from the plaintiff under the following circumstances: The residuary clause of the will of Isaiah V. Williamson, who died in 1889 in the city of Philadelphia, directed his executors to transfer to the plaintiff the residue of the estate, to be held for accumulation during 10 years after his death, and at the end of that period to be divided among such of his grandnephews and grandnieces as might then be living. In April, 1899, the trustee filed its account in the orphans' court of Philadelphia county, and the whole of the balance appearing thereon, which amounted to nearly $6,000,000, without any deduction for legacy tax that might be due to the United States, was distributed among the persons described in the residuary clause of the will. After the distribution had been made, the defendant, who is the collector of internal revenue for this district, demanded a legacy tax, under section 29 of the war revenue act of 1898, and, upon the refusal of the plaintiff to pay, was, on April 17, 1900, about to collect the tax and a penalty of 5 per cent. by distress, when payment was made under protest. The sum thus paid was $280,021.33, but as the tax had been wrongly assessed according to a rate determined by the value of the whole estate, and not by the value of each legacy (Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969), the defendant on June 29, 1900, repaid the sum of $94,660.07. The amount in controversy, therefore, is $185,-361.26, with interest from April 17, 1900, and the sum of $1,151.69,

being the interest upon $94,660.07 from April 17th until the day when it was repaid.

The question for decision is this: Does section 29 of the act of June 13, 1898, impose any tax upon the estate of a person who died before the act was passed? The section is as follows:

"That any person or persons having in charge or trust as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States. * * *"

It will be observed that this section lays a tax upon such legacy or distributive share as may arise from personal property that may pass after the passage of this act from any person possessed of such property to any person or body politic or corporate, in trust or otherwise, by will or by the intestate laws. The tax is laid upon certain legacies or distributive shares; not upon all legacies or shares, but only upon such as pass after the passage of the act. But, in ordinary speech, a legacy or distributive share (both words necessarily implying an antecedent death) passes immediately upon the death of the testator or intestate; and unless, therefore, other language in the section indicates that some other time is in contemplation, the conclusion would be inevitable that the act only taxes legacies or shares passing from persons who died after June 13, 1898. Let us look, then, at the rest of the section, in order to discover, if possible, the legislative intention upon this subject. The legacy or share, we further observe, is described as "arising from personal property"; and if it is the "property" that passes, and not the legacy or share, the passing must still be after the passage of the act. The method of passing is directly described, namely, "either by will or by the intestate laws of any state or territory," and this also necessarily implies that the person from whom the property is to pass must die before the passing can take place. Therefore, as the passing of the property or of the legacy or share must be after the passage of the act, so must be the death. It follows inevitably, as I think, that the "person possessed," from whom the property is to pass, must die after the passage of the act, and that the passing must be by his will or by the operation of the intestate laws.

It is at this point that we encounter the argument of the government. Its right to the tax must depend upon the construction to be placed upon the phrase "from any person possessed of such property." If, as I believe, this phrase refers to the testator or the person dying intestate, clearly there was no claim to the tax now in dispute, because Mr. Williamson died before the passage of the act, possessed at the time of his death of the personal property from which the legacies arose, and the property passed by his will to a body corporate,

to be held in trust, and this occurred several years before the statute took effect. The government's argument, therefore, is that the words "any person possessed of such property," in their application to the facts of the present case, mean the trustee to whom the residuary estate was directed to be paid; that the trustee is the person from whom the property is to pass; and that the property did not thus pass until the period for accumulation had come to an end, because only then could it be known to whom the legacies should be paid. The argument concedes that the legacies would not have been taxed by the section, if they had been vested, but asserts the right to tax because they were contingent when the act was passed, and did not vest until the end of the period of accumulation in 1899.

I have already given some reasons for declining to admit the correctness of this construction. It seems to me quite clear that the words do not bear the meaning contended for by the government, and that the section does not tax any legacy or distributive share unless the testator or intestate died after the passage of the act. This, I think, is the ordinary and natural meaning of the words employed; and, in accordance with well-known principles of statutory interpretation, such meaning should prevail. It is only by what I cannot help but regard as a strained and difficult construction that the phrase in question, "person possessed," can be made to include such a person as the present plaintiff. The manner in which the personal property is to pass from "the person possessed of such property" is either by "will or by the intestate laws of any state or territory." Certainly, as we ordinarily use these words, when we speak of property passing from a person possessed thereof by will or by the intestate laws, we mean by his own will, or by the immediate operation of the intestate laws at the time of his death. But, if the government's argument be sound, this cannot be the meaning here. That argument requires us to say that "the person possessed" here is the trustee, but nevertheless the property is to pass, not by his own will, but by the will of the creator of the trust. This is a conceivable, although surely not a natural, construction; but by what process of interpretation can a similar meaning be put into the phrase "by the intestate laws of any state or territory"? Their operation is immediate upon the death of the owner, and it is a contradiction in terms to speak of personal property passing by the intestate laws from an executor or testamentary trustee. When, therefore, the act speaks of personal property "passing after the passage of this act from any person possessed of such property * * * by the intestate laws of any state * * * to any person * * * in trust or otherwise," it could only have meant such passing upon a death occurring after the date of the act. And this, of course, would leave untaxed the personal property of intestates who had died before the act was passed. If this is true concerning intestates, is it reasonable to suppose that testators are dealt with differently in the same sentence, and without a word to indicate that a different treatment is proposed? But, upon the government's construction, as soon as we say "passing by will" we have this curious difference: The "person

possessed" now includes not only the testator himself, but also his trustee, but "by will" never means the will of the "person possessed," if such person is a trustee, although the act is speaking of property passing by will from such person.

It is also to be observed that the act contemplates the passing of the property from the "person possessed" to some other person "in trust or otherwise." Certainly, as it seems to me, these are unusual words to use, if the "person possessed" is a trustee, to whom the property has already passed in trust; for the words "passing * * * in trust," in their ordinary and natural meaning, refer to a trust created by the "person possessed," and if such person is already a trustee he cannot do more than transmit the property under the trust that has been imposed upon it by the original possessor. And, when it is further noticed that the property is to pass "by will * * * in trust," it is reasonably certain that property in the hands of a trustee, who could not transmit it by will, could not have been in the legislative mind.

Moreover, looking at the remainder of the section, which taxes "any personal property or interest therein transferred by deed, sale or gift, intended to take effect in possession or enjoyment after the death of the grantor or bargainer," it is beyond dispute that this points distinctly to a death after the passage of the act; for it cannot be supposed that the statute was intended to have a retroactive effect, and to tax all such transactions, however remote they may have been in point of time. It is very unlikely, I think, that this part of the section applies only to a death occurring after the passage of the act, while the earlier portion of the same sentence is to be so construed as to apply to cases where property passes from the testator or intestate before the passage of the act, as well as afterwards.

I think enough has been said to show that, while "the exact meaning of the statute is not free from perplexity" (to use the language of Mr. Justice White in Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969), it is only after resolving every doubt in favor of the government that the sense contended for can be read into the act; and even then the construction is strained and unnatural. This being so, I think the government's contention should not prevail, upon the well-understood principle of taxation,—that a doubtful tax does not exist. Before the property of a citizen can be taken under the exercise of the taxing power, it is necessary that the statute be clear and unambiguous, so that there may be no doubt about the intention of the state to take the property of the citizen for public purposes. As I have attempted to show, and as I think must be conceded, the section under consideration certainly cannot be said to express clearly the meaning for which the government argues, while the opposite construction seems to give a much more natural and reasonable meaning to the words.

Without prolonging the discussion, I am therefore of opinion that section 29 was only intended to apply to the estates of persons dying after the act was passed, and accordingly the demurrer must be overruled.

As there is no dispute about the facts, I suppose the government expects this decision to be the end of the controversy in this court. In that event, the remaining question is whether the plaintiff is entitled to interest. Upon this point I entertain no doubt. The money was exacted under the threat of exercising the government's power to distrain, and having been thus exacted without lawful right, and the plaintiff having acted promptly in prosecuting its claim, it seems indisputable that the ordinary compensation for being deprived of the money should be awarded. Erskine v. Van Arsdale, 15 Wall. 75, 21 L. Ed. 63.

Judgment may be entered for the sum of $185,361.26, with interest from April 17, 1900, to December 17, 1900, being $7,414.45, and for the additional sum of $1,151.69, making a total of $193,927.40.

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## UNITED STATES v. OGDEN.

(District Court, E. D. Pennsylvania. December 15. 1900.)

Nos. 25, 37.

1. CRIMINAL LAW—MOTIONS FOR NEW TRIAL—TESTIMONY OF JURORS.
   On a motion for a new trial on the ground that jurors were prejudiced by a newspaper article published during the trial, it is competent for jurors to testify as to the fact of their seeing or reading the article, but not as to its effect upon their minds.
2. SAME—GROUNDS FOR NEW TRIAL—PREJUDICE OF JURORS BY NEWSPAPER ARTICLE.
   A defendant convicted in a criminal case is entitled to a new trial where it is shown that some of the jurors read an article published in a newspaper before the case was submitted to the jury, which declared the defendant guilty, and contained many prejudicial statements and charges against him which would not have been admissible in evidence, besides commenting upon his failure to testify in his own behalf.

On Motion for New Trial.

James B. Holland and Wm. M. Stewart, Jr., for the United States.
Dimner Beeber, for defendant.

J. B. McPHERSON, District Judge. The testimony taken in support of this motion shows that, after the evidence and the arguments of counsel had been heard, and while the jury were awaiting the charge of the court, the following article from the North American, a newspaper published in the city of Philadelphia, was read by one of the jurors; that two other jurors read the displayed headlines, and that the article was to some extent spoken of in the jury room while the verdict was being considered:

"Oleo Dealer Ogden's Boasted Pull of No Avail. Long Protected Man on Trial in Federal Court.

"Prosecuted for Eleven Offenses by The North American and Butter Association After State Officials Fail.

"Protection for David S. Ogden, the Ridge avenue oleo dealer, is apparently a thing of the past. After long dodging the law, he was brought to trial yesterday in the United States district court. A prospect of jail looms up.

"At his store, 2417 Ridge avenue, Ogden used to sell oleomargarine by the ton. He relied upon the state authorities to protect him in his illegal business,

and frankly admitted that he stood high in favor. By this arrangement he prospered at the expense of the defrauded public until the North American last April began its crusade against the bogus butter swindlers and their official allies.

"When Farmer Joseph C. Sharpless, of Chester county, wrote to the dairy and food authorities directing attention to Ogden's oleo trade, Secretary of Agriculture John Hamilton sent a reply to the effect that the inspectors of the department, after an investigation, had been unable to find oleo in the store. Agents of the North American and the Pure Butter Protective Association had no trouble in finding it, however, and they promptly caused Ogden's arrest under the federal law for selling the stuff in packages not properly stamped. The show window of the Ridge avenue establishment was at that time heaped up with oleo, in the same manner it had been displayed there for months.

"Ogden Skipped His Bail.

"Ogden was to have been tried in May, but he skipped his bail, fearing imprisonment. Some time later he surrendered himself, and his bail was increased from $1,000 to $2,500. Since then his case has been on the trial list.

"The protectors upon whom Ogden had counted to save him kept in the background when he was brought into the federal court yesterday. With the evidence prepared by Luther S. Kauffman, counsel for the North American and the Pure Butter Protective Association, United States District Attorney James B. Holland conducted the prosecution. It was Mr. Holland's first oleo case since assuming office, and he pressed it vigorously. Ogden was defended by ex-Superior Court Judge Dimner Beeber. A number of prominent oleo dealers were among the spectators at the trial.

"Ogden's defense threw a lime light upon the shortcomings of the state dairy and food authorities.

" 'Why, this man hasn't tried to deceive any one,' declared ex-Judge Beeber, in his address to the jury. 'The evidence has shown that Mr. Ogden has been selling oleo openly and above board. He came to the government, and paid his tax to sell oleo. If that's so, whom did he try to conceal it from? Why, nobody.'

"State's Pretensions Shattered.

"Whatever pretended excuse the state authorities had for ignoring Ogden's case was shattered by yesterday's proceedings. One of the state dairy and food commission's prosecuting attorneys was a spectator at the trial, and heard several witnesses swear that they had purchased oleo as butter at Ogden's store. With knowledge of such direct evidence of violation of the state law, the dairy and food commission can no longer delay a separate prosecution of Ogden, except in outright defiance of duty.

"As with all the oleo cases pushed to trial by the North American, the evidence against Ogden was strong and convincing. Five agents employed by this paper and the Pure Butter Protective Association testified to the purchases of oleo on eleven occasions ranging from March 6, 1899, to April 12, 1900. The first four times the oleo was bought in packages not stamped in any way. Twice it was secured in wrappers marked 'Butterine,' whereas the law requires the word 'Oleomargarine.' The other five times the wrappers were properly stamped, but the corner of the paper was folded in a flap over the printing, to conceal it, thus making a violation of the law.

"A description of Ogden's window filled with oleo was given by George Eldridge, the agent, who supervised all the purchases. He told how the golden yellow packages were arranged in three piles, bearing placards as follows: 'Gloverdale. Extra Fine. 20 Cents;' 'Farmers' Dairy. Gilt-Edge. 25 cents;' and 'Darlington Butter. Extra Fine. 20 cents.'

" 'Those names were enough to make the purchaser think he was right on the farm,' exclaimed District Attorney Holland.

"Ogden Did Not Testify.

"Ogden did not venture on the stand in his own defense. One point of his attorney's contention was that Ogden was not the proprietor of the oleo

store, which was conducted under the name of the 'Ridge Avenue Beef Company.' To meet this, George Kirkland, employed by the North American, testified that Ogden had told him he owned the place. Chief Clerk Milligan, of the internal revenue office, said that Ogden had paid the United States tax in the name of the 'Ridge Avenue Beef Company. David S. Ogden, Manager.' It was plainly shown that the company name was only a cover.

"Another argument of Mr. Beeber was that there was no violation of the law in turning a corner of the wrapper in oleo to conceal the required stamp. District Attorney Holland thereupon read from the internal revenue regulations that packages of oleo must bear a brand 'so placed as to be plainly visible to the purchaser at the time of delivery to him.'

"Judge McPherson will deliver his charge to the jury this morning."

I need hardly say that the publishing of such comments during the course of the trial was a flagrant impropriety. If the printed words had been spoken to a juror, or if they had been contained in a letter addressed to him, an offense punishable by fine and imprisonment would have been committed; and it is little less blamable to take the not improbable chance of reaching the juror's mind by the method of publication in a widely-read journal. It is greatly to be deplored that a practice, of which we see too many examples, should exist, and that persons accused of crime should be put on trial in the columns of the newspapers, and should be declared to be guilty and denounced as criminals before there has been a careful and impartial trial in the proper and lawful tribunal. A report of facts is one thing, and due allowance should be made for the difficulties and inevitable disadvantages under which the reporter does what is often most excellent work; but after the facts have been ascertained as fully as possible, and laid before the public, it is manifestly unfair to the defendant to assume that no more evidence can be produced, or to draw hasty conclusions from such facts as are known without the safeguard of a public trial and a careful scrutiny of the evidence, and thereupon to declare the defendant guilty before a full and lawful investigation has been had. Moreover, such conduct is likely to make the administration of justice more difficult. Every one knows the frequent delay and trouble in obtaining an unbiased jury to try a case that has received this kind of treatment in the daily press, and the case in hand adds one more to the list of verdicts that the courts have felt obliged to set aside for the same reason. That a second trial of this defendant must be had is wholly due to the ill-timed zeal for conviction displayed by the article in question.

In the celebrated Hat Trimmings Case (C. C.) 49 Fed. 32, Judge Acheson set aside a verdict in favor of the government for a similar reason. There, articles not unlike in tone to the article now under consideration appeared in several newspapers of general circulation published in Philadelphia; and, although there was no proof that these newspapers had been read by the jurors, Judge Acheson declared it to be incredible that they had not been read, and upon this assumption decided without hesitation that an improper influence had thus been brought to bear to obtain a verdict. Here there is positive proof that the article was read, if the jurors were competent witnesses upon this subject. Objection to their testimony was

made by the government on the well-known ground that jurors are ordinarily not permitted to impeach their own verdict. But there is no doubt of their competency to testify to the mere fact of having read or seen the newspaper (Mattox v. U. S., 146 U. S. 149, 13 Sup. Ct. 50, 36 L. Ed. 917), although they could not be permitted to testify that the article had or had not influenced their minds. This is an inference which the court is to draw in each particular case, and it will be a more or less probable inference according to the character of the comments complained of.

The character of the comments now in controversy is so clearly prejudicial to the defendant that I need spend but little time upon that proposition. The article declares the defendant to have been a fugitive from justice, and to have long dodged the law. It asserts that he had combined with the state authorities to violate the state law concerning the sale of oleomargarine, and, in effect, accuses him of corrupt dealing with these authorities in order that he might secure protection in the carrying on of an illegal business. These charges may or may not be true. At all events, there was not a word of testimony about them at the trial, and no such testimony could have been received, even if it had been offered. The evidence that was produced was declared by the article to be strong and convincing; and, in defiance of the constitutional provision that no man shall be obliged to testify against himself, attention was called to that fact, and it was asserted that the defendant did not venture to testify in his own behalf,—an assertion which neither judge nor counsel would have been permitted to make during the course of the trial. It is unnecessary to say that such comments upon a pending case violate the elementary rules that demand justice and fair play to a man accused of crime. Under our system of jurisprudence, at least, cases are tried upon evidence that is carefully scrutinized, and not upon insinuation and hearsay; and it is an attack upon the prisoner's constitutional rights to influence the jurors by presenting to their minds charges against him of which no evidence has been offered, or by urging upon the jurors, or suggesting to them, that the defendant is guilty, and ought to be convicted.

I have no doubt that much of the newspaper comment that is open to the objections I have been endeavoring to state is made hastily, without due reflection, and certainly without desire to do the prisoner a wrong. This may be true in the present case. I have no reason to suppose that the article in question was written in a malicious spirit, but its tendency was manifestly to do the defendant harm, and I must deal with it from that point of view. I sincerely hope that the newspapers of this city, now that their attention has been recalled to this subject, will lend their powerful aid towards making trials impressive by a dignified abstention from hasty and ill-considered and sensational treatment of such vastly important subjects as the life or liberty of a citizen. Much may be permitted to the zeal of the press in detecting and exposing public wrongs. This is often very difficult work, and much freedom of

expression is rightly allowed to those who are thus serving the public; but, after the preliminary stages have been passed, and the inquiry has come before a court of law, it does serious harm to the cause of justice to pursue the prisoner with invective, or to interfere with his trial by usurping the proper functions of the judge and the jury.

A new trial is granted in each case.

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## THOMAS G. PLANT CO. v. MAY CO.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1900.)

No. 832.

1. TRADE-NAMES—RIGHT TO PROTECTION—NAMES INCIDENTALLY DENOTING QUALITY.

   Where the general purpose of a trade-name adopted by a manufacturer is to identify the origin or ownership of the articles to which it is attached, his right to protection in the exclusive use of such name is not affected by the fact that the words used also denote quality, and carry with them a claim of excellence incident to the goods of such origin or ownership.

2. SAME—UNFAIR COMPETITION—INJUNCTION.

   The word "Queen," used by a manufacturer of ladies' shoes, to designate its product, is not essentially one which signifies quality, so as to preclude its appropriation as a trade-name; nor does the addition of the word "Quality" to the name, after it has become identified with the goods of such manufacturer, which were thereafter known to the trade and by purchasers by both names, as "Queen" or "Queen Quality" shoes, materially affect the designation, or destroy its identity, so as to deprive the owner of the right to protection by injunction against the use by another of the word "Queen" as a name for similar shoes, where it appears that the sole purpose of the defendant in adopting it was to obtain the advantage of the reputation which complainant's goods had acquired under that name.[1]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

For opinion in circuit court, see 100 Fed. 72.

This is an appeal from an order refusing in part an application made by the appellant for a preliminary injunction restraining the appellee from infringing a trade-mark belonging to the appellant, and from certain other practices which were alleged to be unfair competition in trade. The motion was heard on the bill and answer and affidavits introduced by the respective parties. The appellant is a corporation organized under the laws of Massachusetts, and engaged in the business of manufacturing and selling ladies' shoes, having its principal place of business at Boston. The appellee is an Ohio corporation, carrying on a department store at Cleveland, one branch of its business being the sale of similar goods. In May, 1892, a corporation was organized at Boston under the laws of Massachusetts by the name of the Clark-Hutchinson Company, and engaged in the sale of ladies' shoes. It adopted as a trademark for this branch of its business the word "Queen," which was stamped upon its goods, and became the designation under which they were sold and known in the market. That company continued to be extensively engaged in the business of selling these shoes under this trade-mark from 1892 until November, 1898, when it sold out this entire branch of its business, together with

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[1] Unfair competition in trade, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.

the good will pertaining thereto, as well as its trade-mark, to the appellant, the Thomas G. Plant Company, already engaged in the shoe business in the same city. This last-named company thereupon proceeded to build up at great expense in advertising and otherwise a large business in that special line throughout the country. It added to the trade-mark of "Queen," which had been used by its predecessors in the business, the word "Quality," and the goods of this class which they sold were branded "Queen Quality," and in the market were known and designated as "Queen" or "Queen Quality" shoes indiscriminately as between these two names. The appellee, the May Company, procured to be made or purchased, and then sold at its place of business, a kind of ladies' shoes similar in appearance to those of the appellant, but at a less price, having, before offering them for sale, stamped them with the word "Queen," and with their own name and place of business, and advertised in the city press that the May Company's was the only store in Cleveland that was selling the Thomas G. Plant's three dollar "Queen Quality" shoes. Upon these and some minor facts appearing in the proof offered, the court made the following order: "This cause came on to be heard upon the motion of the complainant for a preliminary injunction and the affidavits offered by the parties, respectively, and was argued by counsel; and the court, being of the opinion that the words 'Queen' and 'Queen Quality,' as originally adopted and as now used by complainant in connection with ladies' shoes manufactured by it, is and was designed to designate the character, class, grade, and quality of said shoes, declines to enjoin the defendant from using the word 'Queen' as a brand or mark for ladies' shoes, providing it is used in a manner not tending or calculated to deceive or mislead the public. The court being of the opinion that the manner in which said word is now used by the defendant might have a tendency to mislead and deceive the public, it is ordered that a writ of injunction issue enjoining and restraining said defendant, its officers, agents, and servants, from employing or using the word 'Queen,' written in script, as a mark or brand upon ladies' shoes, or in any way connected with the sale or offering for sale thereof, whether upon any label, carton, advertisement, circular, card, or letter head; but this decree shall not be construed as applying to or prohibiting the use by defendant of said word 'Queen' when printed not in colorable imitation of or resemblance to the mark of complainant, or to the use of said word when written in script in the manner complained of in the bill of complaint, if, in connection with such use, the defendant plainly and conspicuously indicates that the shoes so labeled or marked are not the same as the 'Queen Quality' shoes manufactured by the Thomas G. Plant Company, and are not manufactured by said company." The plaintiff, complaining that the injunction is inadequate for the protection of its rights in that it fails to restrain the defendant from in any form or manner whatever making use of the word "Queen" as a name or designation for its shoes, so as to cause them to be known in the market and offered and sold as "Queen" shoes, appeals from the refusal of the court to extend its order so as to restrain the defendant from such conduct.

Frederick P. Fish, George H. Maxwell, Crosby & Gregory, and Hoyt, Dustin & Kelly (Rowland Cox, on the brief), for appellant.

Kline, Carr, Tolles & Goff and F. H. Goff, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and EVANS, District Judge.

SEVERENS, Circuit Judge, having stated the case as above, delivered the opinion of the court.

Counsel for the appellant have first discussed the matter of this appeal in their briefs at some length upon the assumption that the appellant had a technical trade-mark in the designation "Queen Quality" or "Queen," but, as this is not alleged in the bill, and appears only incidentally in the proofs, we shall not deal with the

case on that footing. The substantial merits of the case are involved in the question whether the appellant was entitled to an injunction to restrain the defendant from pursuing its course of dealing in the use of the name "Queen" as a designation of its goods, upon the ground that it leads to the deception of the public, and the unlawful appropriation of the appellant's business reputation. The court below, as indicated by its order, based its action upon the opinion that the use by the appellant of the designation of "Queen" or "Queen Quality" as a brand or name for its shoes was merely to designate "the character, class, grade, and quality" of the shoes, and not to indicate the ownership or origin of manufacture; and this view pervades the substance of the order. It is not necessary to discuss the question whether, upon that assumption, the injunction, as awarded, rests upon any sufficient ground. We are of opinion that the court erred in its conclusion that the designation of its shoes by the appellant was merely or primarily for the purpose of denoting their grade or quality. The court refers in its opinion, which is sent up with the transcript and published in 100 Fed. 72, to the case of Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144, wherein it is said:

"To acquire a right to the exclusive use of a name, device, or symbol as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the articles to which it is attached, or that such trade-mark points distinctly to the origin, manufacture, or ownership of the article on which it is stamped; and is designed to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. If a device, mark, or symbol is adopted or placed upon an article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark."

Undoubtedly this is a correct statement of the law, though the case itself determined nothing pertinent here, the question there being one involving the exclusive right to use a geographical name. The last sentence in the above quotation, in speaking of the purpose of identification, etc., refers to the primary purpose, and it is not to be inferred that the learned justice meant to say that if incidentally the symbol had the effect to denote quality, the general purpose being to denote origin or ownership, and the quality being incident to the goods of such ownership, the right to the use of that symbol could not be sustained; for it is manifest that, if the good will which goes with the trade-name has any foundation in merit, it must necessarily imply a quality in the goods. Indeed, it would seem that the mere fact that the word chosen carries with it a claim of excellence cannot invalidate the choice. The law upon the subject is, as Mr. Justice Jackson said in that case, and has been since many times repeated, well settled, and the questions of difficulty concern the facts. The use of the trade-mark or trade-name of another, although generally the most important of the means resorted to for the purpose of appropriating the benefits of his good reputation, is but one of such means, and the rule of conduct is leveled at them all. The following statement of the general prin-

ciple was approved by this court in the case of American Washboard Co. v. Saginaw Mfg. Co., 43 C. C. A. 233, 103 Fed. 281:

"The circumstances vary greatly, but the underlying principle which is effective in the solution of such cases is that a party may not adopt a mark or symbol which has been employed by another manufacturer, and by long use and employment on the part of that other has come to be recognized by the public as denoting the origin of the manufacture, and thus impose upon the public by inducing them to believe that the goods which this new party thus offers are the goods of the original party. In other words, it is a fundamental principle that a man cannot make use of a reputation which another manufacturer has acquired in a trade-mark or trade-name, and, by inducing the public to act upon a misapprehension as to the source of the origin, deprive the other party of the good will and reputation which he has acquired, and to which he is entitled."

It is insisted in behalf of the appellee that the designation "Queen" is essentially one which signifies quality, and cannot, therefore, be appropriated by one individual as a trade-name to the exclusion of others who have an equal right to use terms which denote a superior value or quality in their goods. But the decisive weight of authority supports the right of an individual to adopt a specific name of this character to distinguish his goods from those of others. Thus, the use of the words "Kaiser," "King," "Monarch," "Royal," "Victor," "King Bee," "Pillsbury's Best" has been in those several instances judicially sanctioned as a lawful appropriation. J. & P. Baltz Brewing Co. v. Kaiserbrauerei, Beck & Co., 20 C. C. A. 402, 74 Fed. 222; Raymond v. Baking-Powder Co., 29 C. C. A. 245, 85 Fed. 231; Sarrazin v. Tobacco Co., 35 C. C. A. 496, 93 Fed. 624; Pillsbury v. Flour-Mills Co., 12 C. C. A. 432, 64 Fed. 841. It is true that in the case of Beadleston & Woerz v. Cooke Brewing Co., 20 C. C. A. 405, 74 Fed. 229, according to the syllabus, the word "Imperial" was, in the circumstances of that case, held to be so far a designation of quality as to be incapable of exclusive appropriation. It must be admitted that at first blush such ruling seems not in harmony with the other cases upon the subject. But the conclusion was based upon references showing the extensive public use of the word to denote great excellence, and it was thought the peculiar manner in which the word was associated with others in branding the complainant's goods indicated that in its context the word signified quality, rather than the manufacturer. One of the judges dissented from the view that the word was not capable of appropriation, though agreeing with the result in that case. But the same court, in the case of Raymond v. Baking-Powder Co., above cited, subsequently held that the word "Royal" had been lawfully appropriated as the trade-name for manufacturing and selling baking powder, and the court distinguishes its decision in the case of Beadleston & Woerz v. Cooke Brewing Co. upon grounds which harmonize that case with the current of decisions by emphasizing the fact that in that case the word "Imperial" was used in such association with other words as to negative the idea that it was not meant mainly to designate quality. In the case of Proctor & Gamble Co. v. Globe Refining Co., 34 C. C. A. 405, 92 Fed. 357,

we referred to the fact that other words and embellishments were employed upon the respective labels of the parties than the more distinctive ones for the purpose of showing that there was fair ground on which the court below might have found that there was enough of dissimilarity in the marks upon the packages to prevent purchasers from being deceived, and, thus bringing the case within the rule applicable to the review of orders granting or refusing preliminary injunction, that the action of the lower court will not be disturbed unless for clear error. Finding that upon all the facts there was sufficient ground on which the order refusing the injunction might stand under the operation of the rule referred to, we declined to reverse it. On the other hand, in Wilson v. T. H. Garrett & Co., 47 U. S. App. 250, 24 C. C. A. 173, 78 Fed. 472, this court found that the evidence of a fraudulent simulation of the trade-mark of the appellant was so clear and unmistakable that the action of the court below could not be supported, and the order refusing an injunction was reversed. Both cases recognized the fundamental principle by which the conduct of the parties is to be tested. The results were different because in the one case there was fair room for doubt, while in the other there was not.

It appears from the record in the case before us that the word "Queen" alone was used by the Clark-Hutchinson Company, the predecessors in this line of business of the appellant, and that the appellant, when it bought the other company out, added the word "Quality" to the designation in marking its goods, and has since continued to mark them "Queen Quality." But it also appears that their goods in common parlance were recognized under both designations, "Queen" and "Queen Quality," and were so known to the trade and by purchasers. We do not think, however, that this addition materially changed the designation. The added word did not obscure the origin. This is shown by the fact that the product continued to be known as "Queen" shoes, and was designated by that name by the trade and by the public. And the word "Queen" was still the dominating word in the trade-mark. There are many cases where it has been held that the addition of other words by an infringer did not destroy the identity of a trade-mark or name, and relieve him from the consequences of infringement, so long as his designation effected the practical purpose of denoting that the goods were those of another. By parity of reasoning, it must follow that, so long as the owner of a trade-name keeps up the substantial identity thereof, he is entitled to protection. It would serve no useful purpose to canvass the numerous authorities cited by counsel in their briefs. There is really no dispute in regard to the controlling principle, though there is some slight confusion upon subordinate propositions. We have limited our discussion to those which are pertinent to the case before us. We do not doubt that, if the court below had adopted the view that it was permissible for the appellant to adopt the word "Queen" as a trade-name for the shoes, the manufacture and sale of which was a distinct line of business in which it was engaged, an order would have been granted for an in-

junction substantially as prayed. The evidence leaves no doubt in our minds that the appellee can have no other object in employing this designation than to get the advantage of the reputation which the appellant's goods have acquired under that name, and that the continued use of it by the appellee would be simply to carry that object into effect.

The order of the circuit court must be so modified as further to restrain the appellee from using the word "Queen" in or upon any labels or marks affixed to ladies' shoes sold or offered for sale by it, and from in any other way representing the ladies' shoes sold or offered for sale by it to be "Queen" shoes, and from doing any other act or thing to induce the belief that the shoes sold or offered for sale by it are shoes manufactured or sold by the appellant.

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## McMICHAEL & WILDMAN MFG. CO. v. STAFFORD et al.

(Circuit Court, N. D. New York. December 20, 1900.)

No. 6,606.

1. PATENTS—INVENTION—PRESUMPTION IN FAVOR OF PATENTEE.

   In dealing with the question of invention, the courts should take a broad and liberal view, in harmony with the intent and purpose of the patent law; and a patent should be sustained unless there is clearly no invention shown, or the presumption of novelty arising from the patent itself is overcome by preponderating evidence. Any question of doubt is to be resolved in favor of the patentee.

2. SAME—INFRINGEMENT—IMPROVEMENT IN KNITTING MACHINES.

   The McMichael and Wildman patent, No. 453,290, for an improvement in the horizontal cam-disk of circular rib knitting machines, which consists in making such disk in sections, each of which can be detached and removed, for the purpose of cleaning or repairing the machine, without disturbing its other parts, discloses invention and patentable novelty, and is valid; also, *held* infringed as to claims 2 and 5.

In Equity. Suit for infringement of patent. On final hearing.

The patent in controversy, No. 453,290, was granted June 2, 1891, to McMichael and Wildman, of Norristown, Pa., for an improvement in the horizontal cam-disk of circular rib knitting machines, whereby the cams may be readily exposed or dismantled for examination, cleaning and removal of broken needles. The specification says: "Heretofore the cam-disks in machines of this class have been made of complete disks fitted upon the central shaft or support, and to obtain access to the needle-grooves, which may become clogged owing to the breakages in the needles, it has always been necessary to dismantle the entire upper part of the machine, and after removing the shafts separate the portions constituting the dial and cam-disks. By our improvements the dismantling of the machine is entirely overcome and that portion holding the needles remains in its normal position, while the cam portions are readily removed for repairs or cleaning without in any wise disturbing the remaining portions of the machine. In carrying out our invention we make the portions holding the cams divisible, so as to be bolted to or removed from a suitable hub carried upon the central shaft. The cam-disk in practice is preferably split across its diameter, and may be removed in two or more sections." The specification states further that in practice difficulty is experienced from broken needles clogging the small

throat of the cam portion and wedging in such a manner as to stop the proper operation of the machine. When those accidents occur it is only necessary to take off the semi-annular piece which covers the locality of the difficulty. In this way the needles can be exposed without disturbing them, the broken needles and other obstacles removed and the machine thoroughly cleaned and repaired. The drawings show the cam-disk divided into two parts, but the patentees do not limit themselves to this line of division. The disk may be divided into any number of parts and still be within the claims of the patent. The claims involved are the second and fifth. They are as follows: "(2) In a knitting machine, the combination of the needle-dial with the cam-disk divided into parts transversely to the plane of the needle-dial, a support for the needle-dial, and a detachable connection between the several parts of the cam-disks and the support for the needle-dial, whereby the cam-disk may be detached in sections without disturbing the support for the needle-dial." "(5) In a knitting machine, the combination of the needle-dial and its support with the adjustable cam, K, and a cam-segment supporting said adjustable cam and detachably secured to the support for the needle-head and removable from said support without disturbing its position in the machine." The defenses are lack of patentability, noninfringement and that the patentees are not joint inventors.

Ernest H. Hunter, for complainant.
George A. Mosher, for defendants.

COXE, District Judge (after stating the facts). The open dial circular rib knitting machine, which preceded the complainant's device in the art, though a structure of marvelous ingenuity, possessed several defects which seriously impaired its utility. The needles, arranged in horizontal grooves in the dial, were exposed to view. Lint was liable to accumulate in the grooves to such an extent that the needles would break and put the machine out of action until the damage could be repaired. Another difficulty with the open dial was that it afforded no means for preventing the horizontal needles from rising out of their grooves. "Gibs" or guards are now used to prevent this, but in the open dial machine there was no attachment for these guards. Still another objection was that when a multi-feed was used it was necessary to multiply correspondingly the separate cam supports, which added to the expense and intricacy of the machine. These difficulties were cured by covering the entire needle dial with a plate; but other difficulties, almost equally serious, were developed by the new construction. The needles and grooves which before were accessible were now completely covered, and when jams occurred, incident to the grooves becoming clogged with lint and broken needles, it was necessary to dismantle the machine or lift or remove the plate. The necessity for this action constantly occurred and frequently resulted in keeping the machine idle for half a day. The same repairs can now be made, if the device of the patent be used, in 15 minutes. Considering the relative merits of the two machines, the one having the open dial and the other the integral dial covering plate, it must be found that the advantages of the latter preponderate, for it has in a large degree supplanted the former in the market. The inference is, therefore, plain that, even with its unquestioned limitations, manufacturers preferred the dial plate machine to the open dial machine. The aim of the patentees

was to unite the advantages of the two machines. This is done by making the covering plate in removable sections so that it is only necessary to detach the section above the point where the difficulty occurs in order to repair the machine. There can be no pretense that this was ever done before. It was, however, old in the art to provide a vertical cam ring with detachable segments so that access could be had to the vertically moving needles. The question, then, is, in view of the fact that vertical cam cylinders had been made with removable parts, did it involve invention to divide the horizontal plate into removable sections? As is generally true in patent causes, much may be said upon each side of this proposition.

The reasons for holding the patent valid may be briefly summarized as follows:

First: The cam ring device, though relating to the same art, is very dissimilar in structure and would not suggest to a skilled mechanic a remedy for the defects of the open and closed dial machines. It is the difference between a jacket and a cap; changes in one would not necessarily suggest changes in the other.

Second: For years those skilled in the art, with the prior structures constantly before their eyes, continued to use the integral plate although its defects were obvious and were daily asserting themselves; and yet, mechanics not only, but inventors also, failed to perceive the analogy which the defendants now think is so obvious.

Third: Dividing the plate into detachable cam carrying sections and holding the plate in position by means of the flanged hub required something more than mechanical skill, even assuming that the prior art might have suggested the idea of constructing the plate in sections.

Fourth: Want of patentability must be proved; it ought not to rest on guesswork. If there be doubt, the patentees are entitled to the benefit of it. The presumption of novelty arising from the patent must be overcome. The proposition is clearly stated by Mr. Justice Bradley, in Reiter v. Jones (C. C.) 35 Fed. 421, as follows:

> "It is contended that the making of the grooves was no invention; and that, if it was, they had been made and used before for precisely the same purpose. The fair questions to put however, are, was there no invention in the whole thing taken together, the detachable crown or lid with its grooves and cells? And has such a crown or lid been made and used before? In answer to these questions the patent itself is prima facie evidence in favor of the patentee, and unless there is clearly no invention in what is claimed to be such, or preponderating evidence of anticipation, the patent should be sustained."

Fifth: The exhibits marked "Fowler" and "Goffe" and the patent to Bennor of July 21, 1891, cannot be considered for any purpose. The Fowler and Goffe exhibits are merely unidentified drawings without proof of any kind, and the Bennor patent was issued after the patent in suit.

Sixth: The invention is not a great one. Such inventions may occur, but the probability is that they will appear with less frequency in the future than in the past. It would probably be a conservative estimate to say that 90 per centum of the patents now is-

sued are for improvements in existing methods and machines. It is the spirit of the patent law to encourage those who develop these improvements and keep this people in the van of industrial development. Remove this hope and inspiration and the American workman will become a soulless automaton with no more ambition than the tools of iron and brass with which he works. In dealing with the question of invention the courts should take a broad and liberal view and one in harmony with the intent and purpose of the law.

Infringement is clearly established. As to the second claim there seems to be no serious dispute, and as to the fifth claim there can be no doubt, unless the claim be limited to the exact form of cam shown in the drawings. Frequently the intent of the patentee in using a reference letter is to limit the claim to the exact construction shown, but in the case in hand there is no reason for such an interpretation found either in the patent itself or in the prior art. The patentees must have known of the numerous adjustable cams of the prior art and there is no ground for the assumption that they intended to destroy the patent by placing unnecessary limitations upon the claims. The supreme court say:

> "Patentees sometimes add to their claims an express declaration to the effect that the claim extends to the thing patented, however its form or proportions may be varied. But this is unnecessary. The law so interprets the claim without the addition of these words." Winans v. Denmead, 15 How. 330, 14 L. Ed. 717.

The assertion that the sectional cap is without utility is hardly consistent with its persistent use. If the defendants be right in saying that the covering of the needle bed by the sectional plate is a positive disadvantage, the discontinuance of its use will inure to their benefit. The criticism that the invention is not a joint one is without adequate foundation. The complainant is entitled to a decree.

## BLOOMINGDALE v. WILSONS & FURNESS-LEYLAND LINE.

(District Court, S. D. New York. August 10, 1900.)

1. SHIPPING—CONTRACT FOR TRANSPORTATION OF GOODS—RIGHT OF RESCISSION FOR BREACH.

A shipper who contracted with a steamship company for the transportation from New York to London of 100 tons of hay on each of the company's weekly steamers for a year, and who was entitled to rescind the contract because of the frequent failure of the company to take the required quantity which was tendered, waived such right by electing to treat the contract as still in force, and making subsequent shipments thereunder, and could not thereafter rescind because of such past defaults.

2. SAME—DAMAGES FOR BREACH.

A shipper who contracted for the transportation to a foreign market of a certain quantity of hay each week cannot recover damages for the failure of the carrier on some occasions to take the required quantity, where it is not shown that there was any request that the deficiency should be made good in subsequent shipments, or any tender of the quantity necessary therefor, or that libelant suffered any actual loss by reason of the breach of the contract.

In Admiralty. Action for breach of shipping contract.

L. Barton Case, Esq., for libelant.

Convers & Kirlin and Burlingham & Hickox, for respondent.

BROWN, District Judge. The above libel was filed to recover damages for the alleged breach of a contract in writing made on April 30, 1898, whereby the above parties agreed for the transportation from New York to London of 100 tons of compressed hay in bales upon each steamer of respondent's line, expected to sail weekly, from May 14, 1898, to May 13, 1899, inclusive, at the rate of 22½ shillings sterling per ton.

Shipments under the contract began May 21st, and were continued weekly, though irregular as to the quantities taken, until the last week in August, 1898, when the libelant refused to ship any more hay. The notice of refusal was an oral notice to the broker only, without any reasons then assigned, and without any formal claim of a right to rescind the contract for breaches of it by the respondent, although there had previously been verbal statements to the respondent that it was not taking the amount of hay contracted for. The price of freights declined soon after the contract was made, and at the time when the contract was broken off by the libelant, they had fallen about five shillings per ton and remained lower during most if not all the remainder of the contract period.

The evidence shows that 100 tons of hay were tendered for the steamer that sailed on May 14th, and no satisfactory explanation of the steamer's omission to take it is given. After that, more or less hay was taken on every weekly steamer, sometimes as much as 176 tons; at other times less than 100 tons, usually much less. Up to August 1st, when the contract was turned over to the Atlantic Transport Company, only about 747 tons in all had been carried in the 11 weekly steamers, which, by the contract, should have carried

1,100 tons. The libelant's agent, Franghiardi, who had charge of the shipments, testifies generally that he always had at least 100 tons alongside in readiness for every weekly steamer. But what was left unloaded by the earlier steamer was usually taken by the next. No specific objection was made to this course, nor was any demand ever made by the libelant that any previous deficit in shipment should be made good by a corresponding subsequent increase in the amount taken by the following steamer, so as to keep up an average of 100 tons weekly. The libelant did not tender to subsequent vessels the additional tons requisite to make up previous deficiencies, and Mr. Franghiardi distinctly testifies that the respondent's line, up to the end of July, carried every pound of hay that had been tendered to them.

After August 1st, when the Atlantic Transport Company assumed performance of the contract, the weight of the evidence is clearly to the effect that the failure to carry the full amount of 100 tons weekly was due to the libelant's default in not supplying enough hay, fit to carry, in time for shipment. Some of the lighter loads of hay that were tendered were so musty or damaged that they had to be reconditioned in part before they were fit to load; and the evidence shows that in August all was taken on board promptly that was in fit condition, and as soon as it was ready, and that efforts were made on the ship's behalf to procure more hay from the libelant to fill up the vessels; that on such requests hay was not supplied, to the respondent's loss, which is claimed to be offset against anything due to the libelant for demurrages accruing in the earlier period.

1. The amount of hay carried prior to August 1st was so frequently far less than the contract requirement, that the libelant no doubt might have rescinded the contract at any time when the respondent neglected or refused to take on board the amount tendered to him, within the agreed limit had the respondent elected to rescind the contract on that ground at the proper time. But he did not do so. After each of the several defaults of the ship to take 100 tons, up to August 1st, the libelant elected to treat the contract as still subsisting, by the subsequent shipment of hay under the contract. This estopped him from thereafter rescinding the contract on the mere ground that the ship had carried less than agreed on some trips prior to such subsequent shipments. See McNaughter v. Cassally, 16 Fed. Cas. 322 (No. 8,911). His right to recover any actual damages from such prior defaults remained, however, unaffected; but his right to rescind was limited to some new defaults, if any; and as I have already said, the subsequent failure, after August 1st, to carry 100 tons per week, arose from the libelant's own default in not supplying sufficient hay in fit condition, and not through any default of the respondent or of the Atlantic Transport Company, since they were ready and prepared each week in August to carry 100 tons or more, and were desirous of doing so.

The respondent's agent testifies that the amount and time of shipment prior to August 1st were regulated by mutual arrangement and

for mutual accommodation. Although Franghiardi does not agree to this, no formal protest or formal complaint against the short shipments was ever made, nor claim of damages made till long afterwards, nor was there ever any request, oral or written, that the subsequent vessels should make good prior deficiencies in the amounts shipped, nor any tender by the libelant of the quantity necessary therefor. The only complaint testified to is the simple statement to the ship agent that he was not taking the agreed quantity. The fair inference from all these circumstances, together with the fact that no evidence has been given of any damage suffered by the libelant from the failure to take the whole quantity agreed on, is that the libelant, considering the declining price of freights, acquiesced in the short shipments from time to time until, finding the much lower price of freights likely to be lasting, he concluded to abandon the contract altogether. Whether this be so or not, the libelant, after making four weekly shipments in August, and being himself in default in the timely supply of bales in fit condition for shipment to the amount of 100 tons weekly for those shipments, could not afterwards rescind the contract for mere omissions by the line theretofore to take the full quantity agreed on.

2. Damages. Had the respondent neglected or refused, prior to August, to take any hay tendered by the libelant under the contract, which the libelant, in consequence of such neglect or refusal, thereafter transported at an additional expense, or sold at a loss in market price, he might have recovered such damages. But there was no such tender or refusal. The libel alleges it but the evidence disproves it, showing only some delay in carrying what was tendered; and there is no charge in the libel or proof in evidence of any loss by this delay. The libel also alleges a loss on the sale of the hay not carried; but there is no evidence of this, nor if there was would it be material without proof that it was offered for transportation, which the evidence disproves.

3. Demurrage. Some loss to the libelant is admitted by demurrage charges which he was obliged to pay for the detention of lighters through the delay of the steamers in unloading the hay, within the required period, and there is general evidence of such charges paid by the libelant; there is also general evidence of the loss of freight by the steamers sailing weekly in August, in consequence of the failure of the libelant to supply 100 tons fit to carry, prior to the libelant's notice of rescission. Should the former exceed the latter, the libelant is entitled to a decree for the excess. If the parties cannot agree upon the facts in this regard, a reference may be taken to compute the amounts. Should the loss of freight exceed the demurrage charges for which the respondent is liable, the latter will be entitled to a dismissal of the libel with costs.

## JOHN B. HONOR CO., Limited, v. MIDDLE DIVISION ELEVATOR CO.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1900.)

No. 960.

1. SHIPPING—CONSTRUCTION OF CHARTER—EMPLOYMENT OF STEVEDORE.
A clause in the form of charter party, used for the charter of a steamship, giving the charterer the right to provide a stevedore at the steamer's expense, was stricken out, and one inserted as follows: "Stevedore employed by vessel to be approved by charterers." *Held*, that such provision did not bind the charterer to approve a stevedore employed by the owners, but required the one selected by the owners to be subject to the charterers' approval.

2. CONTRACT—CONSTRUCTION—PERSON ENTITLED TO ENFORCE.
Where a charter provided that the stevedore employed by the vessel should be subject to approval by the charterer, the refusal of the latter to approve a stevedore, without giving any reason therefor, does not give the stevedore so disapproved any right of action for damages against him, whatever may be the rights of the other party to the contract.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

E. T. Merrick, for plaintiff in error.

E. H. Farrar, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. By a memorandum of agreement dated November 22, 1899, the John B. Honor Company, Limited, the plaintiff in error, contracted with Messrs. Smith Bros. & Co., owners and agents of certain steamships, to do the stevedore work at New Orleans of all the steamers under their management which they may have at that port, unless otherwise bound by charter party. On February 2, 1900, the Middle Division Elevator Company, the defendant in error, chartered the steamship Flambro, of which the Messrs. Smith Bros. & Co. were owners, to proceed to New Orleans, and there take cargo for the charterer. One provision of the charter party is in these words: "Stevedore employed by vessel to be approved by charterers." The declaration in this case charges that the plaintiff in error did, on March 26, 1900, proceed to load the steamship Flambro, and commenced the work of loading, and was engaged thereat, when the Middle Division Elevator Company wrote and delivered a letter to the master of the steamship Flambro, as follows:

"Please consign your vessel to Messrs. Chas. F. Orthweins' Sons, as our agents, per charter, whose stevedore, J. P. Florio, only is approved by us. Respy.,

"[Signed] The Middle Division Elevator Co.,
"H. J. Patten, V. P."

And on the same day also wrote, published, and delivered a letter to the master, as follows:

"As we understand, you propose, notwithstanding our notification to you, to employ another stevedore. We hereby again notify you that we have ap

proved of Mr. J. P. Florio as stevedore for your vessel, and will approve no other stevedore. It is reported to us that you and your officers are allowing another stevedore to interfere with the loading of the cargo into your steamer, and we have accordingly ordered the work of loading your vessel stopped, and will not commence again until you withdraw the intervening stevedore from your ship, until which time please note that all loss of time will be for your account. Yours, truly.

"[Signed] The Middle Division Elevator Co.,
"H. J. Patten, V. P."

The declaration charges that this ordering that the loading of the vessel be stopped until the master should withdraw the interfering stevedore was done maliciously, and without cause or ground, and for the purpose of injuring the plaintiff in error; that the plaintiff in error thereby lost the profit on its contract to the sum of $200, and was injured in its reputation, and with its English employers, with whom it had a large and lucrative business, in the sum of $10,000, by the action of the defendant in error, which is charged to have been a slander on the reputation of the plaintiff in error as a stevedore, and implied, and by innuendo stated, that it was incompetent or dishonest in its business relations, or both, which insinuation is alleged to have been false and untrue. The defendant in error presented an exception to the declaration, to the effect that it disclosed no cause of action against the defendant. This exception was sustained by the circuit court, and the action was dismissed, at the cost of the plaintiff.

Counsel for the plaintiff in error in his oral argument contends earnestly that the language, "Stevedore employed by vessel to be approved by charterers," bound the charterers to approve the plaintiff in error, who, by contract with the owners, had been employed by the vessel before the date of the charter party, and that the charter party expressed the approval by the charterers of the employment of the plaintiff in error as stevedore. We do not so construe the language of the charter party. If such had been the intention of the parties to that contract, it is difficult to see why the stevedore already employed by the vessel and approved by the charterers was not named explicitly. Moreover, if such had been the intention of the parties, the language should have been: "Stevedore employed by vessel is approved by charterers," instead of "to be approved," as therein written. It does not appear in the declaration, nor in the charter party as presented in the transcript of the record, but it does appear from the suggestion of counsel, that the form of charter party used had provided that "the charterer or their agents may provide a stevedore, at the steamer's expense, not exceeding the market rate, but shall not be responsible for improper stowage." This was erased, and the language quoted above relating to that subject was inserted. Counsel for the plaintiff in error asks, "Does not this mean that the vessel shall have the right to appoint the stevedore?" We do not think it does. So far as its construction can affect the plaintiff in error, it would seem to mean just the reverse. As between the ship and the charterer, it doubtless means that the ship has the right to select the stevedore in the first

place, but is obligated to submit the name of that stevedore to the charterer, and that the charterer has the right to object to any stevedore named who for any reason whatsoever is not satisfactory to the charterer, and that the parties must agree upon a person to be appointed as stevedore.

As there is involved in this case no question between the vessel and the charterer, we are not called upon to determine or consider whether the action of this charterer in refusing to agree to a particular stevedore is reasonable or unreasonable, and, if found to be unreasonable, in what manner and to what extent it might affect the relations between the ship and the charterer. It cannot give a stevedore whose name is submitted for acceptance any right or cause of action against the charterer who, however peremptorily, refuses to accept it, giving no reason therefor. So far as persons who are not parties to the contract between the vessel and the charterer are concerned, the charterer has an unlimited right to elect whom it chooses to approve. The judgment of the circuit court is affirmed

## THE NEWPORT NEWS.

(Circuit Court of Appeals, Fourth Circuit. November 21, 1900.)

No. 363.

1. ADMIRALTY—APPEAL—REVIEW OF QUESTIONS OF FACT.
Where a cause in admiralty is reviewed on appeal on the same pleadings and proofs the decision of the trial court on issues of fact will not be reversed, except for clear error, especially where the witnesses were examined in the presence of the judge.

2. COLLISION—STEAM VESSELS—SPEED IN FOG.
A steamer navigating in a fog is bound to proceed only at a speed which will enable her to come to a standstill by stopping and reversing within the distance necessary to avoid collision after a vessel approaching from another direction can be seen.

3. SAME—STEAM VESSELS MEETING—KEEPING TO WRONG SIDE OF CHANNEL.
A collision between a steam ferryboat running between Washington and Alexandria, on the Potomac, and a steamer coming up the river to Washington, during a fog, *held* to have been caused by the fault of the ferryboat in keeping to the Maryland (left) side of the channel, and in changing her course to port after hearing the signal of the approaching vessel.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Alexandria.

In Admiralty. Suit for collision, heard and determined in the district court by Waddill, District Judge.

Libelant appeals from a decree dismissing its libel rendered by the district court for the Eastern district of Virginia. The questions are chiefly of fact, and the case comes before this court on the same pleadings and proofs as were before the district court. The collision which was the subject of the libel occurred in a fog on the Potomac river on the morning of September 6, 1897, between appellant's side-wheel ferryboat Columbia, plying between Washington and Alexandria, and the appellee's screw steamer Newport News, that

plies between Norfolk and Washington. The Columbia is of iron and wood, and measures 155 feet by 52 feet beam. The Newport News is of steel, 260 feet long on keel, and 275 feet over all, 46 feet beam, and 14 feet depth of hold, with a draught of 10 feet forward and 13 feet aft. The libel alleged a custom in fog to take the Maryland (left) side of the channel going down, which the answer denies. The story of the Columbia is: "On arriving at a point about opposite the United States magazine a fog signal was heard from a steamer below, whereupon the engines of the Columbia were immediately slowed down to a speed barely sufficient for steerageway, and she had been slowed down in this way for three or four minutes when a signal of three blasts of a steam whistle was heard from a steamer apparently about three points off the starboard bow, which signal was immediately answered by three blasts of the Columbia's whistle, and her engines were immediately stopped; the vessel's course being then changed from S. by W. to S. In this manner she drifted with the tide, her headway through the water being stopped for a period of one or two minutes, when a steamer, which afterwards proved to be the Newport News, suddenly appeared through the fog, apparently from 100 to 125 feet off, and from two to three points on the starboard bow, coming at a high rate of speed towards the Columbia, and almost immediately thereafter came into collision with her, striking her guard forward of the wheel, cutting through the guard, breaking the wheel shaft and starboard wheel, tearing off one leg of the gallows frame, and doing other damage. The collision occurred about one hundred yards above Sheppard's wharf, and close to the eastern bank of the channel." The faults charged are unlawful speed; not properly sounding fog signals as required by law; not having efficient lookout; not starboarding in time; not stopping and reversing in time to prevent collision. The Newport News alleges: "Just before reaching a point opposite Sheppard's wharf in the course to Washington, and about five minutes' run from Alexandria, the Newport News ran into a fog bank. She was immediately slowed down, and fog whistles blown at intervals, as required by law. Shortly after this those in charge of the steamer Newport News heard one whistle of a steamer, which could not be accurately located. Immediately the engines of the Newport News were stopped, and three blasts of her steam whistle given. The steamer having then drifted a few minutes, those in charge of her heard a second whistle. It then appeared to be quite near and on her port bow. Immediately the signal was given, and the engines of the Newport News put full speed astern. She had been backing a short time, possibly a minute and a half, when those in charge of her saw the steamer Columbia crossing the bows of the Newport News from the Virginia shore eastwardly towards the Maryland shore. Almost immediately after she came in sight of the Newport News the collision occurred; the steamer Columbia striking the stem of the Newport News with her starboard side, and at a point a few feet forward of the starboard wheel of the Columbia. The steamer Newport News was at the moment backing astern, and had actually gained sternway, whereas the steamer Columbia was under decided headway,—so much so as to drive, push, and carry the bow of the Newport News to starboard." The time of the collision is placed as about 6:41; the place, about a mile from Alexandria. The faults charged: Not slowing down on hearing fog signal of respondent; not stopping and reversing on hearing the three blasts; not keeping to the Virginia (right) side of the channel; in changing course and trying to cross the channel when a steamer was approaching whose location had not been fixed, and for immoderate speed both before and after this change of course; not stopping and reversing her engine; not having proper lookout properly stationed; no competent master or mate; not sufficient crew. The district court dismissed the libel, with costs.

Libelant assigns the following errors: First, the court erred in dismissing the libel with costs; second, the court erred in holding that the respondent was free from negligence in the premises; third, the court erred in not giving a decree in favor of the libelant on the facts as shown; fourth, the court erred in holding the libelant in fault for taking the eastern side of the channel; fifth, the court erred in holding libelant in fault for changing its course; sixth, the court erred in holding libelant in fault for immoderate speed; seventh,

the court erred in holding that it was a case of crossing; eighth, the court erred in holding that the libelant was in fault for not stopping and reversing; ninth, the court erred in holding that the Newport News was on its proper course and about in its proper place, and that it did all that could be reasonably required to avert the collision; tenth, the court erred in holding that the Newport News was not proceeding at an undue rate of speed, and that it exercised due care on its part to avoid the collision.

Jas. R. Caton and Robert M. Hughes, for appellant.
Wm. H. White and Harrington Putman, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

PURNELL, District Judge (after stating the facts). The appeal, then, is on findings of fact, and is one of those cases in which it is uniformly held, "Where the issues of fact are decided against an appellant and the cause is reviewed upon the same pleadings and proofs, this court will not reverse unless on clear error." All the witnesses, with one exception, were examined in the presence of the district judge. The exception was the quartermaster of the steamship Newport News, whose deposition before the local inspectors of steam vessels was introduced in evidence by consent. It has been long settled in admiralty appeals that the decision of the trial judge, who had an opportunity to see the witnesses, will not be readily reversed on questions of fact by the appellate court. "To warrant a reversal upon a mere question of fact, the preponderance of the evidence should be of a somewhat decided character,—such as would justify the granting of a new trial in a court of common law on the ground that the verdict was against the weight of the evidence. It seems to me that this principle should govern this court in reviewing a question of fact determined by the district judge." The Grafton, 1 Blatchf. 173, Fed. Cas. No. 5,655, Nelson, J. (1846). This court has announced this rule in a recent case,—The E. Luckenback, 35 C. C. A. 628, 93 Fed. 841. There was the usual conflict of testimony in such cases, each witness swearing for his own boat or the ship with which he was identified,—a disposition not always confined to seamen, but to passengers, and others temporarily or remotely connected therewith. The trial judge, noting the conduct of such witnesses, their deportment on the stand, and the manner in which they gave in their testimony, can better reconcile conflicts and contradictions than any one who reads over conflicting testimony, "mere words," without opportunity to do either. The record in this case is voluminous,—250 pages of printed matter,—and after a careful examination of this, and the briefs filed, after oral argument, there does not appear any reversible error. The district judge exercised great care in finding the facts, and prepared an opinion which commends itself so strongly as being eminently correct that we adopt, therefore, the following as the opinion of this court:

"The statement of the contentions of the parties, respectively, and the faults charged by the one against the other, will at a glance show how utterly at

variance they are as to how the collision happened, and who is responsible therefor. Each charges the other with at least half a dozen faults, any one of which, if proven, would be sufficient to fix the responsibility for the collision, and, as is usual in such cases, each side has witnesses to support its respective contention; and these witnesses are not limited exclusively to the officers and crews of the respective steamers, as frequently happens. The faults charged by the libelant against the Newport News are unlawful speed; not properly sounding fog signals as required by law; not having an efficient outlook; not starboarding in time; and not stopping or reversing in time to prevent the collision. The faults charged against the Columbia are not slowing down on hearing the fog signals of the Newport News; not stopping or reversing on hearing her three blasts; not keeping to the Virginia (right) side of the channel; changing her course and trying to cross the channel when a steamer was approaching whose location had not been fixed; for immoderate speed both before and after this change of course; not stopping or reversing her engines; not having proper lookout properly stationed; and that said steamer was being navigated by an incompetent master and mate and an insufficient crew. I shall not attempt to determine all the questions of negligence raised between the parties, or, indeed, to settle all of the many conflicts in the evidence between the witnesses, as much of the conflict is upon immaterial matters, or points unnecessary to be passed upon in the view I take of the case. My effort will rather be to arrive at a correct conclusion upon one or two of the more important issues, which, if determined, will dispose of the case.

"The libelant seeks to establish a custom, in case of a fog, for steamers to take the Maryland (or left) side of the channel in going from Washington to Alexandria, and in this way to account for the position of the Columbia on the eastern instead of the western side of the channel at the time of the collision. That such custom, if it exists, may serve to supersede the usual rules of navigation, may be conceded. The Pavonia (C. C.) 26 Fed. 109; The James Bowen (D. C.) 52 Fed. 510. This being the effect of a local custom, there should be no doubt of its actual existence, known generally to persons engaged in the business to be affected, and the proof of it should be clear and conclusive. The evidence in this case satisfies me that there was no such custom as that contended for by libelant, and, moreover, that there was not the slightest reason for its existence. An inspection of the chart shows a straight reach between those points, particularly from the forks of the Georgetown channel, below the arsenal at Washington, down to Alexandria, a distance of four miles; the Virginia (or right) side of the channel being marked by black buoys. There is no suggestion of cross currents, and the chart shows no obstruction in the channel proper, which is from three to four hundred yards wide, and, as testified to by the libelant's witnesses, is about half a mile wide between Sheppard's and Alexandria. It is true, libelant introduced quite a number of witnesses who testified as to this custom. They were mostly, however, persons in the employment either of the libelant or the superintendent of libelant's company; and I do not think their evidence is sufficient to establish a general custom, which would have been so well known had it existed, particularly when the fact is vigorously controverted by the respondent's witnesses. Indeed, the libelant's evidence on this question is not of the clear and convincing character it should be. The master of the companion ferryboat owned by the libelant virtually repudiated the existence of such a custom, as did also the former master of the Columbia; and Folkes, the master in collision, on cross-examination, in effect, conceded it did not exist. He testified as follows: 'As a matter of fact, is not your course from the time you leave the arsenal south by west? A. Yes, sir; I do. Q. Then from the time you leave the arsenal, heading for Alexandria, your course is a straight course? A. Yes, sir; south by west. Q. And that straight course you can pursue on either side of the channel or in the middle of the channel? A. No, sir; if you keep on the straight course you can't. Q. And you would almost run into your slip by taking the midway channel in running from Washington to Alexandria? A. Yes, sir; if you know when you get there. Q. In clear weather your course is south by west? A. No, sir; we run down to Sheppard's. Q. In clear and foggy weather?

A. Yes, sir. Q. And there is no difference in your course in clear and foggy weather? A. No, sir; we run down to Sheppard's. Q. Now, then, starting from your slip in Washington, you can see in clear weather your slip in Alexandria, can't you? No, sir. Q. Simply because of the distance, and not because of any— A. No, sir. Q. You cannot see until the time you get to the arsenal? A. Yes, sir; after you get below the arsenal, at the forks of the channel. Q. And then it is a straight course? A. Yes, sir; from the forks of the Georgetown channel. Q. And you run the same course in all weather? A. No, sir; we do not run the same course in all weather. Q. You just said you did. A. Well, that is all right. I did not say we run the same course in all weather. We run wherever we can get down on either side. Q. Well— A. Supposed to run one side as much as the other. Q. Well, have it so. Then you have no regular side, but run one side as much as the other? A. Yes, sir.' James N. Marmaduke, master of the steamer Bellehaven, companion ferryboat to the Columbia, testifies as follows: 'By the Court: Along which side of the river, according to the custom, do steamers travel in going from Alexandria to Washington in case of fog? A. Well, some runs one way, and some another. Some boats that leave there and runs pretty well out from the wharf before they straighten up, and I suppose they aim to run about the middle of the channel, and some run a little nearer. I have met as many on one bow as the other. Q. Then you mean that there is not any custom as to which side the steamers take in going up, and there is a custom in coming down? A. I don't think there is any custom. If a man gets abreast of the ferry, and can get a better course before you get to the Gessboro wharf— You can get a better departure after leaving Alexandria than at Sheppard's, because the bank runs out from Sheppard's, because your boat will smell the mud and run off from it.' Other witnesses for the libelant, by whom it was sought to prove the custom, substantially disprove it on cross-examination; and, indeed, taking the evidence as a whole, there is, to my mind, no real foundation to support the claim. The contention that there was any obstruction in the channel to make such a custom utterly failed. Indeed, the master of the Columbia, in his examination before the inspectors, admitted that there was none. The government chart, as above stated, shows no obstruction, and the effort to prove that there was any real interruption in the navigation of the river at the mouth of the old Alexandria canal, on approaching Alexandria, entirely broke down.

"The respondent further contends that the Columbia, in addition to being on the Maryland (left) side of the channel, improperly changed her course, and in that way increased the chances of collision. The master of the Columbia must have known of the cardinal rule of navigation in rivers and narrow channels,—to keep to the right. The most ignorant navigator will be presumed to have known of this simple and wise requirement. It was long ago settled, before the adoption of formal rules and regulations on the subject, that steamers meeting in narrow channels should port their helms, and thus pass each other. New York & B. Transp. Co. v. Philadelphia & Savannah Steam-Nav. Co., 22 How. 461, 16 L. Ed. 397; The Victory and The Plymothian, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519; The America, 2 Ben. 475, Fed. Cas. No. 280; The Yourri, 10 App. Cas. 276 (Privy Council, 1885); The Energia (D. C.) 56 Fed. 124; Id., 13 C. C. A. 653, 66 Fed. 604; Occidental & O. S. S. Co. v. Smith, 20 C. C. A. 419, 74 Fed. 261.

"The question of whether the Columbia improperly changed her course at the time of the collision can only be determined from a consideration of all of the facts, and in that connection should be considered the conduct of the two steamers at the time of the collision, and whether either one, and, if so, which, brought about the collision. On the one hand it is insisted that the Columbia changed her course and crossed the channel with a steamer approaching whose location had not been fixed, and that she failed to stop and reverse on hearing the proper signals from the Newport News, but proceeded at an immoderate rate of speed. On the other hand, it is contended that the Newport News likewise failed to stop and reverse in time to prevent the collision, and proceeded at an unlawful rate of speed, without giving proper signals or making the proper maneuvers by starboarding her helm. That the Columbia

did starboard and change her course from south by west to south, so as to proceed further to the eastern or Maryland side of the channel, seems to be quite clear from the evidence; that is, from the libelant's own evidence. The libel alleges that when opposite the United States magazine, on hearing the fog signal from a steamer below, the engines of the Columbia were slowed down to speed barely sufficient for steerageway, and, after so remaining for three or four minutes, on hearing the signal of three blasts from a steamer about three points off her starboard bow the engines were immediately stopped and the course of the vessel changed from south by west to south, in which manner she drifted with the tide for one or two minutes, when the Newport News suddenly appeared through the fog, apparently one hundred to one hundred and twenty-five feet off, when the collision occurred. The master of the Columbia, in his examination before the inspectors, testified that he starboarded at the time of the collision, and that his course was south, though on the trial he stated it was south one-half west. The mate of the Columbia also testified before the inspectors that the captain told him he was going to the eastward, though on the trial he says the course was south one-half west and before the inspectors he likewise testified that the Columbia was hard a-starboard, but he denied this on the trial. The mate further testified before the inspectors that the captain said on hearing the whistle of the steamer below, which appeared to be on their starboard bow, that he was going to let her (referring to the Columbia) go to the eastward and keep out of the way of the Norfolk steamer, and that they so went along until he espied the Newport News, when she blew three whistles, to which the Columbia replied. The evidence of the master of the Columbia before the inspectors is clearly that he changed his course from south by west to south, and in his examination before the court it seems equally certain that he was attempting to avoid the effect of the statement thus made. He explained before the inspectors why he starboarded and changed his course from south by west to south, viz. on account of hearing the whistle of the Newport News on his starboard; and he further admitted at the trial, on cross-examination, in answer to a question by the court, that on the course south by west he would have met the Newport News about the middle of the channel, but as a matter of fact he did meet her on the eastern side of the channel. The evidence before the inspectors was taken a short time after the accident, when the facts were all fresh in the minds of the witnesses, and the inspectors were persons peculiarly fitted to make the investigation of the character under consideration; and that they suspended the master of the Columbia for changing his course, according to his own admissions, is not surprising. The New York (D. C.) 53 Fed. 556. The effect of this change in the Columbia's course was to place her across the bows of the Newport News, which is the position in which respondent's witnesses say she was when first discovered by the navigators of the Newport News, and at a time when it was too late to avert the collision. The fact that a fog existed at the time of the collision made it even more imperative that the Columbia should not have changed her course. In The Vanderbilt, 6 Wall. 225, 18 L. Ed. 823, Mr. Justice Clifford, speaking for the court (page 229, 6 Wall., and page 824, 18 L. Ed.) said: 'Steamers may doubtless ascend on either side of the river in the daytime, when the view is not obstructed or obscured by fog; but it was a fault in the steamer, when she found she was approaching a fog bank, that she did not port her helm and leave the accustomed passway of descending boats and vessels.' 'Steamers approaching each other from opposite directions are required by the general rules of navigation, as well as by the recent act of congress, to port their helms and pass to the right; but it is obvious that one or both may omit to comply with the requirement until their proximity is so close that a compliance is wholly inadequate to accomplish any valuable purpose' (page 230, 6 Wall., and page 824, 18 L. Ed.). Mar. Mar. Col. 381, 502; The Servia, 149 U. S. 153, 13 Sup. Ct. 817, 37 L. Ed. 681.

"The Columbia, being in a fog, on hearing the signals of the Newport News on her starboard bow should not have speculated on the possibility of the vessels passing clear. If they were not meeting, they were crossing. If meeting, the Columbia should have ported her helm and passed to the right.

If not meeting, they were necessarily crossing, so that the Columbia had the duty of avoidance. And in neither case was she right in starboarding her helm. The Phenix and The Atlanta, 20 U. S. App. 129, 7 C. C. A. 572, 58 Fed. 927. This was a similar collision on the Hudson river, in which the court said: 'It is, however, conceded that when the fog signals of the Atlanta were first heard by the Phenix the former was on the latter's starboard side. The duty of avoidance, therefore, was plainly on the latter. We are satisfied from the proof that the fog was so dense that neither vessel could see the other at a greater distance than four hundred feet.' The Frostburg (D. C.) 25 Fed. 451.

"The respondent insists that the Columbia should have stopped and reversed her engines upon hearing the three whistles of the Newport News, which the Columbia claims was not necessary, and that she did all that was required, viz. to come to a standstill and kill her headway. This brings us to the consideration of the question of the speed of the respective steamers at the time of the collision, and just what each did at the time. The officers and crew of each steamer denied that their steamer was rapidly moving forward at the time of the collision. The Columbia's officers and crew testified that she had come to a standstill when the Newport News came into collision with her on the starboard side, striking her on her starboard guard, and forward of the wheel. The officers and crew of the Newport News testified that she had killed her headway, and was moving backwards, when she was collided with by the Columbia coming up on her port bow and striking the stem of the Newport News, with her starboard side at a point a few feet forward of the starboard wheel house of the Columbia. Just which of these contentions is true can only be determined from all the evidence and circumstances. The Columbia's officers, by reason of their persistent efforts to vary the statements made by them before the inspectors, do not place themselves in an enviable light before the court. Upon many of the most material questions involved in the case, their evidence before the court is entirely contradictory of that given by them before the inspectors, which disentitles it to the weight which would otherwise be given it. The Morning Light, 2 Wall. 550, 17 L. Ed. 862; The Potomac, 8 Wall. 590, 19 L. Ed. 511; The Frostburg (D. C.) 25 Fed. 451; The Mary Lord (D. C.) 26 Fed. 862, 865. The evidence seems to be quite clear, even from the libelant's own witness, that, whatever may have been the speed of the Columbia at the exact moment of the collision, she must have averaged between nine and ten miles an hour to about the time of the collision, in order to have been at the scene of the collision when it occurred. The engineer of the Columbia testified before the inspectors that it was ten miles an hour, and before the court he said about nine,—between eight and nine. Most of this distance was in a fog which the Columbia encountered about five minutes after leaving her wharf at Washington. Thus, during the greater part of the trip the Columbia was proceeding at an unsafe rate of speed. The rule, as laid down in this circuit, requires a steamboat to so proceed as to be able to bring herself to a standstill after viewing the approaching vessel in a fog. The Laurence, 8 U. S. App. 312, 4 C. C. A. 501, 54 Fed. 542. Goff, Circuit Judge, speaking for the court of appeals, said: 'She was bound to observe unusual caution, and maintain only such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed before she should collide with a vessel which she could see through the fog.' And in The Raleigh (C. C.) 44 Fed. 781, 783, it is said: 'The rule is that such speed only is lawful or moderate speed in a fog as will permit a steamer seasonably and effectually to avoid a collision by slacking a speed or by stopping or reversing within a distance at which another can be seen. If this rule is a severe one, and practically requires a steamship to come to a stop and remain stopped when navigating a river having extensive commerce, or in a crowded harbor, it is too well established to be disregarded.' While it is true that two of the passengers of the Columbia testified that she was at a standstill at the time of the collision, and that the Newport News was rapidly moving and came in collision with her, still this is positively contradicted by the officers and crew of the Newport News and four passengers, whose evidence is entitled to great weight. The four passengers of the Newport News referred to were on the

bow of the steamer in the collision, and were in a position to see exactly what occurred. They were three pilots,—two Maryland and one Virginia,—and the manager of the National Hotel in the city of Washington, who for some years was engaged in the wrecking business, and therefore familiar with the navigation of steam vessels. The Favorita, 1 Ben. 30, 33, Fed. Cas. No. 4,693; The Alhambra (C. C.) 33 Fed. 78, 79. All four of these witnesses fully sustained the contention of the officers and crew of the Newport News, and testified that the Columbia suddenly emerged from the fog, moving at a rapid rate across the bow of the Newport News, and came into collision with the latter steamer, her starboard guard, forward of the wheel house, colliding with the stem of the Newport News; and they further testified that the Newport News had at the time killed her headway and was moving backward. Taking this evidence, coupled with the fact that the Columbia, up to within a short time of the collision, had been moving at an immoderate rate of speed, and the further fact that she was making a maneuver by starboarding her helm, and, as testified to by her mate before the inspectors, to get out of the way of the Newport News by going to the eastward, which, in order to be effectual, necessitated her going forward and not standing still, I am forced to the conclusion that she was a steamer in rapid motion when in collision; and the same evidence indicates that the Newport News, which at the time of the collision was on her proper course, and about where she should have been, did all that could be reasonably required of her to avert the collision under the circumstances. Certainly she had no right to anticipate that the Columbia would be found on the eastern side of the channel, moving under a starboard instead of a port helm. So far as the contention of the libelant is concerned that the Newport News entered the fog on leaving Alexandria, and not near Sheppard's, as it contended, it is immaterial, as the Columbia, when about a mile above Sheppard's, conceded that she heard the fog signals of the steamer below, and therefore had abundant warning to look out for her. The preponderance of the evidence seems clearly to indicate that the Newport News was not proceeding at the time at an undue rate of speed, and that she exercised due care on her part to avoid the collision at the time of the accident. My conclusion is that the collision was the result of the Columbia navigating on the wrong side of the channel, and while on such side improperly changing her course in front of the approaching steamer, which of itself would disentitle her to recover in this case, and that, moreover, she, and not the Newport News, as herein stated, was in fault at the time of the collision."

The decree of the district court is affirmed.

PENNSYLVANIA R. CO. v. ROPNER et al.

VULCANITE PAVING CO. v. SAME.

(Circuit Court, E. D. Pennsylvania. December 18, 1900.)

Nos. 76, 77, April Sess., 1899.

SHIPPING—NEGLIGENT NAVIGATION—PRESUMPTION.

The collision of a steamship with a pier raises a presumption of negligence in the navigation of the vessel.

On Motion for New Trial.

Frank P. Prichard and Hampton Todd, for plaintiffs.
Henry R. Edmunds and I. Parker Kirlin, for defendants.

J. B. McPHERSON, District Judge. I think the defendants are mistaken in their criticism of that part of the charge to the jury that deals with the presumption of negligence and the burden of proof. The instruction complained of concerning the presumption of negligence arising from the collision of the steamship with the pier is based on Coasting Co. v. Tolson, 139 U. S. 554, 11 Sup. Ct. 653, 35 L. Ed. 270, and follows that decision as an authority. With regard to the burden of proof, I am unable to agree that the charge did the defendants injustice. It is argued that the effect of what the court said was to require them to prove that they had not been negligent; but I think the argument must be founded upon a misunderstanding of the charge. Instead of requiring this, the plaintiffs were obliged to bear the burden. The final instruction and summary upon this point was as follows:

"Upon all the evidence taken together,—when I say 'all the evidence,' I mean all the evidence on both sides,—including the prima facie evidence of negligence offered by the plaintiffs, and the explanatory evidence offered by the defendants, the jury must determine whether the fair weight of the evidence is with the plaintiffs, and sustains their charge that the defendants were negligent. If it does, the plaintiffs are entitled to recover. If it does not, if there is an even balance, so that the jury cannot find that the defendants were negligent, after considering all the evidence on both sides, including the prima facie evidence of the plaintiffs to which I have referred, and the explanatory evidence of the defendants, the verdict must be for the defendants."

This seems to me to be sufficiently clear, and to answer the complaint that the burden of proof was erroneously laid on the defendants' shoulders.

With regard to the defendants' liability for the negligence of the pilot, associated, as it was, with the negligence of the captain, I have only this to say: If the question arises properly upon the special verdict, the point is one that has been long disputed, and can only be settled by a decision of the court of appeals or of the supreme court. I have therefore less hesitation in merely deciding formally that the defendants are thus liable, in order that a writ of error may be taken in season for the next meeting of the court of appeals; for I admit

that, owing to the pressure of business, I have not been able to give to this question the examination and consideration that its importance would otherwise deserve.

A new trial is refused.

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## BOWKER v. UNITED STATES.

(District Court, D. New Jersey. December 17, 1900.)

UNITED STATES—ACTIONS AGAINST—JURISDICTION TO ENTERTAIN CROSS LIBEL IN ADMIRALTY.

In a suit in admiralty instituted by the United States to recover damages for injury to a government vessel by collision, the court cannot entertain a cross libel alleging the fault of such vessel, and praying a decree against the United States for damages.

In Admiralty. On motion to quash citation on cross libel in suit by the United States for collision.

Convers & Kirlin and Carver & Blodgett, for claimants.
David O. Watkins, U. S. Atty.

KIRKPATRICK, District Judge. On the 2d day of October, 1899, the three-masted schooner William H. Davenport and the steamer Azales collided in Long Island Sound, off the Cornfield Point lightship. Subsequently, the United States of America, the owner of the Azales, caused a libel to be filed against the William H. Davenport for damages sustained by the Azales in said collision; and now comes F. S. Bowker, the managing owner of the William H. Davenport, with a cross libel, alleging that the Azales was at fault, and praying that citation issue against the United States of America, requiring them to appear and answer; that the court shall pronounce for damages against the United States, and grant a stay of all further proceedings in the said action brought against the said William H. Davenport until security be given by the United States under the rules of the supreme court. There was a formal issuance of the citation, which was served upon the United States district attorney for this district, who immediately gave the following notice:

"Notice is hereby given that I shall move before said court to quash the citation served upon me as United States attorney in this cause upon the ground that no citation can issue against the United States in this matter, and also that the service of the citation upon me as United States attorney for the district of New Jersey is without warrant of law."

It is conceded that the United States cannot be lawfully sued without its consent in any case, but it is insisted that, when the government voluntarily comes into court for the enforcement of a claim, it subjects itself to the rules regulating the practice of the court. Admiralty rule No. 53, which is especially relied on in this case, provides that:

"Whenever a cross libel is filed upon any counter claim arising out of the original cause of action for which the original libel was filed, the respondent

in the cross libel shall give security in the usual amount and form to respond in damages as claimed in the cross bill unless the court on cause shown shall otherwise direct."

The sole object of the rule is to protect the rights of the cross libelant by compelling the respondent (the libelant in the original action) to give security for any damages which may be awarded against him. I have no doubt that the suit instituted by the government must proceed in accordance with the rules regulating the practice of the court, nor that this court has the power to make all proper and necessary orders and decrees therein by which the government must abide. If the cross libel were properly filed, and the citation legally served, so that the respondent was in court in that suit, the court might, in its discretion, require the respondent to give security under rule No. 53. The rule confers no authority to file the cross libel, and counsel distinctly disclaims any intention to ask the security for which it alone provides. Can the cross libel be maintained? I think not. This is not a case analogous to The Siren, 7 Wall. 152, 19 L. Ed. 129, where the court was in possession of the res through voluntary action of the government; nor to The Nuestra Senora de Regla, 108 U. S. 92, 2 Sup. Ct. 287, 27 L. Ed. 662, where the vessel was seized by the United States, and afterwards libeled by it as a prize of war, and in which damages were awarded against the United States because of wrongful seizure. The award was sustained in the supreme court because, to use the language of Chief Justice Waite, who delivered the opinion of the court:

"We cannot but think that the United States have voluntarily submitted themselves to the court at the instance of the Spanish government and the consent of the claimant for the purpose of having the question of damages growing out of the capture judicially settled according to the rules applicable to private persons in like cases."

The submission in this case was made by the chief executive of the government, and the court, considering the question of his right, hesitated to affirm it on general principles, and only did so under the special circumstances of the case. The rule is well settled that the consent which alone enables an independent suit to be brought against the government or its property must be given by the legislative body, and without the authority of congress the government's right of exemption cannot be waived by any of its officers. Case v. Werrell, 11 Wall. 202, 20 L. Ed. 134; Carr v. U. S., 93 U. S. 433, 438, 25 L. Ed. 209; U. S. v. Lee, 106 U. S. 196, 205, 1 Sup. Ct. 240, 27 L. Ed. 171. In the case at bar, not only has the government not submitted itself to the jurisdiction of the court, but the prayer of the libelant is that the court award process against the United States compelling them to appear and answer the complaint made against them. There is no law authorizing the service of this writ upon the United States district attorney, and such service must be set aside. The desirability of having determined at one and the same time all the questions of liability for the collision which is the subject-matter of the original libel has been urged on the court as a reason why it should obtain or retain jurisdiction of the whole case. In Schil-

linger v. U. S., 155 U. S. 166, 15 Sup. Ct. 85, 39 L. Ed. 108, Mr. Justice Brewer, speaking for the court, after reciting that the United States cannot be sued without their consent, says:

"Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government."

In my opinion, the cross libel cannot be maintained

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## THE ABBIE M. DEERING.

(District Court, N. D. California. December 10, 1900.)

No. 12,153.

SEAMEN—BREACH OF CONTRACT OF EMPLOYMENT—MEASURE OF DAMAGES.

It is the duty of seamen wrongfully discharged to use reasonable diligence to obtain similar employment elsewhere, and, where they could have obtained such employment, they can only recover, in a suit for breach of the contract, the difference between what they could thereby have earned and what they would have received under the contract.

In Admiralty. Suit by seamen for breach of contract of employment.

H. W. Hutton, for libelants.
Myrick & Deering, for claimant.

DE HAVEN, District Judge. When the contract declared on was broken by the master of the Abbie M. Deering, it was the duty of libelants to use reasonable diligence to obtain other employment of a similar character, and thus to reduce the damages arising from the breach of such contract. Schroeder v. Trading Co. (D. C.) 95 Fed. 296; Costigan v. Railroad Co., 2 Denio, 609; Utter v. Chapman, 38 Cal. 659; Howard v. Daly, 61 N. Y. 362. The evidence shows beyond all doubt that all of the libelants, if they had so desired, could have obtained such employment upon the schooner Uranus, and, with the exception of libelants Skinning and Hansen, upon the same terms upon which they had been employed upon the Abbie M. Deering. The two last named were offered employment, but at a less compensation than they were to receive under the contract set out in the libel; and they are entitled to recover as damages the difference between the sum offered them to go upon the Uranus and that which was agreed to be paid to them by the terms of that contract. This difference I find in the case of John Skinning to be $25, and in that of Louis Hansen $12.50. Let a decree be entered in favor of libelant John Skinning for the sum of $25, and in favor of Louis Hansen for the sum of $12.50,—said libelants to recover costs; and the libel will, as to all other libelants, be dismissed.

# CRANE v. BUCKLEY et al.

(Circuit Court, N. D. California. December 10, 1900.)

No. 12,884.

REMOVAL OF CAUSES—FEDERAL QUESTION—ACTION ON SUPERSEDEAS BOND.

An action on a supersedeas bond given on an appeal from the decree of a circuit court to the circuit court of appeals, in accordance with Rev. St. § 1000, to recover the damages sustained by the appellee, is one involving questions arising under the laws of the United States, and is removable into the federal court.[1]

On Motion to Remand to State Court.

Mullany, Grant & Cushing, for plaintiff.

Sullivan & Sullivan and Theodore J. Roche, for defendants.

MORROW, Circuit Judge. It appears that an action was brought by the above-named plaintiff against the defendant Cornelius F. Buckley in the circuit court of the United States for the Southern district of California, wherein a judgment was rendered in favor of the plaintiff, but allowing the defendant the equitable privilege of completing the purchase of certain of plaintiff's property in accordance with the terms of a certain agreement, and specifying January 1, 1899, as the limit of duration of such privilege. From this judgment an appeal was taken to the United States circuit court of appeals (38 C. C. A. 688, 97 Fed. 980), a bond being given by the defendants herein (C. F. Buckley as principal, and Rudolph Spreckels and Timothy Hopkins as sureties) in the sum of $8,000, wherein it was recited:

"Now, the condition of the above obligation is such that, if the said C. F. Buckley shall prosecute his appeal to effect, and shall answer all damages and costs that have been and shall be awarded against him if he fails to make his appeal good, and if he shall answer all damages that shall accrue to the said respondent by reason of the value of the use and occupation of the land and premises from the time of said appeal, until the delivery of possession thereof to said Henry A. Crane, and for all waste committed thereon, then the above obligation to be void; else to remain in full force and effect."

On October 2, 1899, the circuit court of appeals affirmed the judgment of the lower court, and upon October 19, 1899, on the hearing of a petition for a rehearing of the case, modified its former decree as follows:

"Cause remanded to the court below, with directions to substitute for the 1st day of January, 1899, the 1st day of November, 1899, within which the payments therein provided for are permitted to be made; and, as so modified, the decree is affirmed."

The defendant Buckley did not complete the purchase of the property by making the payments above referred to, and on or about the day specified in said modified decree surrendered the possession of said property to the plaintiff. Plaintiff then brought suit in the superior court of the state to recover from the defendants herein, upon their said bond, the value of the use and occupation of said

[1] Jurisdiction of federal courts in cases involving federal questions, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

property from the 1st day of January, 1899, to the 1st day of November, 1899 (the extension of time allowed by the court of appeals within which to make payments in completion of purchase, under agreement), and for recovery of damages sustained by reason of waste committed upon said property by the defendant Buckley during said time. Upon the petition of the defendants the suit was transferred to this court upon the allegation that the determination of their liability upon said bond depends upon the construction of an act of congress, namely, section 1000 of the Revised Statutes. The case is now before this court upon plaintiff's motion to remand the cause to the state court. In support of this motion the plaintiff contends that the defendants' liability arises exclusively under their own contract as contained in the supersedeas bond, and therefore the determination of such liability is not dependent upon the construction of any United States law. The section of the Revised Statutes upon the construction of which the jurisdiction of this court is sought to be established is the following:

"Sec. 1000. Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution."

The writ in this case was a supersedeas, and the security given therefor extended to damages as well as to costs. The question for determination is, has this court jurisdiction of the action? It has been held that such a controversy is one springing out of a suit already determined in the federal court, and is in one sense an offshoot of that suit (Seymour v. Construction Co., Fed. Cas. No. 12,689, 7 Biss. 460); and, further, in the same case, that a supersedeas bond is an indemnity given in pursuance of a law of the United States. The measure of the liability of the party and the rights of both plaintiff and defendant depend upon a law of the United States and a rule of the supreme court of the United States (No. 29). 3 Sup. Ct. xvi. It is impossible to take a step in the progress of a suit brought upon such a bond in order to determine the rights of the parties without looking at the law and the rule as the guide of the court, and controlling its judgment in the determination of the case. And in Arnold v. Frost, Fed. Cas. No. 558, 9 Ben. 267,—a suit for recovery on a bond given on appeal,—the court in positive terms declared it to be, not an original suit, but an offshoot or outbranch of the suit in which the bond was given, and that jurisdiction of the original suit gave jurisdiction over the subject-matter of the suit on the bond. The action under consideration is based upon proceedings in the United States circuit court acting under authority conferred by a law of the United States and a rule of the circuit court of appeals (No. 13). 31 C. C. A. cliii., 90 Fed. cliii. It therefore presents a question arising under the laws of the United States, and so within the jurisdiction of this court. First Nat. Bank of Ceredo v. Society for Savings, 25 C. C. A. 466, 80 Fed. 581. Upon the doctrine announced in the foregoing cases the motion to remand the cause to the state court will be denied.

## COOPER v. PRESTON et al.

(Circuit Court, N. D. California. December 3, 1900.)

No. 12,921.

1. EQUITY—PLEA TO JURISDICTION—FORM.
   A plea to the jurisdiction of a federal court in a suit in equity is not objectionable because it alleges more than one ground of objection to the jurisdiction.

2. JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE—SUIT TO QUIET TITLE.
   Where disclaimers filed by some of a number of defendants in a suit to quiet title in a federal court are not directed to any particular subdivision of the tract of land described in the bill, but are of any right, title, or interest in any part of such tract, they do not reduce the value of the matter in dispute, which remains, as between the complainant and the remaining defendants, the value of the land involved.[1]

3. SAME.
   In a suit in a federal court against a number of defendants to quiet title to a tract of land alleged to be of the jurisdictional value, to sustain the jurisdiction of the court it must appear from the bill that all the defendants have a privity of interest, derived from a common source of title, or that the separate claim of each defendant is of the jurisdictional amount, since, where the defendants claim separately, the suit is severable, and the requisite amount must be involved in each separate controversy.

In Equity. Suit to quiet title. On pleas to jurisdiction.

Freeman & Bates, for complainant.
Carter P. Pomeroy, for certain defendants.

MORROW, Circuit Judge. This is an action to quiet title to certain real property situated in Butte county, Cal. The complainant alleges that he is a resident of the state of California, but a subject of the queen of England; that each and all of the defendants reside within the Northern district of California, and are citizens of said state; that complainant is the owner in fee and entitled to the possession of certain real property in this state, the value of which exceeds the sum of $2,000; that each of the defendants claims some title to or interest in the property which casts a cloud upon complainant's title. It is alleged that such claim is without right, and complainant prays for a decree adjudging his title to be good and valid, and quieting his title against all claims of the defendants. Neither complainant nor defendants have possession of the property in controversy. Many of the defendants have filed pleas to the jurisdiction of this court, alleging that a number of the defendants are aliens, and complainant, being also an alien, is, therefore, barred from suing such defendants in this court; that as to the remaining defendants, though the requisite diversity of citizenship exists, their claims to the land in controversy are separate and distinct each

[1] Jurisdiction of circuit courts as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.

from the other, not one of such separate tracts of land being of the value of $2,000, and therefore complainant's suit as against each of the defendants is without the jurisdiction of this court. It is objected to these pleas that they are bad in form, because they are not confined to one point, and present more than one defense. This objection cannot be sustained. The averments of the pleas are all directed to the one objection that the court is without jurisdiction. Several of the alien defendants have filed disclaimers, and the question for consideration is practically narrowed to the determination (1) whether the complainant's suit, as against the remaining defendants, involves a matter in dispute the sum or value of which exceeds $2,000, exclusive of interest and costs; and (2) whether the controversy is properly divisible into separate actions against the respective defendants,—if so, whether the jurisdictional amount is involved in each of such actions. The disclaimers of the alien defendants are not directed to specific subdivisions of the tract of land described in the bill of complaint, but to any right, title, or interest therein, either legal or equitable. These disclaimers do not, therefore, reduce the value of the matter in dispute, which remains, as before, the tract of land described in the bill of complaint, and which, it is alleged, exceeds in value the sum of $2,000.

The remaining question is whether the controversy appears to be divisible into separate causes of action against the several defendants. In Bates v. Carpentier (C. C.) 98 Fed. 452, this court held that a suit to quiet title, brought against a number of defendants, for the purpose of obtaining an adjudication of all claims adverse to complainant which may exist in favor of any of the defendants, is severable as to each defendant where no averment is made that defendants claim title to the realty jointly, or are subject to any joint liability in respect to the subject-matter of the action. In the case at bar no allegation is found in the bill that the defendants claim under a common source of title, or that any privity of interest exists between them, as against the plaintiff. In the absence of such an averment, complainant cannot maintain the jurisdiction of this court upon the allegation that the value of the entire matter in controversy is of the jurisdictional amount. The rule is that, where there are several defendants in an action in a United States circuit court, it must appear affirmatively in the bill of complaint that each defendant is liable to be sued. In other words, where the controversy relates to a piece of property of the jurisdictional value, it must appear that all the defendants have a privity of interest derived from a common source of title, or it must appear that the separate claim of each defendant is of the jurisdictional amount. Stemmler v. McNeill (C. C.) 102 Fed. 660, and cases there cited. In the present case the bill of complaint does not conform to this rule. The pleas must therefore be sustained, and it is so ordered.

## LEE v. PENNSYLVANIA TRACTION CO. et al.

(Circuit Court, E. D. Pennsylvania. December 24, 1900.)

No. 32, October Sessions, 1896.

1. STREET RAILROADS—FORECLOSURE OF MORTGAGE—PREFERENTIAL DEBTS FOR SUPPLIES.

A claim against a street-railroad company for the purchase price of rail joints and track bolts furnished to the company within six months before it went into the hands of a receiver in foreclosure proceedings, which is so moderate in amount as to show that the supplies were purchased for repairs and not for reconstruction, is one for day by day supplies, necessary to keep the road in operation as a going concern, and to maintain its earning capacity and preserve its franchise, and is entitled to preference of payment over the mortgage debt from the earnings of the receivership or the proceeds of the property when sold, independently of any question of the diversion of income.

2. RAILROADS—INSOLVENCY—PREFERENTIAL DEBTS FOR SUPPLIES.

When a railroad corporation becomes in fact insolvent, one result is to make the mortgage bondholders the real owners of the property, and to charge them with the obligation to keep it a going concern, that it may continue to discharge its duties to the public and the value of the security may be maintained. Hence, so long as they permit the insolvent company to remain in control, it may properly be regarded as their agent for that purpose, and to contract for the necessary day by day supplies, to be paid for from the current income, or, if necessary, from the proceeds of the property when sold, in preference to the mortgage debt. But such implied authority does not go beyond the obligation to preserve the property and maintain it in operation, and for that reason the courts recognize a practical distinction between claims for supplies necessary for that purpose, and those for supplies or materials purchased for reconstruction or to make substantial betterments.

In Equity. On exceptions to master's report.

Benjamin H. Lowry and Lynch, Day & Day, for exceptions.
Samuel Dickson, opposed.

J. B. McPHERSON, District Judge. The Pennsylvania Traction Company, which leased and operated a system of electric railways in and around the city of Lancaster, went into the hands of a receiver a few years ago, and its property and franchises were afterwards sold under foreclosure. The decree confirming the sale required the purchaser to pay "any unpaid indebtedness or liability contracted or incurred by the defendant, the Pennsylvania Traction Company, in the operation of the mortgaged property prior to the appointment of the receiver, and which is prior in lien or superior in equity" to the mortgages under which the sale was made, except such indebtedness or liabilities as should be paid or satisfied out of assets or the proceeds of assets. No assets or proceeds of assets were applied to the payment of the Cleveland Axle Manufacturing Company's claim, which was for rail joints and track bolts furnished to the traction company within six months before the appointment of the receiver; and accordingly the axle company asked the master, by whom the proceeds of sale were distributed, to declare that its claim was entitled to a preference out of the corpus of the property, and to recommend a decree requiring the purchasers to pay the

claim in full. The master denied the claimant's right to be thus preferred, and the correctness of his ruling is the point for decision.

It is found as a fact by the master that the claim was for "supplies furnished to the Pennsylvania Traction Company, necessary for the operation of its railways, within six months prior to the receivership"; and it also appears from the report that:

"There is no evidence of any diversion of income by the Pennsylvania Traction Company, prior to the receivership, to betterments of the property or interest on the bonds. During the receivership the receiver did not receive sufficient income to operate the road and pay all the receiver's certificates issued therefor. The proceeds of the foreclosure sale of the mortgaged properties were not sufficient to pay the taxes due; the proceeds of the sale of the property included in the mortgage of January 5, 1894, being $5,000, and the taxes alone, $20,041.16, and [the proceeds of the sale of the property] included in the mortgage of April 5, 1894, being $25,000, and the taxes, $20,041.16; receiver's certificates otherwise unpaid, $3,933.13; and fees of counsel of trustee and receiver in Philadelphia and Lancaster, $8,125."

From these facts it is clear that the equity of the axle company cannot be put upon the ground that income had been diverted from the current expense fund, out of which fund the creditor might have reasonably expected to be paid, and had been used for the benefit of the bondholders, either in bettering the traction company's property, or in paying interest on the bonds. The class of cases of which Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, is the leading example, do not afford the claimant any aid, and, indeed, they are not appealed to for support. The claimant's argument is that the supplies in question were day by day supplies, necessary for the operation of the road, and that the principle on which the equity to be preferred may safely rest is this: Such supplies were necessary to keep the property a going concern and to maintain its earning capacity, without which the security of the bondholders would have been of comparatively little value. I think the argument is sound. Without frequent supplies such as these, a railway in active operation would soon fall into disrepair and decay, its business as a carrier would be seriously impaired, its capacity to earn profits would be greatly diminished, and the value of its franchise—which is, after all, the principal asset of this class of corporations—would be much depreciated, leaving to the bondholders little more than the cars, rails, power house, and appliances. The material property is worth little by itself, apart from its connection with the franchise.

These reasons, I think, need not be much elaborated. To my mind they are persuasive of the claimant's equity; and I see no serious difficulty in the objection that similar reasons may be given for allowing a preference to debts created for reconstructing the track, or rebuilding the power house, or restocking the road with cars. Logically, I concede that little essential difference may exist between an outlay for 20,000 tons of steel rails to replace a worn-out track, and an outlay for a ton or two of bolts and nuts to keep a good track in repair, but practically there is much difference, when the rights of prior mortgage creditors come to be considered; and the courts have stood fast by the practical distinction. They have not permitted such claims to take precedence of a prior mort-

gage, if the claims have been so large that reconstruction, and not repair, was evidently the object, or if the supplies were furnished at so remote a time that they could not be fairly regarded as having been sold in reliance on the current expense fund for payment. These practical rules are to be applied in each case with due regard to the particular circumstances in evidence, and a claim may be properly preferred if the supplies have been recently furnished, and if the quantity is small enough to show that the transaction was a mere preservation of the earning capacity of the road,—merely had in view the road as a going concern,—and was not in reality a partial restoration or reconstruction of the plant.

Perhaps the reason for allowing a preference to claims for repairs, and disallowing a preference to claims for reconstruction, may be stated as follows: When a railway corporation becomes insolvent, which is usually a considerable time before the appointment of a receiver, one result of the insolvency is to make the mortgage bondholders the real owners of the property. Legally, of course, there has been no change of title, but essentially the property now belongs to the bondholders. Save in rare instances, they afterwards acquire the legal title by a foreclosure sale; but, even if other purchasers ultimately buy the property, insolvency puts the substantial ownership where the property or its proceeds must finally go. This being so, it is the bondholders' railway, rather than the corporation's, that is now to be maintained, so that it may continue to discharge its duty to the public, and so, also, that its value as a security for the bonds may not be impaired. To maintain the road in efficiency would be an obligation falling immediately on the bondholders, if the insolvency of the corporation was immediately followed by the consequence that follows ultimately in one form or another, namely, the transfer of the property to the bondholders. If the transfer were formally made, it would be necessary for the bondholders to pay out their own money for necessary day by day supplies; and therefore—the transfer being made in substance, although not in form—it is just to require them to pay for such supplies as have been furnished by others in their stead. I do not mean that a volunteer would acquire an enforceable claim by furnishing supplies. Such a situation is not likely to arise, and does not arise in the ordinary case, where supplies are ordered by the corporation. The insolvent company may properly be regarded as the agent of the bondholders in keeping the railway a going concern, and to this end in contracting for the needful material. Especially may it seem proper thus to regard the corporation, if it is considered that insolvency gives the bondholders the right to step in and assert their claim upon the property, and therefore that the failure thus to intervene justifies the inference that they were content to have the corporation go on and act on their behalf.

I think, also, that to look upon the bondholders as the real owners from the time when insolvency sets in furnishes a sufficient reason for denying a preference to creditors who have gone beyond the mere keeping up of the property, and have furnished the means to reconstruct it in whole or in some substantial part. This is going

too far in dealing with the property of another. It is evidently not mere preservation, which may be a permissible act, but is substitution, which may be against the owner's will, and may thus compel him to take what he does not want.

I think these views find support in Miltenberger v. Railroad Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117, and the class of cases to which it belongs. To quote a passage from page 311, 106 U. S., page 162, 1 Sup. Ct., and page 127, 27 L. Ed., that has since been several times repeated:

"Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property for the receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, prima facie, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid tickets and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of nonpayment,—the general consequence involving largely, also, the interests and accommodation of travel and traffic,—may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien."

The decisions in Finance Co. v. Charleston, C. & C. R. Co., 10 C. C. A. 323, 62 Fed. 205, Wood v. Railroad Co. (C. C.) 70 Fed. 741, and Maryland Steel Co. v. Gettysburg Electric R. Co. (C. C.) 99 Fed. 150, seems also to be pertinent. In Finance Co. v. Charleston, C. & C. R. Co., Mr. Chief Justice Fuller delivered the opinion for the circuit court of appeals of the Fourth circuit, and allowed out of the corpus of the estate an unpaid balance due to certain claims upon accounts accruing before the receiver was appointed. In the course of the opinion he used this language:

"It must be regarded as settled that a court of equity may make it a condition of the issue of an order for the appointing of a receiver of a railroad company that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver, or from the proceeds of sale; that preferential payments may be directed of unpaid debts for operating expenses accrued within 90 days, and of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, in view of the interests both of the property and of the public that the property may be preserved and disposed of as a going concern, and the company's public duties discharged; and that such indebtedness may be given priority, notwithstanding there may have been no diversion of income, or that the order for payment was not made at the time and as a condition of the receiver's appointment, the necessity and propriety of making it depending upon the facts and circumstances of the particular case, and the character of the claims. [Citing cases.] Of course, the discretion to enter such orders should be exercised with great care; but as late as Thomas v. Car Co., 149 U. S. 95, 110, 13 Sup. Ct. 824, 37 L. Ed. 663, the supreme court quoted the remarks upon the doctrine and its proper application in Miltenberger v.

Railroad Co., supra, with approval, although, as observed by this court in Bound v. Railroad Co., 58 Fed. 473, 7 C. C. A. 322, the tendency of that case was to narrow the limits within which an equity court should confine itself in making such allowances."

In Wood v. Railroad Co.,—a case in the circuit court for the district of Massachusetts,—Judge Colt allowed a claim for coupling links, pins, and tank steel furnished within a few months before the appointment of the receiver; and, while the allowance there was not out of the corpus of the estate, the line of argument followed by the opinion supports the conclusion to which I have come in the present case, as may be seen by one or two quotations. For example, in his summary of the cases upon the general subject, he says, on page 743:

"In respect to the payment by receivers of a railroad of pre-existing current debts, as constituting a preference over outstanding mortgage liens, out of current income coming into their hands, or even out of the proceeds of the sale of the property under foreclosure, it may be observed: * * * Sixth, that, independently of the question of diversion [of current income], debts may be preferred which are incurred for labor and supplies necessary to keep the road a going concern from day to day, or which are the outcome of indispensable business relations, a continuance of which involves the interests of the public and the traffic of the road."

And upon page 746 he concludes as follows:

"In Thomas v. Car Co., supra, Mr. Justice Shiras, speaking for the court, observed: 'The case of a corporation for the manufacture and sale of cars, dealing with a railroad company whose road is subject to a mortgage securing outstanding bonds, is very different from that of workmen and employés, or those who furnish from day to day supplies necessary for the maintenance of the railroad.' There is no allegation in this petition of a diversion of current income for the benefit of the mortgagees, and therefore this claim, as now presented, does not come within the principle of diversion laid down in Fosdick v. Schall, supra; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; and St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co., 125 U. S. 658, 8 Sup. Ct. 1011, 31 L. Ed. 832. It does appear, however, that the materials purchased were coupling links and pins and tank steel, furnished from time to time between September 22 and December 8, 1893; and the petition alleges 'that said supplies were necessary to the operation from day to day of said railroad.' I am of opinion that the petition states a case which brings this claim within that limited class of debts incurred for labor and supplies necessary to keep the road a going concern from day to day, and that it should be held to possess a superior equity over mortgage liens, upon the principle recognized in Miltenberger v. Railroad Co., supra; Finance Co. v. Charleston, C. & C. R. Co., supra; Bound v. Railroad Co., supra; Thomas v. Car Co., supra; Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419."

The case of Maryland Steel Co. v. Gettysburg Electric R. Co. was decided in this circuit by Judge Dallas, and he there allowed out of the corpus of the property a claim for printing tickets before the appointment of the receiver, saying:

"I do not think that the tickets in question were so manifestly superfluous and inappropriate to the business of the railway company as to justify the disallowance of the debt incurred in having them printed. I regard these as having been day by day supplies."

It does not appear from the opinion that the tickets were printed before the receiver was appointed, but I have examined the master's report, and find that such was the fact.

Opposed to the doctrine of these cases is the decision in International Trust Co. v. T. B. Townsend Brick & Contracting Co., 95 Fed. 850, 37 C. C. A. 396,—a decision of the circuit court of appeals for the Sixth circuit, which, upon page 860, 95 Fed., and page 406, 37 C. C. A., lays down the following propositions:

"But, if there has been no diversion of the current income, either before or after the appointment of the receiver, and no surplus income during the receivership, out of which unpaid debts of the income can be paid, upon what theory can the proceeds of a mortgage foreclosure sale be applied to the payment of such debts against the objection of mortgage creditors? If nothing has been diverted from the current-debt fund,—if there has been no augmentation of the fund applicable primarily to the satisfaction of the mortgage creditors,—is there any just or equitable reason for requiring a restoration where nothing has been improperly received? We think in such cases the court has no power to displace contract rights; and neither Fosdick v. Schall, nor any of the cases which have followed it, afford any sufficient authority, when rightly understood, in opposition to this view. These debts of the income are an equitable charge only upon the current income of the mortgaged railroad. If such debts remain unpaid when the railroad passes into the possession of a court of equity, this equitable charge is continued, and attaches to the surplus income arising under the receivership. If this surplus income is not applied to the payment of debts to which it is primarily devoted, but is expended for the benefit of the mortgagee, as in payment of interest, or in the purchase of property which passes under the mortgage, or in betterment of the railroad itself, an equity arises, as a consequence of such diversion, which will justify a court of equity in requiring the mortgagees to restore to the income that which has been taken away. The power of the court to displace mortgage liens in favor of such unsecured debts of the mortgagor depends upon the fact that the current income, either before or after the receivership, has been diverted to the benefit of the displaced mortgage, and the extent to which the corpus of the mortgaged property can be called upon to pay such debts of the income is limited by the amount of the diversion."

The opinion, which is by Judge Lurton, and displays his usual clearness of expression and vigor of argument, has not, however, convinced me that these conclusions are altogether accurate. It may be desirable—I express no opinion upon that point—that the existing rules should be modified in the direction indicated by him, but at present I think the weight of authority is against the view contained in the quotation just made.

No objection was made at the argument that the rule now under consideration should not be applied to the traction company because it did not possess the power of eminent domain (Bound v. Railroad Co. [C. C.] 50 Fed. 314), and therefore I shall not pass upon that question.

I am accordingly of opinion that the claim is superior in equity to the mortgages under which the purchasers' title is derived, and that a decree should be entered directing the purchasers to pay the exceptant's claim.

## GRAND TRUNK RY. CO. v. CENTRAL VERMONT R. CO.

(Circuit Court, D. Vermont. November 27, 1900.)

1. RAILROADS—FORECLOSURE OF MORTGAGE—PREFERRED CLAIMS.

A decree confirming the sale of railroad property in a foreclosure suit to a reorganization committee of bondholders provided that the purchaser should pay such further portions of the bid in cash as should be directed by the court from time to time to meet such claims as should be adjudged superior to the mortgage. The purchaser received all residue of funds belonging to the mortgagor. The reorganization agreement provided for payment of all defaulted interest on the bonds participating by bonds of the new company. Petitioner held coupons from bonds deposited under the reorganization agreement, which matured prior to the company's default, and the money to pay them had been properly deposited, but, because they were not presented, had been used in payment of subsequent coupons; the effect being to swell the residue, which went to the new company. *Held*, that such coupons did not represent "defaulted" interest, within the terms of the reorganization agreement, but that petitioner had acquired a right to the money deposited superior to the mortgage, and was entitled, under the decree, to payment from the new company.

2. SAME—INTEREST.

Where coupons from railroad bonds, not bearing interest by their terms, were not presented for payment at the designated place, where the money was deposited to meet them, and the residue of the fund subsequently passed to a purchaser of the property at foreclosure sale, the holder is not entitled to recover interest from such purchaser.

In Equity. Suit for foreclosure of railroad mortgage. On petition for allowance of preferred claim against the purchaser of the property.

Hollis R. Bailey, for petitioner.
Charles M. Wilds, for petitionee.

WHEELER, District Judge. The first mortgage of the defendant's road was foreclosed in this suit by the American Loan & Trust Company as trustee. In a preliminary agreement of reorganization, it was provided that the bondholders should "receive new bonds for the face of their bonds in cash, as interest from February 1, 1898, to the date of the new bonds, and stock in the new company to the amount of eight per cent. on the face of their old bonds for defaulted interest." There was a decree of foreclosure, and a sale of the property thereunder for $7,000,000. At the foot of the final decree confirming the sale and conveyance it was provided that the grantee or grantees named in such deed, or their assigns, as purchasers, shall, as provided in said decree entered January 27, 1899, also from time to time hereafter, pay such further portions of said bid and purchase price in cash as the court may direct, in order to meet the expenses of foreclosure and sale, and such claims as may, in accordance with the terms of said decree entered January 27, 1899, be allowed a preference over the mortgages thereby foreclosed, or either of them, and be ordered by the court to be paid, and the distributive share due upon all bonds and coupons not deposited in payment of the purchase price. Deposits were made with the American Loan & Trust Company for the payment of interest coupons to, but not including,

those of January 1, 1897. Edward A. Coffin is the owner and holder of prior coupons from bonds deposited under the decree, and by petition asks, under this provision at the foot of the decree, that they be ordered paid. As the bonds from which these coupons came were deposited under the reorganization agreement, if the 8 per cent. of the face of the bonds for defaulted interest included these interest coupons the petitioner would have to be satisfied with that provision. The interest represented by these coupons does not, however, appear to be "defaulted" interest. The money to pay it was deposited according to the bond and mortgage. There was no default of the mortgagor, but this money was left by the holders of the bonds from which these coupons came where it was to be, and was deposited. The 8 per cent. of the face of the bonds is made up of the interest falling due January and July 1, 1897, and January 1, 1898, with one month additional arising from a change of the day of payment. There is no room for these coupons there. If the provision for paying coupons in stock of the new company had been made elastic to cover unpaid coupons, these would, of course, have been brought in; but as it was made arbitrary, allowing no more for those having prior unpaid coupons than for those having only the last three, it appears more clear that only those technically defaulted were intended to be included. The right of the petitioner, as owner and holder of these coupons, to present relief, grows out of the right to the money deposited for their payment, rather than out of the right to share in the proceeds of the sale of the mortgaged property; and that right would not be affected by the distribution of the avails of the sale, unless somehow expressly included. These coupons were not paid from the money deposited for their payment, because they were not presented for payment till after the fund was exhausted by payment of subsequent coupons. This right to the money had become superior to the mortgage. By the agreement and the decree, all residues went to the new company, the Central Vermont Railway Company, the petitionee, and that company should now be charged with the payment of this money which went to swell this residue.

The petitioner asks interest on the coupons from the times when they respectively became payable. They are themselves interest on the bonds, and do not, by their terms, carry interest. As they were not presented for payment where they were payable and the money was ready, no damages arose for nonfulfillment of the contract to pay them, or from detention of the money, and, as no money for paying interest passed to the petitionee, no ground for charging it with interest appears. The petitioner appears to hold and own coupons numbered 1 to 25, inclusive, detached from bonds numbered 2,485 to 2,494, inclusive, being bonds of the denomination of $100 each, $625; coupons numbered 14 to 26, inclusive, detached from bonds numbered 2,411, 3,490, and 3,703, of the denomination of $1,000 each, $975; coupons numbered 14 to 26, inclusive, detached from bonds numbered 185 and 750, of the denomination of $500 each, $325. Let an order be entered for the payment of these coupons, amounting to $1,925, and disallowing interest thereon.

HEINE SAFETY-BOILER CO. v. FRANCIS BROS. & JELLETT.

FRANCIS BROS. & JELLETT v. HEINE SAFETY-BOILER CO.

(Circuit Court, E. D. Pennsylvania. December 21, 1900.)

Nos. 1 and 44, April, 1900.

SALES—CONSTRUCTION OF CONTRACT TO FURNISH BOILERS—MODIFICATION OF SPECIFICATIONS.

Where a bidder for the furnishing of boilers required by a contract for the construction of a building, instead of bidding upon the specifications contained in such contract, submitted a proposition and specifications of its own, which were, at its instance, attached to the contract subsequently made between such bidder and the general contractor as modifying the specifications of the original contract, a guaranty contained in such proposition as to evaporating capacity and the tests to be met must be construed as superseding the provisions of the original specifications relating to the same subjects, rather than as having been voluntarily offered by the bidder as additional thereto.

On Motions for New Trial.

J. J. De Kinder and J. H. McNeal, for Heine Safety-Boiler Co.
Frank P. Prichard, for Francis Bros. & Jellett.

DALLAS, Circuit Judge. The first stated action was brought to recover the contract price of two boilers; the other for the recovery of damages for the alleged nonconformity of those boilers with the requirements of the contract under which they were furnished. The two cases were tried together, and in each there was a verdict for the Heine Safety-Boiler Company. Francis Bros. & Jellett have filed separate motions for new trial, but, as the controlling question is the same in both cases, these motions may be disposed of in a single opinion.

Francis Bros. & Jellett had contracted to do certain of the work required in the reconstruction of the Rittenhouse Building, on Arch street, Philadelphia. Their contract provided that they should furnish two water-tube boilers. They accordingly invited bids from several boiler makers, including the Heine Company, to whom they wrote as follows:

"Philadelphia, April 1st, 1899.

"Heine Safety-Boiler Works, Bourse Building, Philadelphia—Gentlemen: Please name us your best figures for furnishing and erecting, together with connections to stack, the boilers called for in the Rittenhouse Building, N. W. Cor. 7th & Arch St. Your bid, to receive our consideration, must reach us not later than April 11th. Plans and specifications can be seen at our drawing room, N. W. Cor. Marshall & Willow Sts.

"Yours, very truly, Francis Bros. & Jellett, Incorporated,
"S. A. Jellett, Mgr."

The plans and specifications referred to in this letter were those which accompanied the contract between Francis Bros. & Jellett and the owner of the property. They were seen by the Heine Company, but they, instead of simply bidding thereon, addressed a letter to Francis Bros. & Jellett, dated April 10, 1899, in which they said:

"We inclose you herewith detail specifications and proposition covering the two Heine safety boilers to be erected in the Rittenhouse Building, 7th & Arch Streets, Philadelphia. * * *"

After the receipt by them of this letter and the inclosure it mentioned, Francis Bros. & Jellett sent a contract, executed by themselves, to the Heine Safety-Boiler Company, for execution by them. To this contract specifications were annexed, which were the same as those of the contract between the owner of the property and Francis Bros. & Jellett; and the first two paragraphs of the contract itself were as follows:

"This agreement, entered into this first day of May, A. D. eighteen hundred and ninety-nine, by and between the Heine Boiler Company, of St. Louis, Missouri, party of the first part, and Francis Brothers & Jellett, Incorporated, a corporation of the state of Pennsylvania, party of the second part. witnesseth: That for and in consideration of the payments and covenants herein mentioned to be made and performed by the said party of the second part the said party of the first part doth hereby agree and covenant to furnish all materials and apparatus for, and to build, construct, and finish, complete, ready for use, two (2) water-tube boilers, with their setting, damper regulator, etc., called for in specifications prepared by Francis Brothers & Jellett, Incorporated, consulting engineers, dated March 15th, 1899, to be erected in the Rittenhouse Building, 707 & 709 Arch St., Philadelphia. The whole of said work is to be erected, constructed, and finished in conformity with the plans and specifications above referred to; both plans and specifications being understood as forming part of this agreement. All work called for by these plans and specifications is to be erected under the direction and supervision of Mr. Oliver Earnshaw, engineer for Mr. Henry C. Lea, owner of the building."

After the word "agreement," immediately preceding the last sentence contained in the above extract, the Heine Company inserted an asterisk, and at the foot of the contract they placed another, and there added these words: "Except the changes in details of construction covered by our proposition and specifications dated 4/10/99, and attached hereto." They then attached the "specifications and proposition" which had been inclosed with their letter of April 10, 1899, signed the contract as thus altered, and returned it to Francis Bros. & Jellett, who thereupon, under date of May 9, 1899, wrote to the Heine Company, saying:

"We are in receipt of contract for boilers, Rittenhouse Building, and note that you have made certain additions. * * * The second one, just above the signature, we would like to know what you mean,—'Except the changes in detail and construction covered by our proposition and specifications dated 4/10/99, attached hereto.' Please specify what these changes 'in detail and construction' are, so that we may know what you mean by this section. Let us have this at once, and oblige. You will recollect that our signature was attached to this contract before these changes were made, and they are not binding on us unless we are satisfied after getting this detail from you."

To this letter the Heine Company replied as follows:

"5/10/99.

"Messrs. Francis Bros. & Jellett, 704 Arch Street, Philadelphia, Pa.—Dear Sirs: Answering your favor of the 9th, in which you ask what we mean by 'except the changes in details and construction covered by our proposition and specifications dated 4/10/99, attached hereto,' would say that we refer simply to the minor details in which the construction of the Heine boiler differs from your general specifications, and these details are set forth in our specification sheet dated 4/10/99. For instance, especially in regard to

the testing and inspecting of the metal, the punching and reaming of the rivet and tube holes, and the caulking of the seams; also the guaranties which we make, and the amount of work which we include in our bid. This proposition of ours of the 4/10, with the modified price, is what you accepted, and naturally it should bear a prominent part in the total contract. Trusting this is satisfactory to you, we remain,

"Very truly yours, Heine Safety-Boiler Co."

To this letter Francis Bros. & Jellett made no reply, and under this state of the contractual relations between the parties, the Heine Company did put two boilers into the Rittenhouse Building.

I instructed the jury that a certain part of the specifications which Francis Bros. & Jellett had annexed to the contract was wholly superseded by the specifications which the Heine Company afterwards attached thereto. The part of the Francis Bros. & Jellett specification which, with the related provision respecting "tests," was held to have been superseded, is as follows:

"Boilers. There will be two (2) new boilers erected in boiler room of new building, set singly as shown; each boiler having a capacity of one hundred and forty (140) nominal horse power, and must be capable of evaporating forty-two hundred (4,200) pounds of water from and at 212 degrees Fahrenheit per hour, with ordinary firing."

The part of the Heine Company specification which was held to have superseded the foregoing is as follows:

"Either of these boilers will, when evaporating 4,200 pounds of water from and at 212 degrees Fahrenheit per hour, evaporate 9.0 pounds of water per pound of dry, newly-mined red ash anthracite pea or buckwheat coal, containing not more than 15% refuse (10.5 lbs. of water per pound of combustible); and when using the same coal, and with ¾ inch draft at boiler damper, either boiler may be forced to evaporate 5,500 pounds of water per hour from and at 212 degrees F. continuously, and at the same time not exceed 1% moisture in the steam at boiler valves. It is understood by us that the tests made to determine these guaranties are to be made by the engineers under our direction; the engineers' fees being paid by the purchaser; we simply furnishing the necessary coal and handling the ashes," etc.

Upon the hearing of the present motions I was in doubt as to the correctness of the ruling which has just been stated, but, having since carefully considered the subject with the aid afforded by the arguments of counsel, I have finally reached the conclusion that it was right. The antecedent negotiations of the parties do not, of course, constitute a part of the contract; but, as showing the situation of affairs when it was actually closed by the receipt, without answer, of Heine Company's letter of May 10, 1899, it is proper, and desirable, I think, that the circumstances of the case should, from the beginning, be again and more particularly referred to. Francis Bros. & Jellett had contracted with a third party to furnish two water-tube boilers in accordance with certain specifications. They invited the Heine Company to bid, and informed them that plans and specifications could be seen at their drawing room. The specifications referred to stated that bidders "must carefully examine the drawings and specifications when bidding, and, if any change is deemed necessary in the details of the specification or in the layout on the plans to enable them to comply with the requirements of this specification, they must promptly notify the engineers at the time

of making their proposal." It also stated that bids were asked on six "makes of boilers," including "Heine boilers." The Heine Company examined this specification, but did not accept it. Their proposal was an independent one. It was "to furnish * * * two Heine patent safety boilers of (see guaranty) horse power each, * * * as per the following specifications," which included the guaranty clause heretofore quoted, and one in these words: "Terms. Cash on demonstration of guaranties, but tests to be made 30 days from installation." It is obvious that the contract which Francis Bros. & Jellett sent to the Heine Company did not conform with the proposal of that company. Their declination to sign it without change was, therefore, certainly not extraordinary. As they said in their letter of May 10, 1899, this proposition of theirs was what had been accepted, "and naturally it should bear a prominent part in the total contract." Accordingly, they altered the instrument which had been sent to them in the manner which has been explained. They attached their own proposition and specifications, and excepted the changes in details of construction which they covered from and out of the specifications originally annexed; and, if the minds of the parties had met at this point, while there could have been no doubt that, as to the difference in details of construction, the Heine specifications would have been controlling, the question whether their guaranty should also not be regarded as the only operative one would not have been free from difficulty; for, although the added clause did not mention that guaranty, yet it formed part of the writing to which the clause referred, and it might not unreasonably have been inferred that no guaranty other than that which especially related to the particular "make of boilers" and to the details of construction specified could have been understood to be applicable. But, as Francis Bros. & Jellett correctly said, no contract as yet existed; and in answer to their inquiry as to what was meant by the change which the Heine Company had made they were informed, among other things, "also the guaranties which we make." Here we have, in effect, the statement that the guaranties which the Heine Company make are those contained in the specifications which they had themselves attached to the contract, and upon this statement the contract, as respects the point under consideration, was closed. What, then, with reference to the circumstances of the case, is the natural meaning of the words "the guaranties which we make"? To me it seems plain that the guaranties referred to were those of the Heine Company's specifications alone, to the exclusion of those contained in the Francis Bros. & Jellett specifications; and that the sense would not be varied if, for the phrase in question, this language were substituted: "We make the guaranties set out in our specifications, and not those which are embodied in yours." Therefore I cannot sustain the contention that this part of the explanatory letter should not be permitted to nullify any part of the original specifications with which it is not necessarily inconsistent. So to decide would be to hold that the Heine Company intended to voluntarily add an undertaking on their part to those which were contained in the contract as at first written, and such intention cannot, I think,

reasonably be ascribed to them. But it is further contended that the reference to guaranties in the final letter of the Heine Company cannot be related to the first paragraph of the section headed "Boilers" in the Francis Bros. & Jellett specifications, because, as is claimed, that particular paragraph contained no guaranties. It is argued that the word "guaranty" is not synonymous with the word "agreement," but ordinarily signifies such an undertaking as to some fact or performance as is enforceable as well after as before delivery and acceptance, and does not include matters of description, or conditions which would be waived by acceptance of the goods. It may be conceded that the distinction here pointed out is technically, and when abstractly considered, correct; that a guaranty, where the word is used in the sense of "warranty" (2 Pars. Cont. 3), is an express or implied statement of something which a party undertakes shall be a part of a contract, and, though part of the contract, collateral to the express object of it"; and that "selling a particular thing by its proper description" cannot with accuracy be said to create a warranty. Benj. Sales, § 600. But see Pars. Cont. 582. It must be borne in mind, however, that we are dealing with the business correspondence of business men, and that attention should be directed, not to legal refinements respecting the words employed, but to the ascertainment of "the substantial intent of the parties, which is the fundamental rule in the construction of all agreements." Canal Co. v. Hill, 15 Wall. 100, 21 L. Ed. 64. The word "guaranty" is not to be taken in "absolute literality." The question is, not what is the technical meaning of that word? but what did the parties intend it to refer to? Reed v. Insurance Co., 95 U. S. 23–31, 24 L. Ed. 348. "What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given" or may not have given, to any particular clause, "and not alone to any particular provision it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." Heryford v. Davis, 102 U. S. 243, 26 L. Ed. 160; Rainey v. Hogsett, 40 C. C. A. 335, 100 Fed. 207. The boilers clause of the Francis Bros. & Jellett specification and the guaranty of the Heine Company specifications relate, unquestionably, to the same subject, namely, to evaporating capability, and their terms are, to some extent, the same. The first paragraph of the boilers clause provides that each boiler "must be capable of evaporating 4,200 pounds of water from and at 212 degrees Fahrenheit per hour, with ordinary firing," and in its second paragraph it is said that "they [the contractors] must also guaranty the number of pounds of water the boilers will evaporate per hour per pound of dry red ash anthracite pea coal containing not over sixteen per cent. refuse, and when developing their normal horse power." The language of the Heine Company's guaranty is: "Either of these boilers will, when evaporating 4,200 pounds of water from and at 212 degrees F. per hour, evaporate 9.0 pounds of water per pound of dry, newly-mined red ash anthracite pea or buckwheat coal, containing not more than

fifteen per cent. refuse (10.5 pounds of water per pound of combustible); and when using the same coal, and with ¾ inch draft at boiler damper, either boiler may be forced to evaporate 5,500 pounds of water per hour from and at 212 degrees F. continuously, and at the same time not exceed one per cent. moisture in the steam at boiler valves." That the Heine Company, in referring, as they did, to these guaranties of their own specifications, intended to substitute them for that part of the Francis Bros. & Jellett specification which has been quoted above, seems to me to be evident by comparison of the one with the other; and I cannot assent to the proposition that the only guaranties of the original specifications are to be found in that part of the boiler clause which follows the words "must also guaranty," and in the other separate and distinct provision in which the word "guaranty" is used, namely, the "contractor must also guaranty to keep the boilers in repair, at his own expense, for a period of one year," etc. This latter provision has no connection with the subject with which the Heine guaranty is concerned; and the presence of the word "also" in the phrase "they must also guaranty," as it occurs in the boiler clause, plainly indicates that the undertakings which preceded as well as those which followed it were regarded as guaranties. It is, however, especially insisted that the words, "each boiler having a capacity of 140 nominal horse power," as included in that clause, were descriptive merely of the thing contracted for, and that, therefore, that part of it, at least, was unaffected by the Heine guaranty. The distinction thus suggested is ingenuous and plausible, but is, I think, too subtle to have entered the minds of the parties; and, indeed, it is clear that they had in fact no thought of disconnecting this particular portion of a general provision for "capacity" from that which, in the same sentence, immediately follows (Heryford v. David, supra); for the Heine Company's proposal, which was to furnish "two Heine patent safety boilers of (see guaranty) horse power each," shows that the whole subject of horse power was referred to their guaranty, and was intended to be covered by it.

I agree with the learned counsel of Francis Bros. & Jellett that in doubtful cases "there is one test which, while not conclusive, is very important in construing commercial contracts, and that is, what is the construction which would best accord with the probabilities of the situation?" I am, however, unable to accept his view that the present contract should not be construed as I have construed it, because, as he thinks, such a construction involves a conclusion "absolutely inconsistent with what common sense would teach to have been the natural actions of the parties." Francis Bros. & Jellett may have failed to observe the extent to which the proposal of the Heine Company departed from the terms of the contract which Francis Bros. & Jellett had made with the owner of the property, or they may have thought that these differences would not turn out to be important; but, be this as it may, it seems to me that it would be quite as reasonable to conclude that Francis Bros. & Jellett made an improvident agreement as to suppose that the Heine Company proposed to add their accustomed guaranties to others which had been

suggested with reference to water-tube boilers generally, and which may have been wholly inappropriate to the Heine boilers.

After full consideration, I remain of the opinion which I expressed upon the trial. I still think that the guaranty clause of the Heine Company specifications wholly superseded the boilers paragraph, and the related provisions respecting "tests," in the original specifications; and my confidence in the correctness of this opinion is confirmed by the somewhat significant fact that the witnesses who were familiar with the subject repeatedly referred, in giving their testimony, to the boilers clause of the original specification, as well as to the guaranty of the Heine specifications, as guaranties. The motions for new trial are denied.

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BURT et al. v. UNION CENT. LIFE INS. CO.

(Circuit Court of Appeals, Fifth Circuit. December 4, 1900.)

No. 864.

LIFE INSURANCE—CAUSE OF DEATH—EXECUTION FOR CRIME.

An action cannot be maintained on a policy of insurance on the life of a person who was convicted by a court of competent jurisdiction of a capital crime, and was executed pursuant to its sentence, although it is alleged that such conviction was erroneous, and the deceased in fact innocent. The policy contained no provision for forfeiture in the event of execution for crime. A policy which in express terms permitted such a recovery would be one in effect insuring against the risk of a miscarriage of justice, and void as against public policy; and, for the same reason, even if a policy can be construed to cover such a risk, because not in terms excluded, it is to that extent void and unenforceable.

McCormick, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Texas.

Gardner Ruggles, for plaintiffs in error.

Geo. F. Pendexter and Geo. E. Shelley, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This suit is on a life insurance policy, and is brought by S. M. Burt and H. R. Burt, citizens of Texas, against the Union Central Life Insurance Company, a corporation chartered under the laws of Ohio. The policy was issued by the defendant on August 1, 1894, for $5,000, on the life of William E. Burt, and was payable at his death to his wife, Anna M. Burt, if living, otherwise to the executors, administrators, or assigns of the insured, within 60 days after proof of death. The annual premiums for the policy were duly paid. The policy contained no provision for forfeiture in the event that the insured should be executed under sentence of the law. On September 10, 1895, Anna M. Burt and William E. Burt assigned in writing to the plaintiffs, to whom they were indebted, a one-half interest in the policy. Anna M. Burt died intestate on July 24, 1896. She left surviving her no descendants, and her husband, William E. Burt, became entitled to any interest she had in the policy. By assignment from William E. Burt, and

as his heirs and next of kin, the plaintiffs are the sole owners of the policy. William E. Burt was indicted for the murder of Anna M. Burt, in the district court of Travis county, Tex., and was tried on November 27, 1896. In addition to the plea of not guilty, he pleaded insanity. He was found guilty by the jury of murder in the first degree, and was by the court sentenced to be hanged; and on May 27, 1898, pursuant to the sentence, he was executed by the sheriff of Travis county, Tex. These facts are all alleged in the plaintiffs' petition. The petition then avers that the insured, William E. Burt, was in fact innocent of the crime of which he was convicted. To quote the petition as abridged by the plaintiffs' counsel, "Notwithstanding said conviction and sentence, said William E. Burt did not in fact commit said murder, nor participate therein, but that, if he did, his policy was not avoided thereby, because he was insane." The defendant demurred to the petition because it appeared therefrom that the insured died at the hands of the law, under judgment of a court of competent jurisdiction. The circuit court, Judge Maxey presiding, sustained the demurrer. The plaintiffs declining to amend the petition, the case was dismissed. In this court it is assigned that the circuit court erred in sustaining the demurrer.

The industry of counsel has been able to find but one case in which a suit was brought on a life insurance policy when the insured had been tried and executed for the commission of crime. That case is Society v. Bolland, 4 Bligh (N. R.) 194, 211, and it is better known and oftener cited as the "Fauntleroy Case." It was an action by assignees in bankruptcy to collect a policy of insurance on the life of one Fauntleroy. The policy was made payable to his administrators or assigns. Fauntleroy was convicted of forgery, then a capital offense, and was executed. The lord chancellor (Lyndhurst) delivered the opinion. After stating the case, he said:

"The question, under these circumstances, is this: Whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed,—whether, under such circumstances, the parties representing him and claiming under him can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the noble lord now present, and we have both come to the conclusion that the assignees cannot maintain this suit. It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money; is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering the policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that condition went, at least, altogether void?"

This case has been cited approvingly in many text-books on insurance, and by the supreme court of the United States. Ritter v. Insurance Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693. That it correctly states the law has never been questioned so far as we know. It is quoted and relied on by the learned counsel for both parties to this suit. It is conceded, however, that there is a material difference between the facts of that case and this. Here the petitioners aver that the insured was guiltless, although convicted and executed. They aver in another count that, if he actually killed his wife, he was insane when he committed the act, and that the defense of insanity was presented unsuccessfully at the trial. If the insured did commit the homicide while insane, he was not guilty of murder. The meaning of the petition, therefore, is that at the trial of Burt, the insured, there was a miscarriage of justice,—that he was unjustly convicted. It must be and is conceded as settled law that, if he had been rightfully convicted, his assignees could not recover on the policy, because, as was held in the Fauntleroy Case (stating the point most favorably for the plaintiffs in error), the policy would have been void if it had expressly provided for payment of the amount thereof on the just conviction and execution of the insured. Does a contract of insurance, having no special provision on the subject, cover the loss, when the insured is tried and condemned in, and executed by an order of, a court of competent jurisdiction, when he is in fact innocent of the crime with which he is charged? This precise question, we are advised by counsel, has never been decided. We will apply to the question the illustration used by the court in the Fauntleroy Case. Would the policy sued on have been valid if it had provided, in the event of the insured's being indicted, tried, convicted, and executed for murder, when in fact he was innocent, that the amount of the policy should be paid to his administrators or assigns? This condition would not be as encouraging to the insured, determined on crime, as that supposed by Lord Lyndhurst, but it would at least let him understand that the provision he had made by insurance for those connected with him would not be conclusively lost by his conviction and execution; that the beneficiaries would have a right of action on the policy, with chances of success, even if he was apprehended, convicted, and executed. It is well settled that no one can lawfully contract to do that which has a tendency to be injurious to the public or against the public good. Can there be a legal life insurance against the miscarriage of justice? Can contracts be based on the probability of judicial murder? If one policy so written be valid, the business of insuring against the fatal mistakes of juries and courts would be legitimate. The same principle could be applied, in a kind of accident insurance, to the miscarriage of justice in cases that led to convictions and punishments not capital. And in each suit to enforce such a policy the issue as to the fatal judicial mistake would be tried by another jury and court, not infallible. That juries and courts do make mistakes is unquestionable. It may be admitted that the history of criminal jurisprudence shows that innocent defendants have, in rare instances, by a

departure from proper rules of evidence, been convicted of murder and executed. Cases in which the juries, the courts, and the pardoning power are so at fault are so rare that they are not likely to be in the contemplation of parties making contracts of life insurance. The terms of the contract of life insurance, it seems, would exclude the idea, as in the case of suicide by the insured while sane, that death at the hands of the law was within the contemplation of the contracting parties. Ritter v. Insurance Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693. But, if parties make express contracts on the subject, could the courts lawfully enforce them? It is the policy of every state or organized society to uphold the dignity and integrity of its courts of justice. Such contracts would be speculations upon whether the courts would do justice. They would tend to encourage a want of confidence in the efficiency of the courts. They would tend to stir up litigation,—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kind were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon of the executive. Such contracts would encourage litigation and bring reproach upon the state, its judiciary and executive, and would, we think, be against public policy and void. The policy of the law often permits, and even requires, for error, a new trial of a convicted defendant, but never after his execution. The principle that makes void a wagering contract as to a rise or fall in the price of goods in the markets (Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225) would make void, for stronger reasons, a contract based on the failure of courts and juries to perform their respective duties. Now, to apply the reasoning of Lord Lyndhurst in the Fauntleroy Case, if a policy with such a form of condition inserted in it in express terms cannot, on grounds of public policy, be sustained, a policy without such a condition cannot be enforced on the averment of facts which, if embraced in the written contract, would have made the policy to that extent void. In some cases it has been held that a trial and conviction or acquittal in a criminal case are conclusive as to the facts decided, when brought in question by the parties in a subsequent civil suit. Coffey v. U. S., 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684; Roberts v. State, 160 N. Y. 217, 224, 54 N. E. 678; People v. Petrea, 30 Hun, 106. But the authorities on this subject are conflicting. 1 Freem. Judgm. (4th Ed.) § 319, and cases there cited. The assignee takes the policy subject to all defenses and equities which attached to it in the hands of the assignor. Bliss, Ins. § 331. If the judgment of conviction against Burt is conclusive as to his guilt in this suit by the assignees of the policy, this case would be brought precisely within the principle decided in the Fauntleroy Case, for the averment in the petition of the conviction of Burt would avoid the effect of the allegation of his innocence. But we prefer to base our conclusion on the ground that a contract of life insurance, written to insure against a capital conviction in the established courts of competent jurisdiction in the event that such conviction is unjust and unwarranted by the evidence, is void,

as being against public policy. The judgment of the circuit court is affirmed.

McCORMICK, Circuit Judge. I cannot concur in the judgment of the court in this case. It seems to me that the case does not call in question in any manner, or come under the authority of or the reasoning in, the case of Society v. Bolland, 4 Bligh (N. R.) 194, 211. The action might very well have been brought in the common form on the policy of insurance, and left it to the defendant to raise by its answer the questions that are herein raised. The plaintiffs, being so advised, chose to raise the question as they have done in their petition. The petition implies, if it does not expressly announce, that if the insured was in fact guilty of murder, and his death occurred by the execution of the sentence against him for that crime, the proof of such facts would avoid the civil contract on which this action is brought. The holders of the policy, however, expressly allege that the assured did not commit the homicide charged against him, and that, if he did commit the homicide, he was in such condition of mental disorder as rendered him incapable at that time of committing murder. They allege that these pleas were presented on the trial of the indictment against the assured, and that on that trial, in a court of competent jurisdiction, the verdict and judgment were rendered against him, and sentence of death pronounced upon him and executed. The demurrer which was sustained in the circuit court must assume either that the death of the assured by a judicial sentence for crime, though in fact he was wholly innocent, and merely the victim of mistake or miscarriage of justice, avoids the policy, or that the judgment of conviction in the criminal case is not only admissible to prove both the sanity and the guilt of the accused, but that it is conclusive evidence of both. I fully concur with counsel for the plaintiffs in error that the first question has never been directly heretofore decided. It is certainly not decided in either the Fauntleroy Case or the Ritter Case. The first of those cases proceeds upon the admission or assumption that the assured was guilty of forgery, as charged, and for which he was executed; no question being made as to his mental condition. In the latter case the question of the assured's sanity was submitted to the jury in the civil suit, and on the evidence and under the charge of the court the jury found against the policy holder. While the elaborate argument in the opinion of the supreme court announcing the decision in the case does not show that, if the insanity of the assured had been shown, his suicide while in that condition would not have avoided the policy, it seems to me to strongly imply that it would not. It seems to me that the ruling of the circuit court cannot be sustained, except upon the second ground indicated above, and that the practical effect of the judgment of this court is to set aside a general rule, which has received immemorial recognition, to the effect that:

"A verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action to establish the facts on which it was rendered."

This is elementary. The reason of the rule, as expressed by Mr. Greenleaf, is:

"If the defendant was convicted, it may have been upon the evidence of the very plaintiff or party claiming the benefit in the civil action; and, if he was acquitted, it may have been by collusion with the prosecutor. But, beside this, and upon more general grounds, there is no mutuality. The parties are not the same. Neither are the rules of decision and the course of proceeding the same. The judgment of a court of competent jurisdiction, being a public transaction, rendered by public authority, is presumed to be faithfully recorded. It is, therefore, the only proper legal evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment, and of all the legal consequences resulting from that fact, whoever may be parties to the suit in which it is offered in evidence. Thus, if one indicted for an assault and battery has been acquitted, and sues for malicious prosecution, the record of acquittal is evidence for the plaintiff to establish that fact, notwithstanding the parties are not the same; but if he were convicted of the offense, and then is sued in trespass for the assault, the record in the former case would not be evidence to establish the fact of the assault, for, as to matters involved in the issue, it is res inter alios acta." 1 Greenl. Ev. §§ 537, 538.

I am unable to see why public policy not only does not forbid, but seems to require, the courts of public justice, at the suit of proper parties, to make new inquiry as to the guilt of one who had been criminally charged and convicted of making an assault, should forbid the making of the inquiry sought to be made in this case, as to the real guilt of the assured in the matter for which he was charged, tried, and executed. It seems to me that the public interest and a sound public policy give stronger support to the general rule in a case like the present than in a suit for damages by one claiming to have been assaulted by a defendant who had been convicted therefor in a criminal prosecution. In the case of Coffey v. U. S., 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, the parties to the civil suit were the same as the parties in the criminal action; the subject-matter was the same; the civil suit, if we may call it so, being for the recovery of a part of the punishment denounced by the penal statute against a crime charged in the criminal action. In that case the court say:

"In both proceedings, criminal and civil, the United States are the party on one side, and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

In the case of Roberts v. State, 160 N. Y. 217, 54 N. E. 678, the parties in the civil action were the state of New York and the claimant; being the same as the parties in the criminal action. And it is not held, as I read the decision, that the judgment of conviction in the criminal action was conclusive as to the fact of the guilt of the accused. On the contrary, the opinion asserts:

"It was, therefore, incumbent upon him [the claimant] to establish that he was improperly convicted and imprisoned, and the amount of damages he had sustained by reason thereof. While a great volume of evidence was given upon the second question [the amount of damages], we find nothing in the

record which justified the board in finding that his conviction and imprisonment were improper, but, instead, the evidence upon which he was convicted and the judgment of conviction were introduced, both of which show that his conviction was proper,—the former presumptively, and the latter conclusively."

By this last word, "conclusively," the court could not have meant that no other evidence on that subject should have been received, because, if that had been their meaning, they would at once have held that the act of the legislature which authorized the proceeding was a void act; for this act recited upon its face that the claimant had been convicted and imprisoned for the alleged crime of burglary, and no question appears to have been made, either in the act or before the board of claims, that the conviction was not had in a court of competent jurisdiction.

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## In re TOLLETT.

(District Court, E. D. Tennessee. November 15, 1900.)

1. BANKRUPTCY—HOMESTEAD—EFFECT OF FRAUDULENT CONVEYANCE.
 Where a debtor residing in Tennessee made a voluntary conveyance of his homestead in fraud of his creditors, and was subsequently adjudicated a bankrupt on his voluntary petition, in which he did not schedule such homestead, the trustee became, by operation of law, vested with the right to recover the property for the benefit of creditors, and such right was not affected by a subsequent reconveyance by the grantee to the bankrupt, nor did such reconveyance, under the decisions of the state courts, revest the bankrupt with a right of homestead in the property, or to the crops growing thereon, at the time of the filing of his petition.
2. SAME—JURISDICTION OF COURT OF BANKRUPTCY—HOMESTEAD RIGHT OF WIFE.
 The claim of the wife of a bankrupt to a homestead right in property of her husband as against his trustee is one which a court of bankruptcy is without jurisdiction to determine in a case like the one at bar.

In Bankruptcy.

The following is the opinion of D. L. Grayson, Referee:

In this cause the petitioner, C. Tollett, filed his original petition, scheduling neither realty, growing crops, nor beef cattle. At the first meeting of creditors the petitioner was examined by counsel for creditors in interest, and the following facts were developed: That on the 3d day of January, 1900, the petitioner and his wife conveyed his homestead to one C. P. Taylor, naming in the deed a consideration of $500. His petition in bankruptcy was filed under date of February 26th, following. On or about 1st of June, 1900, said Taylor reconveyed the real estate in question back to the petitioner, and by leave of the court granted at the creditors' meeting aforesaid this has been scheduled as an asset by amended petition duly filed. The petitioner admitted on his examination that no consideration in fact emanated from said Taylor to him, but that this transaction was voluntary; and it is evident from the proof that it was made purely for the purpose of hindering, delaying, and defrauding creditors. It is now insisted by the bankrupt's counsel that he, as well as his wife, is entitled to a homestead in the aforesaid real estate, and that the same should be so adjudged as prayed in the amended petition. It appears from the proof that the wife of the petitioner joined in the conveyance to Taylor in the manner prescribed by the state statutes, and the legal effect of such joinder was to transfer the homestead right under the well-settled rulings of the supreme court of Tennessee, regardless of any express waiver in the deed. This much is admitted, but it is contended by petitioner's counsel that the homestead revested in both petitioner and his wife upon the recon-

veyance to them by Taylor. This would undoubtedly be true if the conveyance in question had been originally free from taint of fraud, but, it being admitted that the conveyance to Taylor was without consideration, and the proof showing the existence of debts at such time, and the wife having joined in that deed, and no reservation of sufficient assets to pay said existing indebtedness having been shown, said transfer was fraudulent in law, if not in fact, upon the part of the bankrupt, and under the authority of Cowan v. Johnson, reported in 2 Tenn. Cas. 41, I must hold that the reconveyance of said property back to the petitioner does not revest the homestead right. The case in question holds "that the wife who joins with her husband in a deed fraudulently conveying his home and only property thereby parts with her right to homestead therein, and the fact that the land was afterwards fraudulently conveyed back to her will not entitle her to homestead." This is the syllabus of the decision. In the opinion Judge Lea says: "When she executed and acknowledged the deed, although fraudulently done by her husband, she thereby parted with the right to homestead, and the fact that the land was afterwards fraudulently conveyed back to her will not entitle her to homestead." This case is cited and approved by the court in the subsequent cases of Gibbs v. Patten, 2 Lea, 183; Ruohs v. Hooke, 3 Lea, 305; Nichol v. Davidson Co., 8 Lea, 395–398,—this latter case denying the suggestion that the cases in 2 and 3 Lea had weakened the force of this opinion, but, on the contrary, showing that they were to be distinguished from Cowan v. Johnson, in that in the 2 and 3 Lea cases the wife had only accepted the benefit of a fraudulent transfer, and had not joined in one. The argument by petitioner's counsel that the wife should not at least be deprived of homestead in this land because the proof of her husband shows that he did not explain to her the purport of the conveyance is sufficiently met by the facts in the decision quoted, and need not be further noticed, except to say that, the wife not being before the court, her right to homestead cannot be adjudicated. It is therefore held that petitioner is not entitled to a homestead in the realty scheduled in the amended petition; and the trustee, at such time as due advertisement can be made and sale had, will sell the entire fee in this property.

With respect to the question of growing crops it appears from the proof that they were planted before the filing of the petition, but that since its filing the bankrupt has conserved them by services rendered looking to their preservation from the elements, etc. Having already held that the petitioner is not entitled to homestead, this disposed of the right of the petitioner to said crops as exempt property, because such right is legally predicated alone upon the theory that they be raised upon the homestead, and are exempt for such reason. The trustee will therefore be directed to take possession of such crops, and harvest the same; but they will, of course, be subject to such lawful liens as are recognized by the state law for supplies furnished, etc. Said liens must, however, be presented for adjudication and allowance in this court, the court having possession of the res in which the lien is claimed. The bankrupt will also be entitled to reasonable compensation, to be fixed by the court for services rendered in caring for said crops since the date of filing his petition.

With respect to the seven head of cattle of the value of $20 each, which the proof shows were transferred by the bankrupt to his counsel as security for services in this bankruptcy proceeding, it is sufficient to say that by virtue of the provisions of section 60d of the act the court can fix the compensation of counsel, but the excess must be recovered by the trustee for the benefit of the estate. I have no power to order counsel to surrender this property to the trustee, but will fix their fee for services in this matter, unless the same can be agreed on with the trustee, in which event the court will adopt such agreed figure, and any surplus remaining must, in the event counsel decline to surrender possession of said cattle to the trustee, be recovered by him by suit instituted for such purpose. It is intimated in the report of the trustee that the sum of $50 is all that is claimed by said counsel. If this be true, the court will be pleased to hold that such sum is reasonable, and will so adjudge upon consent of parties. The application of the petitioner for the exemption of one of said cattle as exempt to him in addition to the one cow heretofore set apart to him by the trustee is declined. The petitioner, having given a

preference by said transfer, is not now entitled to said exemption out of property which may be recovered by the trustee, and he has, furthermore, waived his right to claim the same as exempt by not including the same in his claim for exemptions heretofore filed. See In re Friedrich, 40 C. C. A. 378, 100 Fed. 284. The claim of Elijah Tollett, Sr., to a first lien upon the seven head of cattle because he furnished the sum of $50 to the bankrupt for their purchase, will be denied, because there is no resulting trust in personal property.

This disposed of all questions before the court in this matter, so far as I am at present advised.

W. B. Miller, for petitioner.
J. B. Swafford, for creditors.

CLARK, District Judge. The sole question certified to me by the referee in this case, stated in his own language, is as follows: "Whether or not the petitioner is entitled to a homestead in the real estate set out in his amended schedule, and to the crops growing thereon at the time of filing his petition." Upon the evidence disclosed by the record, there can be no doubt that the conveyance made by the bankrupt of the land in which homestead is now claimed was fraudulent; certainly so in law, whatever might be considered true as a matter of fact. The conveyance was entirely voluntary. In this situation of affairs, when the bankrupt was duly adjudged such bankrupt, the right to set aside this conveyance and to recover this property and subject the same to the debts of the bankrupt's creditors became, by operation of law, vested in the trustee for the benefit of such creditors, and the subsequent attempted conveyance by the fraudulent vendee back to the vendor had no effect on this right; and under the decisions of the supreme court of this state construing the homestead law the bankrupt, under such circumstances, is not, as against creditors, entitled to homestead. It is accordingly so adjudged, confirming in that respect the view of the referee. The question debated whether or not the wife of the bankrupt has, by reason of joining her husband in the fraudulent conveyance, deprived herself of homestead, is a question not before this court, as the wife is not a party to the suit by any mode of service of process, actual or constructive, and that question is accordingly left undecided. If the wife of the bankrupt should be duly advised that she may assert her homestead right, notwithstanding the conveyance in which she joined, a remedy in the state court is open to her in that behalf according to the case just decided by the supreme court of the United States of Bardes v. Bank, 2 Nat. Bankr. N. 725, 20 Sup. Ct. 1000, 44 L. Ed. 1175. This court would be without jurisdiction of a suit by the wife claiming homestead against the trustee, and such a suit could only be prosecuted in the state court, unless, by consent, it should be prosecuted in this court. Judgment will be entered accordingly.

## In re MAHLER.

(District Court, E. D. Michigan. November 6, 1900.)

1. BANKRUPTCY—PROVABLE CLAIMS—RENT ACCRUING AFTER ADJUDICATION.
Rent accruing under a lease after the lessee has been adjudicated a bankrupt, is not provable against his estate under Bankr. Act 1898, either as a fixed liability or an unliquidated claim.

2. SAME—EFFECT ON LEASE—RESUMPTION OF POSSESSION BY LESSOR.
Where a lease of a store building authorized a re-entry by the lessor for nonpayment of rent, but contained no provision making the lessor agent for the lessee in respect to the premises, and after the bankruptcy of the lessee and the removal of his goods by his trustee the lessor at once relet the building temporarily, and subsequently for a term of years, his action amounted to an eviction of the bankrupt, which terminated the lease.

In Bankruptcy. In the matter of the claim of Mrs. Adele C. Thompson. On case certified by referee.

Moore & Moore, for petitioner.
Dickinson, Warren & Warren, for trustee.
Jonathan Palmer, Jr., for bankrupt.

SWAN, District Judge. On October 1, 1895, the petitioning creditor made an agreement with the bankrupt to erect a four-story brick building to be used by Mahler for a retail grocery store, and to execute to him a lease of the premises for the term of five years and two months from March 1, 1896, rent payable monthly in advance at the rate of $3,600 per annum, and after February 1, 1898, at the rate of $4,000 per annum. This lease was executed by the petitioner and accepted by Mahler, who, upon the completion of the building, entered into possession, and occupied the same until January 3, 1899, when, upon his own petition, Mahler was adjudicated a bankrupt. March 11, 1899, the petitioner, Mrs. Thompson, filed a claim for rent due to January 3, 1899, the date of adjudication of bankrupt, and for repairs for which the lessee was liable under the lease, amounting together to $442.69. This claim was duly allowed, and the first dividend paid thereon. At the same time Mrs. Thompson also filed a contingent claim for $10,000, purporting to be founded upon the covenants contained in the lease executed by her to the bankrupt. The bankrupt abandoned the leased premises January 3, 1899, and has neither paid the rent which has accrued since that time nor made provision to restore the premises to their condition when he took possession. The lessor claims under the covenants of the lease the rent which has accrued since the bankruptcy and that accruing for the remainder of the demised term, the sum of $9,333.33. The balance of the $10,000 is claimed "for other possible breaches of the covenants in said lease contained." The trustee of the bankrupt occupied the leased premises from January 3, 1899, the date of adjudication, to January 27, 1899, inclusive, and has paid the petitioner therefor the sum of $275, which is rental for the time of his occupancy at the rate provided in the lease; and delivered possession of the premises to the agent

of the lessor. Thereupon said agent rented the premises to Joseph L. Hudson, who had purchased a portion of the bankrupt's stock. Hudson paid rent to the agent for the five days of his occupancy, viz. $55; and surrendered the premises to petitioner's agent. After Hudson vacated the premises, the store was rented a third time to one O. C. Frederick, for a short period, who paid $100 to said petitioner for the rental thereof. August 15, 1899, Mrs. Thompson, the lessor, filed a petition stating that there was due her absolutely upon the contingent claim previously filed the sum of $2,396.41, the covenanted rental of the premises to September 1, 1899, and asked that amount be "allowed as an absolute claim." A hearing was had before the referee upon this petition of Mrs. Thompson for the accrued rental. The referee found: (1) That the lessor had not consented to the termination of the lease to Mahler; (2) that rent which accrued subsequent to the adjudication in bankruptcy was not a provable claim against the estate of the bankrupt; and (3) that the lessor's claim against Mahler individually for rent due after he was adjudicated a bankrupt is unaffected by his discharge.

The lease to Mahler contains the following clause:

"Provided, that, if any rent shall be due and unpaid, or if default be made in any of the covenants or conditions herein contained, then it shall be lawful for the party of the first part, her certain attorney, representatives, agents, or assigns, to re-enter into and repossess the said premises, and the said party of the second part, and each and every other occupant to remove and put out. And the said party of the second part hereby waives notice to quit, and demand of rent or possession, and all other notices, in case he shall neglect or refuse to pay the rent specified in said lease in accordance with the terms thereof."

And also the following clause:

"Said party of the second part hereby expressly agrees that he will not sell, assign, or transfer this lease, and that he will not sublet said premises hereby leased, nor any part thereof, without the written consent of the party of the first part indorsed thereon."

Equivalent provisions are also contained in the lease to Sullivan, hereinafter mentioned.

The evidence and the findings and order of the referee have been certified to this court for review under general order 27 (32 C. C. A. xxvii., 89 Fed. xi.). Exceptions to the referee's findings of fact and law have also been taken. Since the certification by the referee, the parties have filed a stipulation by which it is admitted that on the 18th day of November, 1899, petitioner made a lease of the premises formerly leased to bankrupt to one Roger J. Sullivan for the term of five years from and after the 1st day of January, 1900, at an annual rental of $3,000 per year. A copy of this lease is attached to the stipulation, from which it appears that petitioner has covenanted thereby that, if said Sullivan shall pay the rent above reserved in manner aforesaid, and observe, keep, and perform all covenants and agreements, he "shall and may have, hold, occupy, possess, and enjoy the said demised premises with the appurtenances for and during the term aforesaid" (five years). It is also stipulated that Sullivan "has taken possession of said premises, and is now paying rent therefor to said petitioner [Mrs. Thompson]

in accordance with the terms of said lease." The question presented is whether the petitioner has a provable claim under the lease against the estate of the bankrupt for the covenanted installments of rent accruing after the lessee had been adjudicated.

Section 63 of the act of 1898 defines and classifies provable debts. Omitting subdivisions 2, 3, 4, and 5, which are conceded to have no application to this case, it provides:

"(a) Debts of the bankrupt may be proved and allowed against his estate, which are:

"(1) A fixed liability as evidenced by a judgment or instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, with interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as was not then payable, and did not bear interest. * * *

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall elect, and may thereafter be proved and allowed against his estate."

Subdivisions 2, 3, 4, and 5 of the section have no application to this case. It is argued for the petitioner that the claim has become fixed, and is capable of definite computation, and, if presented before a final dividend, should be allowed. Alternatively it is urged that it is an unliquidated claim, capable of valuation, and therefore provable under the last clause of section 63, cited supra. It is clear that the claim for future rent is not "a fixed liability * * * absolutely owing at the time of the filing of the petition against him" (the bankrupt), because before the day at which rent is covenanted to be paid it is in no sense a debt. It is neither debitum nor solvendum; for, if the lessee is evicted before that day, it never becomes payable. Bordman v. Osborn, 23 Pick. 295; Savory v. Stocking, 4 Cush. 607; Deane v. Caldwell, 127 Mass. 242; Wilder v. Peabody, 37 Minn. 249, 33 N. W. 852; In re Commercial Bulletin Co., 2 Woods, 220, Fed. Cas. No. 3,060. It is said by Chief Justice Gray in the case of Deane v. Caldwell: "It is not an existing demand, the cause of action for which depended upon a contingency, but the very existence of the demand depended upon a contingency." A covenant to pay rent quarterly creates no debt until it becomes due, for before that time the lessee may quit, with the consent of the lessor; or he may assign his term with his consent; or he may be evicted by a title paramount to that of the lessor. In either of such cases he will be discharged from his covenant. Wood v. Partridge, 11 Mass. 488. It is not an unliquidated claim, capable of valuation, which may be proved and allowed after its amount has been ascertained. The general intent of congress in the enactment of the statute was to make every debt and demand existing against the bankrupt at the time of his adjudication, which was recoverable either at law or in equity, provable in bankruptcy. This provision, however, is evidently intended to include and permit the proof of such claims then existing as are uncertain only in amount. Unlike the acts of 1841 and 1867, it does not expressly authorize proof of contingent claims; and, if it did, petitioners could not be classed in that category, for the reason stated in Deane v. Caldwell, supra, "that the very existence of the demand depended upon a contin-

gency"; or, to adopt the distinction between a provable contingent claim under the act of 1867 and one not provable, the former is payable on the happening of an uncertain event, but the sum to be paid is certain, while in the latter both the happening of the event and the amount to be paid are uncertain and contingent, and depend on the time the event may happen. Wolf v. Stix, 99 U. S. 8, 25 L. Ed. 309. In Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 232, Riggin was sued for damages for breach of a covenant of seisin in a conveyance. One Martin Thomas had owned the premises, to which his wife had never relinquished her right of dower. Riggin pleaded in defense his discharge under the bankruptcy act of 1841, obtained in June, 1843. Thomas, the former owner, died in 1848. In 1868, Magwire, who claimed under Riggin, was sued by Thomas' widow for the value of her dower, and the widow recovered. Magwire brought his action against Riggin for damages under the covenant of seisin, to which Riggin pleaded his discharge in bankruptcy. The question was whether Riggin was discharged from this demand by his discharge in bankruptcy in 1843. This depended upon the question whether the claim could have been proved against him in the bankruptcy proceedings. The fifth section of the bankruptcy act of 1841 provided as follows:

"All creditors whose debts are not due and payable until a future day, all annuities, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts and claims under the act, and shall have a right, when those debts or claims become absolute, to have the same allowed them; and such annuities and holders of debts payable in future may have the present value thereof ascertained under the direction of such court, and allowed them accordingly, as debts in præsenti."

The court held, in an opinion by Mr. Justice Bradley, as follows:

"It is argued that under the right given by the fifth section of the bankruptcy act of 1841 to prove 'uncertain and contingent demands,' the claim in this case could have been proven under the act. But the better opinion is that, as long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the act of 1841. See 1 Smith, Lead. Cas. p. 1251, notes to Mills v. Auriol, by Hare. In 1843, Martin Thomas was still living, and there was no certainty that his wife would ever survive him. It was uncertain whether there would ever be any claim or demand. On what principle, then, could the covenant have been liquidated, or reduced to present or probable value? If an action at law had been brought on the covenant at that time, nominal damages at most, if any damages at all, could have been recovered. It did not come within the category of annuities and debts payable in future, which are absolute, existing claims. If it had come within that category, the value of the wife's probability of survivorship after the death of her husband might have been calculated on the principles of life annuities. Had a proposition for a compromise of her right been made between her and the owner of the land, such a mode of estimation would have been very proper. But, without authority from the statute, the assignee would not have been justified in receiving such an estimate and making a dividend on it. It is unnecessary to review the authorities pro and con on the subject. They are quite numerous, and are mostly cited in the note of Mr. Hare, above referred to. The case is so clear that we have hardly entertained any doubt about it."

The act of 1841 was also construed in Bosler v. Kuhn, 8 Watts & S. 183; Savory v. Stocking, 4 Cush. 607,—in both of which cases it was held, notwithstanding the ample authority it gave to prove contingent debts and for their valuation, that rent accruing after the adjudication was not provable as a contingent debt.

In Ex parte Houghton, 1 Low. 554, Fed. Cas. No. 6,725, it was held that a claim for rent accruing after an adjudication could not be held either as a debt or unliquidated damages, under the act of 1867. The elements of uncertainty in point of time, amount, and contingencies prevent the liquidation of the claim, or the ascertainment of its present or future value.

In Bosler v. Kuhn, supra, Gibson, C. J., said:

"A rent service is not a debt, and a covenant to pay it is not a covenant to pay a debt. It is a security for the performance of a collateral act. The annual payments spring into existence, and for the first time become debts, when they are demandable; for, while they are growing due, the landlord has no property in anything distinct from the corpus of the rent or the realty of which they are the product; and the fruit must be severed from the tree which bears it before it can become personal property and a chose in action. A debt is an entire thing, although it be payable by installments; and to admit it to be proved when thus constituted would require the installment to be combined by a penalty, such as formerly was called in aid of an annuitant, or else to be consolidated by the contract. To whatever length the law may go for the purpose of liquidating a contingent demand, it must necessarily stop short when the demand is not only uncertain in itself, but incapable of being reduced to a certainty."

Note to Mills v. Auriol, 1 Smith, Lead. Cas. p. 1251.

Although this construction of the act of 1898, if correct, authorizes the rejection of the petitioner's claim, another ground of defense is insisted upon by the trustee, founded upon the practical acceptance of the surrender of the premises by the lessor, and evidenced by the renting thereof to Hudson, Frederick, and the trustee, and later to Sullivan for a term of years from November 18, 1899. While nothing can be predicated upon the action of the lessor in permitting the occupancy of the premises by the trustee, as the latter had a reasonable time to elect whether he would accept the lease or not, and could not be charged with its acceptance by reason of the goods remaining in the leased premises after the bankruptcy, yet the renting of the premises to Hudson, Frederick, and later to Sullivan for a term of years, was a practical eviction of the lessee, terminating his interest under the lease, and authorized by its terms. As is said by Judge Lowell in Ex parte Houghton, supra:

"The petitioners have availed themselves of the power of re-entry, and have put an end to the estate of the bankrupt, and repossessed themselves 'as of their former estate.' Such an entry is an eviction, and puts an end to the rent by operation of law. * * * They cannot be heard, after they have entered, and exercised all acts of ownership, and relet the premises, to say that they have not entered as lessors nor to repossess the premises, but merely as agents of the lessee, and to save the estate from waste. We have already seen that this lease confers no power or agency upon the petitioners in this matter, and their entry must be taken to be according to their right. It is immaterial whether the bankruptcy was the breach for which they entered. It is enough that they have entered lawfully, and have ended the term and the rent together. If the lease had been valuable, and they had relet the shop

for an increased rent, I do not see how the assignee could have made any valid objection to the re-entry."

The lease in the case at bar did not authorize the lessor to act as agent for the lessee. The facts of this case are nearly parallel with those in Day v. Watson, 8 Mich. 535, where the tenant gave the key of the demised premises to the agent of the lessor, and surrendered possession. The lessor brought an action for the rent accruing during the agent's possession. The court said:

"There is no proof in the case from which an inference can be legitimately drawn that the entry of defendant in error was by consent of her tenant, or under any arrangement with them. This being so, and the entry followed by continued possession which was inconsistent with the time assured to the tenants under the lease, that possession amounted very clearly to an eviction. If she [the lessor] be regarded as entering on conditions broken, that would signify an intention to terminate the lease entirely. If she regarded the lease as still continuing, the right to rent was suspended during the occupancy. In the absence of any evidence showing an understanding with the tenant, she had no right to reassume possession whether the premises were vacant or not, if she designed to regard the lease as continuing."

See, also, Deane v. Caldwell, supra, as to the effect of lessor's unqualified acquiescence in the surrender of the lease. See, also, Gray v. Ice-Cream Co., 162 N. Y. 388, 56 N. E. 903.

As there is no evidence that the lessor restored or surrendered the possession to the bankrupt, it must be presumed that her possession continued until the demise to Sullivan, who is now in occupancy thereof, under the lease made by the lessor. Petitioner therefore has no legal or equitable claim against the bankrupt's estate under the covenants of the lease.

Other questions have been argued by counsel, and authorities cited, which it has not been considered necessary to examine. The only question calling for decision is that upon the character of petitioner's claim. Whether the bankrupt remains liable under the covenants of his lease, and, if so, to what amount, notwithstanding his discharge, is not decided. The conclusion of the referees that petitioner's claim is not provable against the bankrupt's estate is approved.

AMERICAN GRAPHOPHONE CO. v. NATIONAL GRAMOPHONE CO. et al.

(Circuit Court, S. D. New York. December 11, 1900.)

PATENTS—SUIT FOR INFRINGEMENT—WITHDRAWAL OF DEFENSE.

One who is not a party to a suit for infringement, but has become privy to it by assuming the defense under an agreement to protect the defendant, may withdraw from the prosecution of the defense, and the appearance entered for defendant by its counsel, at any time; but pleadings and evidence already on file or in the hands of officers of the court, whether examiner, master, or clerk, cannot be withdrawn.

Petition of the Berliner Gramophone Company and the United States Gramophone Company to withdraw answer and testimony introduced by it on behalf of the defendant Seaman, under contract to defend.

The bill in equity in this case was filed December, 1898, to restrain the defendants from infringing letters patent of the complainant Nos. 341,214, issued May 4, 1886, to Bell and Tainter; 341,288, issued May 4, 1886, to Sumner Tainter; 375,579, issued December 27, 1887, to Charles Sumner Tainter, —all being for improvements relating to graphophones. An answer on behalf of the defendants was filed shortly thereafter by counsel retained by the Berliner Gramophone Company, which was not a party defendant. At the time of the filing of the bill of complaint, Frank Seaman, one of the defendants, had a contract with said Berliner Gramophone Company by which the said Seaman was made the sole selling agent of the said Berliner Gramophone Company, and by which contract it was obligated to defend the said Seaman in any suits for infringements which might be brought against him by reason of his selling the gramophones and gramophone goods of the Berliner Gramophone Company. The Berliner Gramophone Company, in co-operation with the United States Gramophone Company, its licensor, thereupon undertook and carried on the defense of the said suit against the said Seaman by its own counsel, at its own expense. On or about the 5th day of May, 1900, a consent decree, without the knowledge of the Berliner Gramophone Company, was entered by the National Gramophone Company with the connivance and knowledge of the said Seaman, as alleged by the petitioners, for the purpose alleged, of injuring the business of the Berliner Gramophone Company. After the date of the said consent decree no further testimony was taken by the said Berliner Gramophone Company on behalf of the defendants. On July 26, 1900, the Berliner Gramophone Company notified the said Frank Seaman of the termination of its contract with him, by reason of certain alleged breaches on the part of the said Seaman; and about this time the said Seaman instituted suit in the United States circuit court for the Western district of Virginia to restrain the Berliner Gramophone Company from terminating its contract. On October 19, 1900, the American Graphophone Company secured an order limiting the time of the defendant Seaman for completing his testimony; and on November 16, 1900, the Berliner Gramophone Company and the United States Gramophone Company, the petitioners in this motion, presented their petition praying for leave to withhold all testimony from the case taken by it at its expense on behalf of the defendant Seaman, and to withdraw the answer filed, and also the appearances of its counsel which had been entered for the defendant Seaman. The defendants' testimony taken before a notary had not been filed in the office of the clerk of the court. For former opinion, see 90 Fed. 824.

Philip Mauro and C. A. L. Massie, for complainant.

Horace Pettit, Howard W. Hayes, and Charles E. Mitchell, for petitioners.

Waldo G. Morse, for defendant Seaman.

LACOMBE, Circuit Judge. The situation in this case is as follows: The plaintiff contends that both defendants infringe its patents. The defendant Seaman has or had a contract with the Berliner Gramophone Company, under which they undertook to defend him, should he be sued for infringement because of his handling the instruments of the Berliner Company. This latter company therefore entered upon the defense of this case in behalf of Seaman, and has taken considerable testimony. Recently the defendant National Gramophone Company has conceded infringement, and allowed a decree to be entered against it. Moreover, quarrels have arisen between Seaman and the Berliner Company, and their relations are greatly strained. Under these circumstances the Berliner Company (which never was made a party to the suit) desires to withdraw from the further prosecution of the defense, in order that the final adjudication in this suit may not have the effect in other litigations of a decision against a privy who had the opportunity to defend, and who did defend. To this there can be no possible objection. Indeed, it was wholly unnecessary to apply to the court for leave to withdraw from the prosecution of Seaman's defense; it being a matter entirely betwixt the Berliner Company and himself. Nevertheless it was perhaps desirable for the Berliner Company to make it thus a matter of record, so that their position in the future litigation between the parties to the suit might not be misunderstood. It further asks leave to withdraw the answer now on file, and the proofs presented by the petitioner, and that petitioner's counsel, who have appeared for said defendant Seaman, may be allowed to withdraw such appearances. As to the withdrawal of appearances of counsel, the application is granted, with the proviso that such withdrawal be not operative until 10 days from the date of the entry of this order, so that opportunity may be afforded to Mr. Seaman to retain other counsel to appear for him. Documents already on file, however, or in the hands of officers of the court, whether examiner, master, or clerk, may not be withdrawn from the files. Therefore the motion as to the answer and as to any proofs that have been filed is denied. As to the proofs which have been taken in the case, but have not yet come within the custody of the court, this court has nothing to do with them. Withdrawing, as they do, from the case, the Berliner Company, and the counsel with which it supplied Mr. Seaman, are under no obligation to file anything which they have not yet filed. Much of the testimony, however, it may be supposed, has been taken down stenographically, and transcript written out for both sides. What shall be done touching this testimony—whether it shall be, by assent of both parties to the continuing litigation, hereafter filed as a part of the defendant's testimony, or whether it shall become the subject of some motion by one side or the other—is a matter which the court is not now called upon to decide. Certainly it has no power to require the complainant to deliver up to the Berliner Company the transcripts of the testimony which the complainant already has, or to assent to their destruction.

## THE LANSDOWNE.

## THE W. B. MORLEY.

(District Court, E. D. Michigan. October 29, 1900.)

1. COLLISION—ABSENCE OF LIGHTS—WEIGHT OF EVIDENCE.
In a suit for collision in the nighttime, where the officers on watch on one of the vessels and her lookout testify that no colored side light was visible on the other vessel, until immediately before the collision, to indicate that she was in motion, or her course, and there is nothing to indicate negligence on their part, and the management of their vessel was consistent with such fact, but directly contrary to the navigation rules and the practice of good seamanship if such light were seen, their testimony is entitled to greater weight than that of casual observers who had no interest in the matter.

2. SAME—FAILURE TO OBSERVE RULES—PRESUMPTION OF FAULT.
Under the decisions of both English and American courts, where a vessel has disregarded a rule of navigation, it is incumbent on her to show, in case of collision, that the violation of the statute not only did not contribute to the collision, but could not have done so.

3. SAME—STEAMERS CROSSING—EVIDENCE CONSIDERED.
A collision which occurred in the nighttime on the Canadian side of the Detroit river, between a steam ferryboat on her way down from Windsor to Detroit and a steamer passing up the river, *held* to have been due solely to the fault of the ferryboat in failing to comply with the Canadian navigation rules as to the position and character of her bright lights, or to signal when within sight of the other vessel, as required by such rules, and, chiefly, in failing to display her red port light until immediately before the collision. She was a double-ended vessel, and carried two sets of colored lights, which closed by metal screens; the custom being, when leaving her slip, for the watchman to close the lights on the end which was, for the time being, the stern, and open the others. The weight of evidence tended to show that on this occasion the port light was either not opened until the vessels were near together, or that it was only partially opened, so that it could be seen but a short distance; in consequence of which, in connection with her failure to signal, and the numerous lights in the city behind her, the officers and lookout of the other vessel were unable to make her out until near, and then supposed her to be stationary, until too late to avoid the collision.

4. SAME—CONTRIBUTORY FAULT.
The other vessel was not guilty of contributory fault in passing up within 600 or 700 feet of the shore, it appearing that she was seen by the ferryboat when half a mile distant, nor in failing to sooner signal under the circumstances shown, nor because, when a few lengths distant, she signaled her intention to pass to port, which was contrary to the rules when a vessel was approaching on her starboard hand; since she was justified in the supposition that the object seen nearly ahead was stationary.

In Admiralty. Libel and cross libel for collision.

F. H. Canfield and H. D. Goulder, for the W. B. Morley.
John C. Shaw and Alfred Russell, for the Lansdowne.

SWAN, District Judge. About 12:30 a. m., August 6, 1899, the car ferry Lansdowne, while on her trip from the slip at Windsor for her slip at 18½ street, Detroit, came into collision with the steamer W. B. Morley, coal laden, and bound up the Detroit river. The car ferry is a registered Canadian steam vessel, 318 feet long, 41 feet beam, and at the time of the collision was fully laden with freight cars.

The Morley is an enrolled and licensed American steamer, 275 feet long, and of 2,000 tons burden, and was laden with a cargo of coal. The night was starlit, and the weather clear. The collision occurred about 600 or 700 feet from the Canadian dock line, and about abreast of a point between Church and Bruce streets, of Windsor, wholly within Canadian waters. Both vessels were so badly damaged that the Morley sank in the river before reaching the dock on the American side. The Lansdowne settled on the bottom after returning to her slip at Windsor. The regular course of the Lansdowne between her Windsor slip and that at the foot of 18½ street, Detroit, was about W. ½ S., or W. by S. The Morley's course was about E. by N. ½ N., which brought her about 600 or 700 feet from the Canadian dock line. The locality of the collision makes applicable the Canadian navigation act (as amended by the order in council of February 9, 1897), constituting chapter 79 of the Revised Statutes of Canada. The following sections of that act, which is entitled "An act respecting the navigation of Canadian waters," are relied upon as defining the obligations of the vessels. The interpretation clause of the act (section 1, par. "C") declares that:

"The expression 'steam-ship' or 'steam-boat' includes every vessel propelled wholly or in part by steam or by any machinery or power other than sails or oars;"

"Sec. 2. The following rules with respect to lights, fog signals, distress signals, steering and sailing, and rafts shall apply to all the rivers, lakes and other navigable waters within Canada, or within the jurisdiction of the Parliament thereof,—that is to say:

"Preliminary. In the following rules, * * * every vessel under steam, whether under sail or not, is to be considered a steam-vessel."

"The word 'steam-vessel' shall include any vessel propelled by machinery."

Then follow the rules concerning lights, etc., prefaced by this provision:

"The word 'visible' in this rule when applied to lights shall mean visible on a dark night with a clear atmosphere."

"Article 1. The rules concerning lights shall be complied with in all weather from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited."

"(e) A steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (a). These two lights shall be so placed in line with the keel that one shall be at least 15 feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance."

"Art. 18. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other."

This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision; and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other. The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and, by night, to cases in which vessel is in such a position as to see both the side lights of the other. It does

not apply, by day, to cases in which a vessel sees another ahead crossing her own course; or, by night, to cases where the red light of one vessel is opposed to the other, or where the green light of one vessel is opposed to the green light of the other, or when a red light without a green light or a green light without a red light is seen ahead, or when both green and red lights are seen anywhere but ahead.

"Art. 2. A steam vessel when under way shall carry: (a) On or in front of the foremast, or if a vessel without a foremast, then in the forepart of the vessel, at a height above the hull of not less than 20 feet, and if the breadth of the vessel exceeds 20 feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than 40 feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of 20 points of the compass, so fixed as to throw the light 10 points on each side of the vessel, viz: from right ahead to 2 points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles. On the port side, a red light so constructed as to show an unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles."

A like requirement is made for the starboard light.

"The said green and red side lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow."

"Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

This is identical with rule 18 of the White law (28 Stat. 648).

"Art. 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. Note,—when, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take action as will best aid to avert the collision."

Excepting this note, this rule is, in substance, rule 20 of the White law.

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the cause admit, avoid crossing ahead of the other.

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

This is rule 21 of the White law.

"Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."

"Art. 27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

This is identical with rule 27 of the White law.

"Sound Signals for Vessels in Sight of One Another.

"Art. 28. The word 'short-blast' used in this article shall mean a blast of about one second's duration. When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these

rules, shall indicate that course by the following signals on her whistle or siren, viz.: One short blast to mean: 'I am directing my course star-board.' Two short blasts to mean: 'I am directing my course to port.' Three short blasts to mean: 'My engines are going full speed astern.'

"Art. 29. Nothing in these rules shall exonerate any vessel or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

"Sec. 5. If, in any case of collision, it appears to the court before which the case is tried, that such collision was occasioned by the non-observance of any of the rules prescribed by this act, the vessel or craft by which such rules have been violated shall be deemed to be in fault; unless it can be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary. 43 Vict. c. 29, § 6."

"Sec. 9. When foreign ships are within Canadian waters, the rules for preventing collisions prescribed by this act, and all provisions of this act relating to such rules, or otherwise, relating to collisions, shall apply to such foreign ships; and in any case arising in any such court of justice in Canada concerning matters happening within Canadian waters, foreign ships shall, so far as regards such rules and provisions, be treated as if they were British or Canadian ships. 43 Vict. c. 29, § 11."

The provisions of the White law, so called, regulating navigation on the Great Lakes and their connecting and tributary waters, which took effect March 1, 1895, and rule 2 and rule 7 of the American pilot rules for the Great Lakes and their connecting tributary waters, have also been referred to in argument. But, as the case is controlled by the Canadian statutes, they have not been considered where they differ from the foreign code. The Lansdowne, being a Canadian vessel, was subject to the law of her flag; and under it's requirements, because of her beam, should have carried a bright white light 40 feet above her hull, having a range of illumination of 10 points, as required by article 2 of the Canadian statute. She carried instead the lights prescribed by rule 7 of the American pilot rules for double-ended ferryboats. These were but 32 or 33 feet above her hull. The faults charged against the Lansdowne are: (1) Failure to exhibit her lights; (2) the lack of proper officers and crew; (3) failure to maintain a lookout; (4) for not sounding a whistle at the proper time; (5) for not checking her speed or stopping when risk of collision was evident. The first three specifications of fault against the Morley are identical in substance with those made against the Lansdowne. The remaining specifications in the cross libel charge: (4) That, the vessels being on cross courses, the Morley, having the Lansdowne on her own starboard side, did not adopt timely measures to keep out of the way of the Lansdowne. (5) For attempting to force the Lansdowne out of her course, and calling upon her for an impossible maneuver in order to let the Morley cross ahead of the former when the vessels were close together. (6) For wrongfully attempting, when the vessels were in close proximity, to cross the Lansdowne's course ahead of that vessel, instead of waiting, if necessary, or porting her wheel so that she might pass on the port side of and under the Lansdowne's stern. (8) For not passing between the Lansdowne and the Canadian shore. (9) In proceeding on her adopted course up the river, close to the Canadian docks, at an excessive and dangerous speed. (10) For adopting an unusual

and dangerous course next to the Canadian docks, where her lights were liable to be hidden or confused with lights on the docks and on the shore, and at a place where ferryboats are continually putting out and crossing the river.

The Lansdowne is what is termed a double-ended ferryboat. On her main deck are two tracks, upon which, at her slips in Detroit and Windsor, cars are run over her bow proper. At her stern are bumpers at the end of each track to prevent further movement of the cars astern. When running up the river from Detroit to her Windsor slip, she proceeds bow first. On the return trip to her Detroit slip, she moves down the river stern first, under engine signals of two bells, until she has arrived at a point where her bow can be swung into the slip. She carries two sets of colored lights, and has two pilot houses, one forward and aft, set upon the bridge. The lights are placed six or seven feet outboard from each side of the pilot house, and were properly fitted with inboard screens of the full regulation size. They had, however, an additional appliance to dispense with the necessity of shifting them each trip from one end to the other of the steamer, consisting of a metallic cylindrical shield of about the same height as the light, but of greater diameter, permitting it to be revolved freely around the lights, which it inclosed. This shield had an opening somewhat larger than the lens of the lights. It was the watchman's duty, preparatory to the return trip for her slip at 18½ street, Detroit, to adjust this shield on each forward light so as to close the light, and to open the lower lights by bringing the opening of the shield in front of the lens. There was also an opening about 2½ inches in diameter through the inner side of the screen board, a few inches in front of the light, through which the gleam of the light could be seen by those in the pilot house, if the lens was either fully opened or not completely closed. The Lansdowne, while in her slip at Windsor, lay with her stern about 30 feet further out in the stream than her bow, heading about on her course to her Detroit slip. Her master, before entering the pilot house to give the starting signal, went to the outer side of the bridge, —that is, on the starboard side of the boat when she is running down stream,—and looked down the river, before giving the starting signal. From that point his range of vision was limited, and he saw no vessel coming up. Before the steamer started from her slip, the master, in accordance with his custom, went into the pilot house at the upper end of the boat. Bassett, the wheelsman, Pierce, the watchman, and Prior, the assistant wheelsman and lookout, were on the main deck at this time. The first two were handling the apron and adjusting the clamps, preparatory to moving out of the dock. When this was done, the wheelsman signaled from the main deck to the master, who then sounded two short and smothered blasts of the whistle as a signal to the assistant wheelsman, who was on the main deck at the lower end of the boat, to cast off the line. This done and reported, the master gave the signal to work the port engine. When the steamer had cleared the slip, the current had a tendency, aided by the port wheel, to swing her somewhat to starboard. There was no one in the pilot house on the down-stream end of the boat when the

port engine was started. After casting off the line, the assistant wheelsman took the wheel in that pilot house. After starting the port engine, the master of the Lansdowne went from the forward pilot house to that at the downstream end. To do this he had to walk from his station at the bell pull in the pilot house, some 12 feet, to the head of a stairway of 12 steps, which brought him to the upper deck at a point about 270 feet distant from a like stairway leading to the pilot house at the down-stream end. From the top of that stairway it is 12 feet to his post in the after pilot house, which is about 330 feet from his first position. Until his arrival there was no officer at the downstream end of the steamer, and no one in that pilot house except the assistant wheelsman, who also bore the title of lookout, but was without other nautical experience than such as could be acquired by shifting the wheel under orders, casting off the lines, and loading and unloading cars. The range of his duties and his position in the pilot house disqualified him as lookoutman. The Northern Indiana, 3 Blatchf. 104, Fed. Cas. No. 10,320; The Ottawa, 3 Wall. 273, 18 L. Ed. 165. By the time the master had reached his post in the lower pilot house, the Lansdowne had got about abreast of the ferry dock at the foot of Ouellette avenue, or a little below that point, a distance of 500 or 600 feet from her slip. At this point he started the starboard engine. At an ordinary walking gait, he must have taken a minute and a half to reach the pilot house on the down-stream end, after he rang the port engine bell. Bassett, the wheelsman, got there just before the master's arrival. The distance from the Lansdowne's slip to the place of collision is about 1,800 feet. When abreast of the ferry dock, the master saw the Morley showing green and white lights. He kept on his course without signaling her until the Lansdowne was just below the lower ferry dock at the foot of Ferry street, which is about 1,000 feet below the Lansdowne's slip, when he sounded a one-blast signal, and ordered the wheelsman to port a little. He states that, if the vessels had kept their respective courses, they would have passed in safety port to port; that his signal of one blast was answered by the Morley with two blasts in such time that, as he states, "I was in no particular uneasiness about coming together," although the vessels were then not over the length of the Landsdowne apart. Thereupon he rang the bell to stop both engines, but did not reverse, because he had not time. He states that the speed of the Lansdowne was then 4 or 5 miles an hour. The current of from 1½ or 2 miles an hour would increase that to at least 6 miles an hour. The boats came together, the bow of the Morley penetrating the stern proper or lower end of the Lansdowne several feet at an angle of 22 deg., as estimated by the master of the Lansdowne, or, as claimed by libelants, 15 deg. The photographs of the Lansdowne and Morley taken shortly after collision tend to corroborate the libelants' estimate. The master of the Lansdowne testifies that she went straight down the river out of her slip on her usual course; that when she was opposite Ferry street he saw the lights of the Morley about 1,200 or 1,500 feet down the river, and that he had seen them from the time he was abreast the ferry dock at the foot of Ouellette avenue; that he ran a minute

and a half with her lights in view before signaling her, and that the steamers were probably only 800 or 900 feet apart when he gave the signal of one blast,—the Lansdowne being then about 600 feet out from the dock line on her usual course, and the Morley then beginning to show both her lights. The speed of the Morley, it is admitted, was about 7½ miles an hour by the land; that of the Lansdowne, with the current, probably 6 miles an hour at least. The combined speed of the vessels was therefore nearly 14 miles an hour, or about 1,200 feet per minute.

It is charged as a fault on the part of the Morley that her course was dangerously near the shore, and imperiled vessels and ferries whose track it crossed. The proofs fail to sustain this contention. The collision is in no way referable to the proximity of the Morley's course to the Canadian shore.

Two questions arise in this case which are the subject-matter of directly conflicting testimony. The master and crew of each vessel testify that their own steamer sounded the first signal. Eleven witnesses on the part of the Lansdowne are confronted upon this issue by 11 equally credible witnesses who testify as positively that the Morley's signal of two blasts was first given. It is unnecessary to determine this issue. The case must be decided upon other grounds. There is much force in the suggestion that the signals sounded by the two steamers were independent, and the evidence is satisfactory that neither steamer made any change of course because of the signals of the other. The Morley's version of the circumstances which led to the collision contradicts in every material point that given in support of the Lansdowne's case. The pivotal question in the case is that relating to the port light of the Lansdowne. The libel charges, and libelants' proofs tend to show, that when the Morley was on the described course "her watch discovered on the water, and not a great distance ahead, nearly, but somewhat inside and to the starboard of, the course of said steamer, a dark object showing no lights of any kind which were visible to the men on said steamer, and which object had not and did not give any signal or indication of being a steamer navigating. The Morley promptly sounded a signal of two blasts, indicating an intention to keep outside, whereupon the dark object, which proved to be the said car ferry Lansdowne, * * * replied with a signal of one blast, and suddenly exhibited a red light. The Morley, not having changed her course, at once stopped, and reversed her engines, and backed strong; * * * but the Lansdowne, apparently without checking her speed or stopping, * * * came on, and struck the bows of the Morley nearly stem on, and crushing them in," etc. The deck watch of the Morley was composed of the master, the mate, the lookoutman, and the wheelsman. There is no evidence assailing their competency. Their testimony is that they were giving their attention closely to the navigation of the steamer; that no light was visible on the "dark object," which proved to be the Lansdowne, no indication that it was in motion, nor was any signal given by her until after the Morley had sounded a signal of two blasts, notifying her course to port; that no change of course was made on the part of the Morley in pursuance of her signal, but

instantly, upon the Lansdowne's reply of one blast, and the simultaneous exhibition of her red light, the signal to reverse the Morley's engine and back strong was given and obeyed, and her wheel was put amidships. The testimony of the master of the Morley as to the orders to the engine in their relation to the exchange of signals is supplemented by that of the engineer, watchman, and other members of the Morley's crew, and by witnesses upon other vessels in the vicinity. On the part of the Lansdowne there are about an equal number of witnesses whose testimony is that the latter's colored and bright lights were burning brightly. The preponderance of evidence is that the Lansdowne exhibited the bright lights fore and aft, but that these had no significance to a steamer on the Morley's course, because her green light was shut out from the Morley by the Lansdowne's heading, and her red light was not opened, and because of the many like lights in the back ground upon the railroad premises and in the city of Windsor from which the bright lights of the Lansdowne would be indistinguishable unless characterized by a colored light or lights.

Section 29 of the Canadian statutes, above quoted, is decisive of the fault of the Lansdowne in failing to comply with the requirements of the Canadian statute as to the position and character of the bright lights, and is prima facie evidence, until conclusively refuted of the agency, of that violation of the statute in the collision. Both the American and English courts hold that, where a vessel has disregarded a rule of navigation, it is incumbent upon her to show, in cases of collision or other disaster, that the violation of the statute not only did not, but could not have, contributed to the collision. The Fenham, L. R. 3 P. C. 212; The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148; Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398. In view of the number of lights in that neighborhood for which the lights of the Lansdowne could easily be mistaken, it is impossible to say that the breach of the statute did not contribute to this disaster. The general courses of the two vessels were intersecting at an angle of between 1 and 1¼ points until the wheel of the Lansdowne was ported after the exchange of signals. It is not claimed that the green light of the Lansdowne was at any time visible to those on the Morley. If her port light was open, and burning, it should have been visible to the Morley's watch from the time the Lansdowne left her slip. It is insisted by libelants that it was first displayed immediately after the whistles were sounded. It was one of the numerous duties of the watchman of the Lansdowne to care for, close, and open the lights. He is the only witness who testified to the manual act of opening the metallic shields upon the lights at the lower end of the boat, although the assistant wheelsman of the Lansdowne states that he incidentally saw the port light open when going to the wheel after the Lansdowne had left her slip, and when he was standing near that light for the purpose of ascertaining if the bright light was burning. As the bright light was in plain sight on his way to his post at the wheel, and before he reached the stairs leading to the bridge, upon which the lights were placed, a better reason for his visit to the port

light would have inspired more confidence in his testimony. The testimony of Capt. Firby and Bassett, the wheelsman, that they saw the gleam of the red light through the opening in the screen, will be considered hereafter. It was the watchman's duty to care for the lights, to aid in raising and lowering the apron or movable platform over which the cars were run on and off the steamer, to assist in making the steamer fast in the slip, to remain at the bow until she left the dock, to open the lights at one end of the boat and close them at the other, and to help at the wheel from slip to slip. If the Lansdowne was going to her Wabash slip at Detroit, which would be made known to her crew by two low blasts of her steam whistle, given when the loading had been completed and the apron raised, the watchman had then to close the upper lights. If she were bound to the Detroit and Milwaukee slip, three blasts of the whistle were given, and the lower lights were kept closed while the upper lights remained open. He states that he opened the lower lights "as soon as we got into the dock so we could be ready to start again. Q. How long before you left the slip on that trip was it that you opened the red and green lights on the lower end? A. Not long. Sometimes the boat gets to the lower end of the slip before I get them shut off. Q. I am speaking of this particular trip. At the lower end, how long had they been open before you left the slip? A. They had been open only the time we would take to get a load off and get a load on again. Q. Then you opened them when you came into the slip? A. Yes, sir; after we get into the slip. I help the boys to land always. Then I go straight down and open them, and have them ready to start again. Q. The lights at the down-stream end would not be open as you were going up to the slip? A. No. Q. So, I understand you had opened the lights at the lower end after you got into the dock, and you helped them get away from the dock, and shut the lights off at the after end? A. Yes, sir; and when I heard our boat's whistle, I was just going to go down the stairs, and I heard the captain give one whistle, and then I turned around, and I heard the Morley give two whistles. * * * I was then at the upper end of the boat. I was going downstairs, and I was half way on the stairs when I was thrown down [by the shock of the collision]." The deposition of this witness was taken during the hearing because of his illness. His physical condition was such as to excuse the leading form of some of the questions, and the cross-examination was humanely shortened for that reason. His testimony is ambiguous and unsatisfactory. While he states that the lights were properly opened and burning, he leaves it doubtful whether they were opened before the Lansdowne was under way. His statement that he opened them after the boat got into the dock, and shut off the upper lights after he had helped to get her away from the dock, is rather an echo to the question to which he made that answer than a recollection of the order of events, or the sequence of his services. He speaks rather to his custom than to his acts that night. The fact that he had scarcely completed the closing of the upper lights before the exchange of the signals between the steamers, given when they were less than a thousand feet apart,

strongly suggests that the closing of the upper immediately followed the opening of the lower lights. That would be the natural and probable order of his duties, for until the signal of two short whistles announcing that the steamer was bound for the Wabash slip he could not know whether it would be necessary to open the lower and close the upper lights. It is, therefore, highly improbable that he opened the lower lights until the master had notified his destination for the Wabash slip by the signal of two low whistles. Then, as he admitted, it was his duty to help get the boat away from the slip, and that was doubtless an immediate and urgent duty, taking precedence over all else. The work of opening and closing the lights was merely momentary. As he had to cover the same distance, in going from the lights of one end to those at the other, which the master traversed in going from one pilot house to the other, if he did not open the lower lights until just before he closed the upper, the Lansdowne must have been about abreast of Ferry street before she showed her port light to the Morley. If this be true, it would explain the sudden appearance of that light to those on the Morley. It is also not improbable that in the hurry of his work and the multiplicity of duties, the adjustment of the metallic shield, whenever done, was hurriedly and imperfectly made, leaving the light so obscured as to be invisible at the distance which separated the two boats before the exchange of signals. The testimony of Capt. Firby, the wheelsman Bassett, and Prior, his assistant, is that from their positions in the pilot house they saw the reflection of the lights through the opening in the screen board of each light. This, however, is entirely consistent with the fact, experimentally ascertained, that the metallic shields might nevertheless have been in such position as almost wholly to obscure the lens, except to a near observer dead ahead, and yet throw a gleam inboard through the opening. Whether the shield was improperly adjusted in the hurry of leaving the slip, or whether the duty of opening the lights was not seasonably performed, cannot positively be determined upon this record; but the proofs satisfy me that one or the other of those causes prevented the sight of the red light by the Morley's watch. The witness Pangborn, a night ferryman, who was in the rowboat just below the Ouellette avenue dock when the Lansdowne left her slip, testified to seeing her red light. This may be true, and yet it may have been invisible to vessels at a distance and to the port side, because insufficiently open. He was scarce a length from the Lansdowne when she moved out of her slip, and nearly ahead of her, between her course and the ferry dock. He had no need to note her lights, but was merely waiting for her to pass down so that he might go under her stern. Other witnesses from a car ferry a mile below the Lansdowne's slip, and one from a ferry in the C. P. R. slip near Seventeenth street, Detroit, testified to seeing the colored lights of the Lansdowne before the collision. This consists entirely with the testimony of the crew of the Morley. Powers, wheelsman on the C. P. R. ferry Michigan, claims to have seen the Lansdowne's colored lights when she was coming out of her slip at Windsor when his own steamer was half a mile below the Morley, and half way between the

Wabash and C. P. R. slip. As the Lansdowne lies in her slip and moves out of it down the river in the same line of vision to one in Powers' position, it is scarcely credible that such an observer could tell whether the vessel was at rest or in motion, at her slip or a thousand feet below it.

The great majority of the witnesses had no concern with the absence or presence of the lights. The deck watch of the Morley was charged with the duty of navigating their vessel with reference to the dangers and exigencies of navigation, which in that locality were numerous and great. They knew that ferryboats were constantly crossing in that vicinity, that the numerous lights on each side of the river increased the difficulty of distinguishing those on land from those water-borne, and the conditions peculiar to the locality called for the utmost vigilance. It must be presumed that men of their experience, familiar with the river and the exceptional hazards of its navigation, were alive to their duties, and appreciated the conditions of the locality. From a point 600 or 700 feet—nearly one-third of the width of the river from the Canadian shore—the Morley's crew was, for over half a mile at least, in a position to discern the light of an approaching vessel, whether that vessel was leaving her dock bound down, or coming from a point above. It is hard to believe that if the Lansdowne seasonably showed her port light, competent navigators would be so negligent of their duties, and so reckless of the consequences of collision, as to take no precaution, nor give any warning, but keep on at full speed until that vessel had approached within 800 or 900 feet. By rule 23 of the White law every steam vessel in taking any course authorized or required by the rules shall indicate that course by prescribed signals of her whistle, and by rule 5 of the pilot rules for the Great Lakes and their connecting and tributary waters, with both of which her master was familiar, it was the duty of the Morley to sound a passing signal to an "approaching vessel" on any course, and within half a mile distant. The Canadian statute is yet more stringent requiring the passing signal when vessels are "in sight of each other." The statutes of both countries penalize the violation of any of their provisions. While the master of the Morley had no actual knowledge of the Canadian statute, yet the instinct and training of every competent American master and the penalty of the statute would naturally prompt him to observe at least the salutary requirement of the American statute and rules. He willfully disregarded these if he knew, or might have known, before the exchange of whistles, the approach of the Lansdowne, whose port light, at least if opened, was visible to him from the time she cleared from her slip, and yet approached her at full speed without signal or precaution of any kind. Such a gross violation of law and of the dictates of common prudence is not to be presumed, but must be established by the clearest evidence. That offered in support of the charge fall short of the requirement.

On the other hand, the violation of article 28 of the Canadian statute, quoted supra, is confessed by the master of the Lansdowne in the admission that he saw the Morley's green and masthead light

from the time he was abreast of Ouellette avenue. He must have seen, during every moment of her approach, that she was navigating without reference to the Lansdowne, and was on a course which would cross the latter's, yet he sounded no signal notifying her of the presence and course of the Lansdowne until the vessels were but three lengths apart, and 40 seconds would bring them together. Not even then had he any apprehension of a collision, but put his wheel nearly hard a-port, and, without waiting for answer, kept his speed and the course until he had only time to give the stopping signals to his engines before the vessels came together.

Where reputable witnesses, whose competency and experience in their calling is not questioned, testify that no light was visible, who were in a position to see it if it was, whose interest, duty, and safety were involved in observing it, and where there is nothing to indicate negligence on their part, and a collision occurred which might easily have been avoided, and would naturally have been averted if the light had been visible and seen; when their testimony is opposed mainly by that of men having less favorable opportunities of knowledge of the fact in question, and which is quite consistent with the obscuration of a light by a cause which they were not in a position to observe; and where the testimony of one of the opposing witnesses, who was charged with the duty of opening the light, is apparently to his practice, rather than his recollection of the facts and of the time when he opened the light; and when the navigation of vessel charged with fault is shown to have been flagrantly negligent in other particulars,—the weight of evidence must be deemed to establish the light in question was either imperfectly displayed or was not seasonably shown. The Drew (D. C.) 35 Fed. 791; The Livingstone (D. C.) 87 Fed. 775; The Monmouthshire (D. C.) 44 Fed. 697.

It is argued that the vessels were on crossing courses, and therefore the Morley was at fault,—if she was the first to signal,—in announcing that she was taking her course to port; that her duty was to keep out of the way of the Lansdowne by passing under her stern. It may be remarked, in passing, that the Canadian statute does not make that course imperative. Article 19 of that Code is qualified by article 22, providing that "every vessel which is directed by these rules to keep out of the way of another vessel, shall, if the circumstances of the case admit, avoid crossing ahead of another." It is manifest, however, that the rule and its qualification apply only to those cases where both vessels are under way, and the intersection of their courses is evident. If no light was visible to the Morley until she had given the signal of two blasts, and there was nothing to indicate that the Lansdowne was on a crossing course, she was, as to the Morley, not an "approaching" vessel, but merely a possible obstruction to be shunned,—the "dark object" which the Morley's crew described her to be. When she notified her course and character by her signal and the exhibition of her port light, the collision was inevitable; and under articles 22 and 23 the "circumstances of the case" did not admit of any other course than that adopted by the Morley. It is strong evidence of careful navigation that the master refused to take the chances of crossing ahead of the Lansdowne at

full speed after her light was displayed. It is impossible to accept the judgment of the Lansdowne's master that the vessels would have passed port to port if the Morley had kept her course. The clear preponderance of the proofs is that the Morley made no change of course, notwithstanding her signal. If her port light was seen by those on the Lansdowne, it was brought into view by the advance of the latter, and at the instant of collision.

The navigation of the Lansdowne was fraught with so many sins against the Canadian statutes, the neglect of so many precautions required by the ordinary practice of seamen, that all doubts must be resolved against her. No proper precaution was taken to ascertain the proximity of vessels before she left the dock. She moved out of her slip without a competent navigator in charge of her forward deck. Her master was her only licensed officer. She had no lookout. She did not carry the lights prescribed by the statutes of Canada. She failed to properly and seasonably display her port light. She did not seasonably sound the passing signal, although she had seen the Morley more than half a mile away. She neither slackened speed, stopped, nor reversed until a length away from the Morley, although it should have been evident to her master at the exchange of signals that collision was imminent. Were the evidence less convincing of the careful navigation of the Morley, any doubt of the propriety of her management must be given her when contrasted with the many and grievous faults of the Lansdowne. "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption, at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." The City of New York, 147 U. S. 85, 13 Sup. Ct. 211, 37 L. Ed. 84.

A decree will be entered holding the Lansdowne solely in fault for the collision, dismissing the cross libel, and referring the cause to a commission to ascertain and report the damages.

## CHARMAN v. LAKE ERIE & W. R. CO. et al.

(Circuit Court, D. Indiana. December 22, 1900.)

No. 9,893.

1. Removal of Causes—Joint Action.
   That one of two defendants sued jointly in a state court was joined for the purpose of preventing a removal of the cause to the federal court by the other defendant does not give the latter the right of removal, where the plaintiff had the legal right to bring a joint action.
2. Torts—Actions—Joinder of Defendants.
   It is not necessary to the maintenance of a joint action for a tort that the injury should grow out of the breach of a joint duty, but where it results from an act or omission which constitutes at the same time a breach of duty owing by each defendant to the plaintiff, although such duties are not the same and do not grow out of the same or similar principles of law, a joint action therefor may be maintained.
3. Same—Master and Servant—Joint Liability.
   Burns' Rev. St. Ind. 1894, § 7083, which makes a railroad company liable for an injury to an employé caused by the negligence of any person in its service who has charge of any switch yard, shop, etc., imposes upon the company the duty of employing foremen who will not by their negligence injure other employés; and, where the negligence of the foreman in charge of a switch yard causes an injury to an employé therein, his act constitutes a breach of the duty of the master, and at the same time a breach of duty on his own part towards his co-employé, and the person injured may maintain a joint action against the master and servant for the injury.
4. Removal of Causes—Separable Controversy — Joint Action for Tort.
   It being the settled rule in Indiana that a master and servant may be jointly sued for an injury resulting from the servant's negligence, such an action brought in a court of that state cannot be severed for the purpose of removal.

At Law. On motion to remand to state court.

This is an action by the plaintiff, as administrator, against the defendants to recover damages for the death of Frank Coffman by the wrongful acts and omissions of the defendants. The action was begun in the circuit court of Delaware county, Ind., and removed into this court. It is alleged that on November 29, 1899, Frank Coffman died intestate, and that letters of administration upon decedent's estate were duly issued to the plaintiff, who has duly qualified and entered upon the duties of his office; that on and long prior to November 29, 1899, the defendant the Lake Erie & Western Railroad Company owned and operated, and now owns and operates, a line of railroad through the county of Delaware, Ind., which passes through the city of Muncie, in said county, at which place the defendant railroad company has had during said time regularly established switches and switch yards for handling cars and making up trains, and that during all of said time the defendant railroad company kept as its duly-appointed yard master the defendant Oliver, with full authority and control over said switch yard and the employés in said switch yard; that during said time the defendant company was, and still is, a common carrier for hire of freight and passengers, employing a large number of persons for the purpose of operating its railroad and switch yards; that on October 5, 1899, the defendants employed the decedent and put him to work as a brakeman in said switch yard, and that on November 29, 1899, the decedent, while in the performance of his duty as such brakeman, was requested, ordered, and commanded by defendant Oliver, as such yard master in charge of said switch yard, to couple together by means of chains two damaged cars which were then standing on one of the switches in said switch yard with a number of other cars; that the damaged

cars were without drawbars and bumpers, and that because of said defects the ends of said cars would come together, leaving but a few inches between their flat-end surfaces; that while in the exercise of due care, and without any fault or negligence on said decedent's part, and while chaining together said damaged cars, and acting under direct command of said defendant yard master of said defendant company, said yard master, without notice or warning to decedent, carelessly, negligently, and recklessly permitted an engine to be operated and propelled in and upon said switch, which set said cars in motion, whereby said cars, without decedent's fault or negligence, were propelled upon and against the decedent with great force and violence, and said decedent was then and there, without fault, caught between said damaged cars, and his head and skull were crushed, from the effects of which he instantly died; that the defendant Oliver kept no outlook and exercised no care whatever whereby he could have known that said cars would be propelled against the decedent; that said yard master used no signals to prevent said cars from being propelled against the decedent as aforesaid, and gave no warning to decedent that he was in danger of injury from said moving cars; that decedent was not aware of his peril, and had no notice of the movement of said cars; that all of said wrongs, grievances, and injuries to the person of the decedent occurred solely through the negligence, carelessness, and recklessness of said defendants, as hereinbefore stated and alleged; that decedent was a strong and vigorous young man, 27 years of age; and that he left a wife and child.

The defendant the Lake Erie & Western Railroad Company filed a petition and bond for the removal of the cause from the state court into this court. The state court ordered the removal. The petition alleges "that the Lake Erie & Western Railroad Company is, and at the time the action was commenced was, a corporation organized and existing under and by virtue of the laws of the state of Illinois, and a citizen of that state, and that the plaintiff was at the time of the commencement of the suit, and ever since has been, and still is, a resident and citizen of the state of Indiana; that the matter in dispute between the plaintiff and the petitioner in said action exceeds, exclusive of interest and costs, the sum of two thousand dollars; that there exists in said action a controversy between the plaintiff and the petitioner, which is wholly between them, and is entirely distinct and separate from the controversy between the plaintiff and the defendant Hortense L. Oliver, and the controversy between the plaintiff and the petitioner may be tried and fully determined apart from and independently of the controversy between the said plaintiff and the said Oliver; that, as shown by said complaint filed herein, the plaintiff seeks to recover a judgment against the defendant Oliver solely by reason of his personal acts of negligence, resulting in the injury of the plaintiff's intestate, and in said complaint he seeks to recover a judgment against this petitioner upon the ground that the petitioner is claimed to be liable for the negligent acts of said Oliver as its agent, and by reason of the alleged fact that the said cars sought to be coupled were out of order, and by reason of the statute of the state of Indiana known as the 'Employers Liability Act,' in force March 4, 1893, and known as 'Section 7083 of Burns' Revised Statutes of 1894.' But the petitioner further shows that said complaint does not state any joint liability against it and said Oliver, but whatever liability is shown as to each is several, and not joint. But this petitioner avers that the plaintiff, for the purpose of preventing the removal of this cause into the United States circuit court for trial, has joined the said Oliver, who is a resident and citizen of Indiana, as a co-defendant with the petitioner."

The statute referred to in the petition reads as follows: "That every railroad * * * operating in this state shall be liable for damages for personal injuries suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, * * * where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine, or train upon a railway."

The plaintiff moves to remand this action to the state court on the ground that the cause of action set out in the complaint is an entirety, and not separable.

White & Young and Mann & Lesh, for plaintiff.
John B. Cockrum and Miller, Elam & Fesler, for defendant.

BAKER, District Judge (after stating the facts). The statement that the defendant Oliver was joined as a co-defendant with the petitioner for the purpose of preventing a removal is of no importance. If the plaintiff had the right to bring a joint action against the company and its servant for the negligent killing of the plaintiff's intestate, his motive or purpose in so doing is immaterial. In respect to the removal of actions for tort on the ground of a separable controversy, certain matters are too firmly settled to be open to dispute. In Railroad Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473, the complaint charged two corporations with having jointly trespassed on the plaintiff's land; and it was set out in the petition for removal that one of the corporations was not in existence at the time of the alleged trespass, but that was held to be a question on the merits. It was said—

"That in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court."

In the case of Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528, it is said:

"As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts which might have been brought against all or against any one of the defendants, 'separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'"

The complaint in this case charges—

"That all of said wrongs, grievances, and injuries to the person of said decedent occurred solely through the negligence, carelessness, and recklessness of said defendants, as hereinbefore stated and alleged."

If "a defendant has no right to say that an action shall be several which a plaintiff elects to make joint," it would seem that this rule would apply here, because the plaintiff has elected to sue the defendants jointly for wrongs which he alleges the defendants have jointly committed.

It is, however, insisted that the complaint does not show that the company was present, participating in the alleged wrongs, nor that such wrongs were committed by its authority, nor with its knowledge, consent, or subsequent approval. Whether the master and servant can be sued in tort, as joint wrongdoers, for an injury caused by the negligence of the servant under such circumstances, is a question upon which the authorities are not in agreement. That the

master and servant cannot be jointly sued for an injury caused by the negligence of the servant in the absence of the master, and without his direction or approval, is supported by the cases of Parsons v. Winchell, 5 Cush. 592; Mulchey v. Society, 125 Mass. 487; Banfield v. Whipple, 10 Allen, 27, 87 Am. Dec. 618; Bailey v. Bussing, 37 Conn. 351; Sellick v. Hall, 47 Conn. 260, 273, 274; Campbell v. Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Page v. Parker, 40 N. H. 47, 68; Clark v. Fry, 8 Ohio St. 358, 377; Warax v. Railway Co. (C. C.) 72 Fed. 637; Hukill v. Railroad Co., Id. 745; Beuttel v. Railway Co. (C. C.) 26 Fed. 50; Hartshorn v. Railway Co. (C. C.) 77 Fed. 9. In Mulchey v. Society, supra, the doctrine that the master and servant could not be jointly sued for tort is made to rest on the rule of law making the master answerable for the negligence of the servant; that is, on the doctrine of respondeat superior. It is said:

"If there was any negligence in the agents, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact nor in legal intendment the joint act of the principal and of the agents, and therefore both could not be jointly sued."

In the case of Warax v. Railway Co., supra, it was held that there were separable controversies in a joint suit for tort against master and servant, because the liability of the master for the negligence of the servant in his absence and without his knowledge or approval arises from the principle of public policy which requires that the master shall be held responsible for the acts of his servant done in and about the master's business, while the liability of the servant arises from his personal wrong.

The foregoing cases seem to rest upon too narrow a view of the relation of master and servant, especially where the master is a corporation, and in failing to place the master's responsibility on its true basis. To affirm that public policy or a rule of law makes the master answerable for the negligence of his servant in and about the master's business is not an accurate and complete statement of the principle on which the master's liability rests. If any action can be maintained against the master in such a case, it is because he owes a duty towards the injured person which has been violated. It is universally agreed that, in order to maintain an action for injury to person or property by reason of negligence or want of due care, there must be shown to be existing some obligation or duty towards the plaintiff which the defendant has disregarded or violated. This is the basis on which the cause of action must rest. There can be no actionable fault or negligence or breach of duty where there is no act or service or contract which the party is bound to perform. The statute of this state above quoted has made it the duty of the railroad company to place a person in charge of its switch yard who should be free from fault resulting in injury to a fellow servant. The master is made an absolute guarantor that the decedent should not be harmed by the negligence of the servant in charge of the switch yard. This duty was a positive and continuing one. The duty of the person in charge of the switch yard, grow-

ing out of the exigency of the social order, was so to conduct himself about his master's business as not to injure a fellow servant by his negligence or want of due care. The plaintiff's intestate is alleged to have been killed by the negligence of the person placed by the defendant company in charge of its switch yard. The negligence of the person in charge of the switch yard gave rise to a twofold breach of duty, namely, that of the person in charge of the switch yard and that of the railroad company. The breach of the master's duty arose from its failure to keep in charge of its switch yard a person who would not by his negligence injure a fellow servant. If the master had not failed in the performance of this duty, no actionable injury could have occurred. The servant's carelessness constituted a breach of duty on the part of the master. While the master's duty was an absolute and continuing one, to keep a person in charge of its switch yard who would not injure a fellow servant by negligence, no breach of this duty could happen except through the negligence of the person so placed in charge. The mere placing by the master of a careless person in charge of its switch yard would of itself constitute no actionable wrong, and an actionable breach of duty could only arise when a fellow servant was injured by the negligence of such person. It is thus manifest that the company's breach of duty was concurrent in point of time with the breach of duty of the person in charge of the switch yard, and that the breach of duty on the part of each grows out of the same acts and omissions. The injury complained of arose from a concurring and co-operating breach of duty on the part of each, and it could not have occurred except as the result of such concurring and co-operating breach of duty. If the company had not employed the careless servant, and if the servant had not been careless, the injury would not have happened. The liability of the company does not grow out of the breach of the servant's duty by the servant, on the principle of respondeat superior. It grows out of the breach of the company's duty by the company failing to keep a person in charge of its switch yard who would not by his negligence injure a fellow servant. If the employer fails in the performance of this duty, his responsibility does not arise out of the servant's breach of the servant's duty towards the injured party, but it grows out of the employer's breach of the employer's duty towards the decedent,—a duty imposed upon the employer by law. The defendants have each violated a duty owing to the decedent, imposed upon them by law. The negligent acts of the servant gave rise to a breach of duty on the part of each. It is not essential that the duty violated by each should be joint or identical, nor that the duty of each should be deduced from the same legal principles. The case of a joint action by a passenger who is injured by the collision of two trains owned and operated by different railroad corporations affords a familiar illustration. The duty of the carrier of the passenger is to exercise the highest practicable degree of care to protect him from hurt. Its liability grows out of the breach of this duty. The duty of the other company is to use ordinary and reasonable care not to collide with the train carrying the passenger. Its liability grows out of the breach of this

duty. The two companies may be jointly sued for the injury of the passenger, and the cause of action is not separable and removable by one of the two defendants. Railway Co. v. Martin, 59 Kan. 437, 53 Pac. 461; Id., 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055. Hence it is apparent that it is not necessary to the maintenance of a joint action for tort that the injury should grow out of the breach of a joint duty, nor out of the same or similar duties deducible from the same or similar principles of law. The rule would seem to be that where the same acts or omissions constitute and give rise to a breach of duty owing by each defendant to the plaintiff, and concur and co-operate in producing the injury, a joint action may be maintained. That the master and servant may be jointly sued for an injury resulting from the servant's negligence is supported by the cases of Wright v. Compton, 53 Ind. 337; City of Peoria v. Simpson, 110 Ill. 294; Johnson v. Magnuson, 68 Ill. App. 448; Hoye v. Raymond, 25 Kan. 665; Phelps v. Wait, 30 N. Y. 78; Wright v. Willcox, 19 Wend. 343; Montfort v. Hughes, 3 E. D. Smith, 591; Suydam v. Moore, 8 Barb. 358; Wilkins v. Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450; Schaefer v. Otserbrink, 67 Wis. 495, 30 N. W. 922; Greenberg v. Lumber Co., 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439; Schearer v. Evans, 89 Ind. 400; Michael v. Alestree, 2 Lev. 172; Id., 1 Vent. 295; Steel v. Lester, 3 C. P. Div. 121; Moreton v. Hardern, 4 Barn. & C. 223, 10 E. C. L. 316; Newman v. Fowler, 37 N. J. Law, 89; Comitez v. Parkerson (C. C.) 50 Fed. 170; Connell v. Railway Co. (C. C.) 13 Fed. 241.

In 2 Thomp. Neg. 892, § 11, it is said:

"Under the Codes of New York and Indiana, which, as is well known, abolish forms of action, the master and servant may be joined in one action."

Judge Cooley, in his Treatise on Torts (2d Ed. [1888] p. 164), says:

"The case of carriers of persons is a conspicuous instance in which the failure of a servant to observe due care may constitute a legal wrong to third parties, and render him and his master jointly responsible. In undertaking to carry, the carrier assumes the duty to carry safely, in so far as the highest vigilance will enable him to do so. A railroad company acting as such carrier employs an engineer whose duty to the company is to run the train with skill and prudence. Now, although there are no contract relations between the engineer and the person who is to be carried, yet when an individual is placed in a position of responsibility, and the property and especially the persons of others are intrusted to his prudence, his skill, and his fidelity, so that his negligence may inflict serious and perhaps irreparable injury, it is reasonable that the law should make it the right of every person thus circumstanced to demand from him a vigilance corresponding to the responsibility. And this we understand to be the rule. The negligence in such cases is that of both master and servant, and the liability, as in other cases where two or more are chargeable with a wrong, may be enforced in a suit against one or against both."

This action was properly brought against the master and servant jointly in the state court. In Wright v. Compton, supra, the supreme court of this state said:

"That the servant is also liable for his own carelessness and negligence, and that the master and servant may be joined in the same action, are principles well settled."

In Connell v. Railway Co., supra, Mr. Justice Blatchford, on the circuit, remanded a case where a master and servant had been jointly

sued for tort, expressing the opinion that it was proper for the federal courts to follow the decisions of the state courts on the question of the entirety of a cause of action. The language of the learned judge is as follows:

"The decision of the state court at the special and general terms that the cause of action is entire is a decision which it is proper for this court to follow, and it leads to the conclusion that there is but a single controversy in the suit."

It would be anomalous if a cause of action which constituted an entirety in the court of the state could be severed into parts for the purposes of removal. In my opinion, it cannot be done. Remanded at the costs of the railroad company defendant

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## ELDRED et al. v. AMERICAN PALACE-CAR CO. OF NEW JERSEY et al.

(Circuit Court of Appeals, Third Circuit. December 14, 1900.)

No. 25.

1. FOREIGN CORPORATIONS—ACTIONS AGAINST—SERVICE OF PROCESS.
   A federal court in one state does not acquire jurisdiction over a defendant which is a corporation of another state, and which does not carry on business in the state of the suit, nor have any authorized representative therein, by the service of process on one who is merely shown to have been a director of such corporation two years previously.
2. JURISDICTION OF FEDERAL COURTS—NONRESIDENT DEFENDANTS—LOCAL ACTIONS.
   A suit in a federal court in New Jersey by stockholders of a Maine corporation against such corporation and others to set aside a transfer of patents and property by the corporation to a co-defendant, and to compel a restoration of such property, where the property is not within the district of New Jersey, and the relief sought is general, and not in rem, is not one to enforce a claim to or lien upon property in the district, within the meaning of section 8 of Act March 3, 1875, so as to authorize service on such corporation thereunder as a nonresident defendant.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Edward Q. Keasbey, for appellant.

Arthur Lord and Robert H. McCarter, for appellee.

Before DALLAS, Circuit Judge, and BUFFINGTON and J. B. McPHERSON, District Judges.

BUFFINGTON, District Judge. In this case Eldred and others, citizens of Massachusetts and New York, and stockholders of the American Palace-Car Company, a corporation of the state of Maine, filed a bill against the American Palace-Car Company, a corporation of the state of New Jersey, to set aside a transfer of its patents and property by the Maine to the New Jersey company. An injunction was also prayed for. The Maine company was made a respondent. To the subpœna the marshal made return under date of June 30, 1899, as follows:

"Served the within writ on the defendants Hayward A. Harvey, the American Palace-Car Company of New Jersey, and the American Palace-Car Com-

pany of Maine, on the 12th day of June, A. D. 1899, at East Orange, in the district of New Jersey, by delivering to and leaving with an adult person at the residence of Hayward A. Harvey three (3) copies thereof, and at the same time showing said person this original, with the seal of the court attached, and informing said person of its contents."

While the bill alleges that Harvey—the person served—had some two years previously been a director of the Maine corporation, no official connection is shown by the return to have existed at the time of this service, nor is such fact proven aliunde. The Maine company, by counsel appearing specially for the purpose of such motion, moved the circuit court to dismiss the bill on the ground that it was an indispensable party to the bill, and the court had acquired no jurisdiction over it. After hearing, that court held it had not, by the service returned, acquired jurisdiction over such company, and, as to it, dismissed the bill. 103 Fed. 209. It was not contended the company was doing or had done any business in the state of New Jersey, nor was it alleged that any one was authorized to represent it therein. Under these facts it is clear the circuit court of the district of New Jersey acquired no jurisdiction over the Maine corporation. Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Construction Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608. It is contended, however, the court below should have made an order directing service on it as an absent defendant, under the act of 1875, which provides:

"That when in any suit, commenced in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be." Act March 3, 1875, c. 137, § 8.

It is manifest, however, that this act has no application to the case in hand. This bill does not purport to concern "real or personal property within the district in which the suit is brought," and in fact the personalty involved is located in another district. It does not seek to obtain a decree in rem, but general relief. The object of an order of service in this case is not to enforce the appearance of an absent defendant in order to extinguish a claim to a specific res already within the jurisdiction of the court, but to secure, as we have said, a decree of a general nature. Moreover, as will appear from our opinion in another branch of this case, the rights which this bill seeks to enforce are wholly the rights of the absent defendant. It is an indispensable party, without whose presence on the record no relief can be granted, for its rights are the foundation of the bill. It is clear this case is not within the purview of the act of 1875. The decree of the court below is affirmed.

ELDRED et al. v. AMERICAN PALACE-CAR CO. OF NEW JERSEY et al.

(Circuit Court of Appeals, Third Circuit. December 14, 1900.)

No. 26.

1. CORPORATIONS—ACTIONS BY STOCKHOLDERS—NECESSARY PARTIES.
A corporation is an indispensable party to a suit by its minority stockholders to set aside a transfer of property by the corporation.

2. PRELIMINARY INJUNCTION—DISSOLUTION—WANT OF JURISDICTION TO GRANT FINAL RELIEF.
Where it has become clear that the court cannot grant the final relief prayed for in a bill because of the absence of an indispensable party, over whom the court is without jurisdiction, and who refuses to become a party voluntarily, a preliminary injunction issued against the defendant should be dissolved.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Robert H. McCarter and Arthur Lord, for appellants.

Edward Q. Keasbey, for appellees.

Before DALLAS, Circuit Judge, and BUFFINGTON and J. B. McPHERSON, District Judges.

BUFFINGTON, District Judge. This is an appeal by the American Palace-Car Company, a corporation of the state of New Jersey, and others, from an order of the circuit court for the district of New Jersey refusing to vacate, and continuing, a preliminary injunction theretofore granted by said court against said appellants. The court's opinion is in 96 Fed. 59. Thereafter the same court vacated a decree pro confesso entered against the American Palace-Car Company, a corporation of the state of Maine, and dismissed the bill as to said respondent company. 103 Fed. 209. On an appeal to this court by the complainants from the order so dismissing the bill as to the Maine company, the action of the circuit court has been affirmed in an opinion herewith filed. The bill in question was filed by a small minority of the stockholders of the Maine corporation to invalidate and set aside a transfer made by that company of its patents and personal property to the New Jersey corporation. It also sought to enjoin the latter company from retransferring and disposing of said property, and prayed that "the American Palace-Car Company of New Jersey may restore to the American Palace-Car Company of Maine all the property, chattels, and patent rights of every kind, and so attempted to be transferred, and any equity they may have in the palace car, Boston." The complainants represented 293 out of 15,000 shares. After hearing the application for an injunction, the court, on June 27, 1899, granted the injunction, which still remains in force. Subsequent thereto answers were filed. From these it appears that on March 2, 1900, after notice to all the stockholders of the Maine company, a stockholders' meeting was held. At such meeting the former action of the said company in transferring its assets to the New Jersey corporation in consideration of the assumption of the debts of the Maine company and the issue to

the stockholders of the latter company of one share of stock of the New Jersey company in lieu of two shares of the Maine company was ratified and approved. In taking this action, out of the 293 shares represented by the complainants in this bill 27 voted in favor of such ratification, 129 were present and did not vote, and 127 did not attend. Only 10 shares voted against ratification. It sufficiently appears that the Maine company is insolvent. No plan is suggested by which it can now pay, or will have any prospect of hereafter paying, its debts. No plan of reorganization or readjustment of its affairs is advanced by complainants or their counsel. Subsequent to the filing of said answer, application was made to the circuit court to dissolve the injunction. Such application was made to Circuit Judge Gray, who heard the case in the absence abroad of Judge Kirkpatrick, who had granted the preliminary injunction. In an opinion filed Judge Gray continued the injunction, though evidently with some hesitation, as he had before him the answers showing ratification and the dismissal of the bill as to the Maine company,—matters occurring subsequent to the grant of the injunction. As the case now stands, we have the hopelessly insolvent corporation of the state of Maine seeking to provide for its indebtedness by having the New Jersey corporation assume it, and also issue one share of its stock in exchange for two shares of the stock of the insolvent Maine company. At bar counsel for the New Jersey company signify the willingness and desire of that company to carry out such proposed stock exchange. After full consideration it appears that but 10 shares of stock, represented by one of the complainants in this case, record any objection to this plan. The Maine company, by a practically unanimous vote of its stockholders, favors the plan, and that company refuses to become a party to this bill, by which it is sought to invalidate the transfer. Apart from the strong case thereby presented for the court declining to lend its aid to the minority stockholders, whose purpose is manifestly not to put the company in a position where its indebtedness can be paid or provided for, but to obstruct the plan of practically all the stockholders whereby something can be saved from the wreck, we think this injunction should be lifted, because it is clear the complainant can have no relief by final decree. This litigation must eventually end in the dismissal of the bill, by reason of the absence from the record of a necessary party. If such be the certain end of the bill, why should this injunction, without security, stand until that end is reached? It is quite clear that the right of action here sought to be enforced is the right of action of the Maine corporation. The right of such corporation is the foundation on which the relief sought by its stockholders rests. The stockholder has no rights separable from those of the corporation. The right of the party before the court depends on the right of the party not before the court. Not only is the presence on the record of that corporation necessary to constitute the stockholders' right, but the respondent has a right to its presence, so that it may be concluded by the decree. The authorities are clear that such corporation, either as a complainant or a respondent, is an indispensable party to the bill. In Davenport

v. Dows, 18 Wall. 626, 21 L. Ed. 938, it was held the corporation was a necessary party to a bill filed by a stockholder, and its nonjoinder was demurrable. To the same effect are Mallow v. Hinde, 12 Wheat. 193, 6 L. Ed. 599; California v. Southern Pac. Co., 157 U. S. 248, 15 Sup. Ct. 591, 39 L. Ed. 683; Fourth Nat. Bank v. New Orleans & C. R. Co., 11 Wall. 625, 20 L. Ed. 82; Railroad Co. v. Mills, 113 U. S. 256, 5 Sup. Ct. 456, 28 L. Ed. 949; Porter v. Sabin (C. C.) 36 Fed. 476. The order continuing the injunction is, therefore, reversed, the injunction dissolved, and the case remanded, with direction to dismiss the bill

## FARMERS' NAT. BANK OF HUDSON v. JONES, Governor of Arkansas, et al.

(Circuit Court, E. D. Arkansas. December 29, 1900.)

1. JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE.
   A suit against the officers of a state to compel them to do acts which would impose a contractual pecuniary liability upon the state, or to issue any evidence of debt which would have that result, is, in fact and legal effect, a suit against the state, of which a federal court has no jurisdiction.
2. EQUITY JURISDICTION—MANDATORY SUIT AGAINST PUBLIC OFFICERS.
   A bill in equity to compel a board of public officers to issue bonds to plaintiff is, in effect, a petition for a peremptory mandamus, and neither can be maintained unless the act sought to be coerced is a purely ministerial one, enjoined on the defendants by positive requirement of law, which leaves nothing to their discretion.
3. STATES—POWER OF BOARD TO ISSUE BONDS—ARKANSAS STATUTE.
   Act Ark. May 8, 1899, which authorizes and directs the state debt board to fund the valid bonded indebtedness of the state by exchanging new bonds for outstanding valid bonds, which shall be presented by the holders, confers no power on such board to issue new bonds in lieu of old bonds which have been lost or destroyed, even though they were erroneously destroyed by the officers of the state, nor can such power be conferred by a court on equitable grounds; the only remedy of the creditor being through legislation.

In Equity. Suit against the state debt board of Arkansas to compel the issuance of state funding bonds to complainant.

The act of the legislature of the state of Arkansas approved May 8, 1899, entitled, "An act to fund the debt of Arkansas and for other purposes," contains the following provisions:

"Section 1. That the state debt board is hereby authorized and directed to fund the valid bonded indebtedness of the state of Arkansas, excepting the one hundred and sixty (160) bonds of the series of 1870, now owned and held by the United States, and to call in the outstanding script and treasurer's certificates of this state."

"Sec. 3. Each bond at the time of its delivery or exchange shall be signed by the governor and sealed with the great seal of the state, be countersigned by the treasurer and registered by the auditor of state, and the date of each registration shall be endorsed on the bond and signed by the auditor. The signature required above shall be in the personal handwriting of the official making the same. The coupon attached to each bond may be signed by the treasurer alone, which signature may be engraved thereon at time of preparation of the blank bonds by the printer."

"Sec. 5. Immediately after the passage of this act the state debt board, by its president, shall publish for sixty days, in each, in a daily paper in Little

Rock and New York City, a notice to all private holders of valid bonds of this state, to present same for exchange for new bonds provided for by this act. The basis of exchange shall be an amount of new bonds equal to the aggregate amount of old bonds and matured coupons thereto attached."

On the 4th day of May, 1900, the plaintiff in this case presented to the state debt board its petition requesting the board to issue to it, under the act quoted, funding bonds in lieu of certain state bonds which it alleged belonged to it, and had by mistake been burned by the burning board of the state on December 11, 1896. The state debt board, upon consideration of the plaintiff's petition and the evidence presented in support thereof, made the following finding of facts:

"And upon consideration of the recitals thereof, and the matter and questions arising thereon, in connection with the evidence offered in support thereof, and an examination and inspection by the board of the records in the office of the auditor and treasurer relating thereto, the board reached the conclusions, and made and hereby declares the following finding of the facts, as the same exist and relate to the said matter, namely:

"(1) That the said Farmers' National Bank and its predecessor in interest, the Farmers' Bank of Hudson, New York, became the owner prior to June 14, 1839, of the following described non-Holford Real-Estate Bank bonds of the said state of Arkansas, issued under authority of the act of legislature of said state to aid in establishing what was known as the 'Real-Estate Bank,' together with coupons thereto, the numbers of said bonds being Nos. 482, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 657, 658, 676, and 698, being eighteen bonds; that said bank remained continuously the owner of said bonds until September 12, 1871.

"(2) That on the 12th day of September, 1871, the officers of said bank caused the said described bonds and coupons and others owned by it to be surrendered to the financial agent of the state of Arkansas, at the office of the Union Trust Company in the city of New York, to be exchanged for new funding bonds under the provisions of the act of April 6, 1869, which authorized and directed such exchange.

"(3) That in exchange for said Real-Estate Bank bonds and others, and by way of funding same in manner provided for in said act of 1869, said funding agents of the state of Arkansas wrongfully caused to be delivered to said Farmers' National Bank, either fraudulently or through mistake, the following described pretended bonds of said state, namely, Nos. 1,451 to 1,480, both inclusive, 1,496 to 1,508, both inclusive, 1,511, 1,512, 1,753, 1,794, 1,795, 1,809, and 1,810, being fifty bonds, and equivalent in amount of the aggregate sum of bonds and coupons so surrendered by said band for exchange.

"(4) That the said fifty bonds were of the date and denomination of bonds issued by said funding agents to F. W. Caper, as attorney for Holford, on the 22d day of September, 1869, and the delivery thereof in exchange for the non-Holford bonds described in finding No. 1, on the 12th day of September, 1871, was either a mistake or a fraud upon the rights of the Farmers' National Bank.

"(5) That there appears upon the record of detailed receipts kept by said funding agents an entry purporting to have been made on January 31, 1872, reciting the fact that on said date the bonds described in finding No. 1 were presented by one W. P. Denkla for funding into new bonds under said act of 1869, and on said day the said funding agent awarded in exchange for said bonds the following described funding bonds of the series of 1869, and of these Nos. 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, twenty-nine bonds, each of said bonds bearing interest at the rate of 6 per cent. per annum, and having coupons attached for same from January 1, 1872; that, notwithstanding the said twenty-nine bonds were so ordered to be issued in exchange for the said twelve non-Holford bonds and the coupons thereon, only four thereof, namely, Nos. 796, 805, 823, 824, were in fact issued, and the same have been duly redeemed and paid, and that, therefore, no claims, legal or equitable, exist against the state of Arkansas for said four bonds.

"(6) That the remaining twenty-five bonds, and all coupons aforesaid thereto

attached, although duly prepared and signed and registered, were never in fact delivered to said W. P. Denkla, or to any one else, but apparently remained continuously in the hands of the funding agents until 1896, when the same were taken into possession of the treasurer of Arkansas, and on the 11th day of December, 1896, listed, and destroyed by burning, by the tribunal known as the 'Burning Board of the State of Arkansas,' and that at the same time, and under the same circumstances, the said twelve original non-Holford Real-Estate Bank bonds surrendered by the said Farmers' National Bank for funding and exchange as aforesaid were received from said funding agent by said treasurer and likewise burned."

"(8) That the said twenty-five bonds so coming into the possession of said state treasurer, and destroyed as aforesaid, were not the property, legal or equitable, of the said W. P. Denkla or the state of Arkansas, but belonged in fact to the Farmers' National Bank.

"(9) That said Farmers' National Bank has offered to surrender to this board the Holford bonds described in finding No. 3, disclaiming any right thereto.

"(10) That this board, notwithstanding it concedes to the said Farmers' Bank the ownership of the claim and debt represented by the twenty-five (25) funding bonds and coupons destroyed on December 11, 1896, declines to issue and deliver to said bank in exchange therefor the bonds of the state of Arkansas under the funding act of 1899, for the reason that in the judgment of the board the authority conferred by said act limits its powers to the funding and exchange of bonds and coupons in existence and capable of an actual manual delivery and exchange, and does not extend to or include claims based on bonds and coupons destroyed, even if the same was done erroneously.

"Because of the ground stated in this paragraph, the board now declines to fund the claim of the said Farmers' National Bank.

"Dan W. Jones, Governor.
"Alex C. Hull, Secretary of State.
"Clay Sloan, Auditor of State.
"Thos. E. Little, Treasurer of State."

Upon the refusal of the state debt board to issue refunding bonds to the plaintiff for the bonds so burned, this bill in equity was filed, setting out, at length and in detail, the facts found by the state debt board, and concluding with these prayers: "Wherefore the said complainant prays that the said official defendants may be held to be estopped to insist upon an actual tangible presentation of the bonds and coupons belonging to the defendant, in the face of the admitted fact that the same were destroyed by the officers of the state when there was no claim that the same belonged to the said state of Arkansas, but the record showed that they belonged to the owners of the bonds that they were directed to be exchanged for. (2) But, if complainant shall be mistaken as to its right to relief of this character under the facts stated, it prays that, under the language of the statute authorizing and directing the defendants composing the state debt board to fund the valid bonded indebtedness of the state, be held to include the power to fund as such bonded indebtedness the destroyed bonds and coupons of this complainant burned by the officers of said state, treating the said bonds and coupons as still in existence, in furtherance of justice and to accomplish the plain equities of this complaint, and to prevent the officers of the state from taking advantage of their unauthorized act in burning bonds and coupons which did not belong to the state at the time of the destruction thereof, it being a fact that the funding board could not lawfully destroy the property of any person under its powers. (3) If complainant should be mistaken as to its rights to relief in either aspect stated, then it prays that the said defendants re-execute the said bonds and coupons so destroyed, and when so re-executed, or treated as so re-executed, that the said defendants composing the said state debt board proceed to make exchange therefor, in accordance with the act of 1899, as valid bonded indebtedness of the state, and to issue and deliver to it new bonds for the aggregate amount of its said twenty-five bonds and the coupons thereon, and which would mature on the date of the court's order, the said new bonds to be for the amount, and numbered, signed, and registered, as required by the act of 1899, to make and constitute the same valid bonded obligations of the state

under said act. (4) That process issue for each of said defendants, commanding each thereof to make answer to the same under the penalty, etc., and that pending a hearing that the defendant Little, as treasurer, be enjoined from listing for destruction, and the said board from destroying, so many of the blank bonds now in the hands of said Little, as treasurer, as may be required to comply with any order that may be made in this cause. (5) That defendants make answer unto this bill, but not under oath, the same being hereby expressly waived. (6) That complainant be granted all other and further relief that the foregoing facts may entitle it to and to equity may appertain."

The state, by her attorney general, appeared, and demurred to the jurisdiction of the court upon the ground that the suit was, in fact and legal effect, one against the state. This demurrer was overruled by the district judge; and thereupon the state, by her attorney general, protesting and denying the jurisdiction of the court, filed an answer denying the material allegations of the petition. The facts as found by the state debt board are clearly and indubitably established by the evidence in the case.

James P. Clark and Thomas C. McRea, for complainant.

Jeff Davis, Atty. Gen., and Chas. Jacobson, for defendants.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

A state, without its consent, cannot be sued by an individual. "It is a well-established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or any other without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state." Beers v. Arkansas, 20 How. 527, 15 L. Ed. 991. The United States has waived this privilege in this regard, and allowed suits to be brought against it in a few specified cases. Some of the states of the Union, including Arkansas, have at times claimed no immunity from suit, but made provision for submitting themselves to the jurisdiction of courts at the suit of any one who choose to sue them. Experience, however, soon demonstrated this to be an unwise and extremely injurious policy, and most, if not all, of the states, including Arkansas, after a brief experience, abandoned it, and refused to submit themselves to the coercive process of judicial tribunals. When the supreme court of the United States in Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440, decided that under the constitution that court had original jurisdiction of a suit by a citizen of one state against another state, the eleventh amendment of the constitution was straightway adopted, taking away this jurisdiction. That amendment reads as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Since the adoption of this amendment, the contract of a state is substantially without sanction, except that which arises out of the honor and good faith of the state itself, and these are not subject to coercion. Ex parte Ayers, 123 U. S. 443, 505, 8 Sup. Ct. 164, 31 L. Ed. 216. One claiming to be a creditor of a state is remitted to the justice of its legislature. It was once said by the supreme court of the United States that the eleventh amendment was limited to suits in which the state was a party to the record. Osborn v. Bank, 9 Wheat.

738, 6 L. Ed. 204. But as a state can perform its functions through officers and agents only, it was soon perceived that, if these officers and agents of the state were liable to be sued and coerced to comply with the judgments and decrees of a federal court, the whole scope and purpose of the amendment would be nullified, and the doctrine of that case on this point has long ceased to be authority.

It is now settled that the jurisdiction in such cases is dependent upon the real, and not upon the nominal, parties to the suit, and it is now clear, both upon principle and authority, that a suit against the officers of a state to compel them to do acts which would impose a contractual pecuniary liability upon the state, or to issue any evidence of debt, in the name of the state, which would have that result, is in fact and legal effect a suit against the state, though the state itself is not named a party on the record. This suit is not against the named defendants as individuals, but against them in their official character and capacity as officers of the state constituting the state debt board, and seeks to compel them to perform an official act in the name of the state, whereby the state will become bound for the payment of money by an evidence of debt which now has no existence, and which they are not by law empowered to issue. The state debt board owes to the state the duty to do for and in the name of the state the things enjoined upon it by the act of the legislature, and none other. The board, as a board, has no contract relations with the owners of lost or destroyed bonds, and stands in no relation to them which imposes on the board any duty towards them whatever; and if it be conceded that the state owes to the owners of lost or destroyed bonds, no matter by whose agency lost or destroyed, the duty of issuing new bonds in their stead, no federal court can coerce the state, or any of its officers or boards, by any form of suit or proceedings, to the performance of that duty. As was said by the supreme court in the Jumel Case, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448, the board can be moved through the state, but not the state through the board. A suit like the one at bar, which seeks to compel a board of state officers to execute and deliver to a suitor the bonds of the state, which, if legally executed and delivered, would constitute a valid money obligation against the state, is to all intents and purposes a suit against the state, of which a federal court has no jurisdiction. It is a suit to compel the board to issue negotiable bonds of the state, to become legal and binding obligations upon the state. There is no difference between such a suit and a suit against the state for the amount of money expressed in the bonds. If one can be maintained, the other can. The justice and merits of the demand cut no figure in determining the jurisdiction of the court. When it is determined that the suit is one against the state, the jurisdiction of the court is terminated, and any inquiry into the merits of the case is irrelevant. There is a well-defined line of distinction between a suit like the one at bar and suits against officers and agents of the state to restrain them from inflicting a personal injury on a citizen in violation of his legal and constitutional rights, or to compel them to perform for a citizen a plain ministerial duty, the performance of which is enjoined upon them by law, and concerning the performance of which they have no

discretion. This line of distinction is pointed out and illustrated in the cases which we cite. Ex parte Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448; Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468; Cunningham v. Railroad Co., 109 U. S. 446, 3 Sup. Ct. 292, 27 L. Ed. 992; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805; Osborn v. Bank, 9 Wheat. 738, 6 L. Ed. 204; Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447; Board v. McComb, 93 U. S. 531, 23 L. Ed. 623; Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842; Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363.

The plaintiff's suit must fail on another ground. The bill is, in effect, a petition for a peremptory mandamus on the state debt board to compel it to issue state refunding bonds to the plaintiff in lieu of state bonds alleged to have been wrongfully or erroneously burned by the state burning board, and which it is alleged belonged to the plaintiff. The act of the legislature, providing for refunding the bonded debt of the state, confers on the board no authority to issue refunding bonds in such a case. That act contemplates the exchange of one bond for another. Wherever the holder of a valid state bond presents the same to the board to be funded, it is the duty of the board to issue and deliver to the holder so presenting such bond a refunding bond for a like amount, as prescribed by the act. Until a valid state bond is presented to the board to be refunded, it has no jurisdiction to act in the premises. The actual presentation of a state bond to be refunded is an indispensable prerequisite to the exercise of its jurisdiction. It has no power or authority under the act to inquire into the ownership or validity of alleged lost or destroyed bonds with a view of refunding them. And the inquiry the board made, and the facts it found, on the application made to it in this case, were extra official. It was a judicious and proper thing to do, but after doing it the board rightfully decided that it was without power or authority to grant the relief sought, or give any legal force or efficacy to its findings. The court is fully in accord with the board in its finding of facts, but they have no official sanction or force. No state of facts can confer on the board the authority to issue state bonds. This can be done by law only. It is a power not to be implied or presumed; it must be expressly conferred. The facts found by the board will doubtless be persuasive before the tribunal which alone can do justice in the premises under the existing laws of the state. They are unavailing elsewhere. In the absence of express statutory authority, no state officer or board has power or authority to issue state bonds or other evidences or debt in lieu of bonds or evidences of debt alleged to have been lost or destroyed. The policy pursued by the United States in this regard is instructive. For a long time it was the practice to pass special acts of congress authorizing the secretary of the treasury of the United States to issue, upon the conditions prescribed in the acts, duplicate United States bonds in lieu of bonds destroyed by fire or otherwise. As examples of such acts we cite: Act Feb. 13, 1862 (12 Stat. 901); Act Jan. 19, 1861 (12 Stat. 878); Act March 28, 1864 (13 Stat. 577); Act

July 23, 1866 (14 Stat. 599); Act April 25, 1866 (14 Stat. 584); Act March 1, 1869 (15 Stat. 464). Finally, congress passed a general law on the subject to cover all cases of the loss or destruction of United States bonds, which is embodied in sections 3702–3705, Rev. St. U. S. Without express authority to that effect conferred by an act of congress, the secretary of the treasury of the United States never presumed to issue duplicate United States bonds to take the place of bonds lost or destroyed, no matter how clear or satisfactory the proof of loss might be. On examination, it will be found that the acts of congress and of the states, which authorize the issue of bonds or other evidence of debt of the United States or of a state in lieu of lost bonds or other evidence of debt, uniformly prescribe the conditions upon which it will be done. Proof of loss and the execution of an indemnifying bond are among the conditions required by such acts.

As before remarked, the bill in this case is, in effect, a petition for a peremptory mandamus. If a mandamus would not lie to coerce the state debt board to the performance of the act, no more can its performance be coerced on a bill in equity. A court of equity cannot, by its process or decree, invest a public officer with power or authority not conferred on him by law, any more than a court of law can do that thing by a writ of mandamus. When it is sought to compel a public officer or board to do a particular act, it must clearly appear that the law has made it the legal duty of the officer or board to do the act, and that the act is purely a ministerial one, which leaves nothing to the discretion of the officer or board. The whole law on this subject is briefly and accurately expressed by the supreme court of the United States in the case of U. S. v. Lamont, 155 U. S. 303, 15 Sup. Ct. 97, 39 L. Ed. 160. In that case the court say:

"The duty to be enforced by mandamus must not only be merely ministerial, but it must be a duty which exists at the time when the application for the mandamus is made. Thus, in the case of Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861, this court, speaking through Mr. Chief Justice Waite, said: 'It is settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one.' Moreover, the obligation must be both peremptory and plainly defined. The law must not only authorize the act (Com. v. Boutwell, 13 Wall. 526, 20 L. Ed. 631), but it must require the act to be done. 'A mandamus will not lie against the secretary of the treasury, unless the laws require him to do what he is asked in the petition to be made to do' (Reeside v. Walker, 11 How. 272, 13 L. Ed. 693. See, also, Secretary v. McGarrahan, 9 Wall. 298, 19 L. Ed. 579); and the duty must be 'clear and indisputable' (Commissioners v. Aspinwall, 24 How. 376, 16 L. Ed. 735)."

And see Board v. King, 14 C. C. A. 421, 67 Fed. 202. These rules are applicable to this case, and decisive of it. The bill must be dismissed for want of jurisdiction, without prejudice to the plaintiff's right to assert its claim before any tribunal competent to afford the relief sought.

## CHRISTIAN v. SMITH et al.

(Circuit Court, S. D. New York. September 4, 1900.)

EQUITY—SUIT FOR ACCOUNTING—GROUNDS OF JURISDICTION.

A bill alleged that complainant and defendants were appointed by the bondholders of an insolvent railroad company a committee to have charge of proceedings for the foreclosure of the mortgage and the reorganization of the company; that it was agreed that the members of the committee should be fully compensated for their services and expenses, and a fund was raised and placed in its hands to pay the expenses of the proceedings and such compensation; that it was further agreed that the committee itself should compensate its members by justly apportioning between them the available surplus of such fund; that defendants, who constituted a majority of the committee, had apportioned a sum to complainant which was less than full compensation, and less than the amount of the fund remaining in their hands warranted, but that they refused to make an accounting as to such fund, or to give him any information on the subject. *Held*, that such bill stated a good cause of action for an accounting.

In Equity. On demurrer to bill.

John S. Wise, for complainant.
Miller, Peckham & Dixon, for defendants.

TOWNSEND, District Judge. Demurrer to amended bill for an accounting originally filed by Edward D. Christian, who died, and whose executrix has revived the suit. It appears from the bill that in August, 1886, the Seattle, Lake Shore & Eastern Railway Company, a corporation of the state of Washington, mortgaged its railroad to the Union Trust Company of New York to secure the payment of an issue of bonds to the amount of $5,675,000; that in 1893 the company defaulted the interest upon said bonds; that thereupon the bondholders, by written agreement, appointed complainant's decedent and the defendants trustees and agents, under the title of a committee, to take such measures as might appear to them to be judicious for the protection of the bondholders; that the whole issue of bonds was deposited with the Manhattan Trust Company; that the Union Trust Company foreclosed the mortgage; that the original agreement was modified on March 25, 1896, so that the previous acts of the committee were ratified, and they were authorized to bid in the property at the foreclosure sale for the bondholders, and to organize two new corporations, and take various other measures for the preservation of said property; and it was further agreed that, in case of the purchase of said property, a voting trust should be created, and that defendants Armour, White, and Sage should be voting trustees, with extensive powers.

Paragraphs 8 and 9 of the bill allege as follows:

"Eighth. In the making of the agreement aforesaid for the foreclosure and reorganization, it was contemplated and understood between the parties thereto that the committee would have to perform great and protracted labor, involving onerous and delicate responsibilities, for all of which it was intended and provided that the committee should be fully compensated, and suitable provision was made therefor in the said agreement, but the amount of compensation was not fixed and stated in the agreement, because the just amount could only be determined by future events and ultimate results. Nor

was any personal liability assumed in the premises by individual bondholders. The only recourse for compensation was and is against the fund in the hands of the committee under the said agreement. As security for such payment of just compensation and for their expenses the committee had a lien and charge upon all the securities placed in their hands under the said agreement, and upon the proceeds of such securities. Moreover, in order to raise a fund to provide for part, at least, of such compensation and expenses of the foreclosure and reorganization, by the terms of said agreement each depositor of a bond of $1,000 was required to pay, as an assessment thereon, the sum of $50. The committee received from such assessments in the aggregate $273,000."

Paragraph 10 alleges, inter alia, as follows:

"Tenth. Your orator avers that, as a member of such reorganization committee, he had at all times, and now has, a right to an account from the defendants, jointly and severally, and whether as members of the said committee, or as voting trustees, acting with members of such committee, in respect to all moneys or funds coming into their hands, in order, among other things, that your orator might receive his aforesaid just compensation out of the funds or money in the defendants' hands justly applicable thereto; and your orator has often demanded of the defendants such an accounting, but, nevertheless, the defendants have always hitherto, and still do, refuse to render any account to your orator, or give him any information in the premises. In this behalf your orator avers that on or about the 30th day of July, 1896, your orator received, out of the fund applicable thereto, twelve thousand and five hundred dollars in part payment of his services aforesaid, and on or about the 28th day of January, 1898, he received, through the defendants, the further sum of $7,225.15, as additional part payment. The defendants then pretended and alleged that the said last-mentioned sum so paid was your orator's full and equal share of all that remained applicable to the payment to members of the said committee of reorganization in respect of their services. Your orator, upon information and belief, alleges that the said statement and pretense was and is wholly untrue; that the defendants, in fact, still have in their possession, or under their control, money or funds justly applicable to the payment to your orator of the full amount of thirty-five thousand dollars so due to him, as aforesaid, unless the defendants have fraudulently appropriated to their own use, or made other unlawful disposition thereof, in which case, as your orator is advised, the defendants are liable to your orator notwithstanding."

It is thus alleged that it was agreed that complainant's decedent should be fully compensated; that his services were worth $35,000; that he has been refused an account or any information in the premises, and the full amount of $35,000 applicable to his payment is under the control of defendants, unless fraudulently appropriated. "It was * * * agreed that the said committee itself should justly apportion the available surplus funds to and among the respective members." An apportionment made by a majority of the committee, while refusing to the minority any information as to the amount to be apportioned, and therefore all opportunity to properly discuss the question in a meeting of the committee, is not a just apportionment by the committee. The demurrer is overruled.

## STATE TRUST CO. v. DE LA VERGNE REFRIGERATING MACH. CO.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1900.)

No. 951.

1. JUDGMENTS—RES JUDICATA—MATTERS CONCLUDED.

On a petition filed in the federal court in a suit to foreclose a railroad mortgage by a creditor of the defendant to enforce a judgment of a state court establishing his right to a vendor's lien or privilege against certain property of the defendant, the plaintiff cannot relitigate the question of petitioner's status as a vendor, or his right to privilege as such; the judgment of the state court being conclusive upon such questions.

2. LIENS—VENDOR'S PRIVILEGE AS TO MOVABLES UNDER LOUISIANA STATUTE—RECORDING.

Under the statute of Louisiana (Rev. Civ. Code, arts. 3271, 3273, 3274), as construed by the supreme court of the state, a vendor's privilege in respect to a movable which has been attached to realty is not lost as against a mortgagee of the realty by a failure to record the same, but the thing sold remains a movable, and subject to the privilege, so long as it has not lost its identity, and can be separated from the land, tenement, or building to which it has been attached without injury thereto.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The State Trust Company is the trustee of the first mortgage on all the property of the New Orleans & Western Railroad Company. This mortgage was executed on July 15, 1895, and was duly recorded in the parishes in which the mortgaged property lies. On January 10, 1898, in a suit brought by the State Trust Company, a receiver was appointed of the railroad company's property by the United States circuit court for the Eastern district of Louisiana. In October, 1896, the De La Vergne Refrigerating Machine Company began an action in the civil district court for the parish of Orleans, La., against the railroad company, claiming a vendor's lien for the balance due on two compresses and appurtenances erected by it on the premises of the defendant company, under an original contract with the Delta Construction Company, of New York. This action was pending when the receiver was appointed, and under the terms of the order appointing him and directing him to prosecute and defend all actions against the company he made himself a party to the cause in the state court, and adopted the defendant's answer. In due course judgment was rendered in the civil district court for the De La Vergne Company, which was appealed from by the railroad company and the receiver, and was modified and affirmed by the supreme court. In that case the plaintiff claimed that, as between it and the Delta Construction Company, its contract to construct and erect the two cotton compresses on the railroad company's property in St. Bernard parish, La., was a Louisiana contract, and that it has a vendor's privilege on the property covered by said contract. The defendants the railroad company and the receiver contended that the contracts were New York contracts, and, therefore, that no vendor's privilege could result therefrom. The court held that the contracts were Louisiana contracts, and hence carried a vendor's privilege, and adjudged such privilege against the defendants. To this suit neither the trustee of the mortgage nor any of the mortgage creditors were parties. There was no issue in that case as to rank of the alleged privilege, nor as to whether it had any existence as against the mortgagee.

After the judgment of the supreme court of Louisiana became final, the De La Vergne Company filed its petition of intervention in the present case, making the trustee of the mortgage the complainant in said cause, and the receiver party defendant, and asking leave to execute its judgment by the separate seizure, sale, and removal by the purchaser, if necessary, from the premises, of the two presses and appurtenances under the alleged vendor's

lien adjudged in its favor. The defense made by the receiver is not in issue here, and all reference to it is omitted. The trustee answered this intervention as follows:

"That it denies all and singular the allegations in the plaintiff's petition contained, and avers that the true facts with reference to the subject-matter of said petition are as follows: That the Delta Construction Company, of New York, entered into a contract with the New Orleans & Western Railroad Company to construct its railroad and various buildings and appurtenances upon the property of said New Orleans & Western Railroad Company situated in the parish of St. Bernard, in the state of Louisiana, and that among the appurtenances contained in the said construction contract were two cotton compresses. That the Delta Construction Company sublet the contract to construct and complete the said presses and their appurtenances to the De La Vergne Refrigerating Machine Company. That in due form of law the mortgages represented by petitioner were placed upon all the property of the New Orleans & Western Railroad Company, and duly and properly recorded in the mortgage office of the parish of St. Bernard, and in other parishes through which the line of railroad aforesaid runs. That said construction contract of the Delta Construction Company was never recorded in the mortgage office of the parish of St. Bernard, nor was the said contract of the De La Vergne Refrigerating Machine Company recorded in the mortgage office for the parish of St. Bernard, or, if it was so recorded, it was not recorded within the time provided by articles 3272 and 3274 of the Civil Code of the state of Louisiana, and no lien of any sort or kind resulted in favor of the De La Vergne Refrigerating Machine Company against the holders of the said mortgages. That under the settled jurisprudence of this court no equitable lien existed in favor of a construction contract against mortgages upon railroad property, and that the plaintiff has no claim whatever against this appearer except as an ordinary creditor of the New Orleans & Western Railroad Company. That this appearer and none of the mortgage creditors aforesaid were parties to the suit in the state court, and none of them are bound by any judgment or decree rendered by said court, and that nothing in the judgment of the said court can be construed as ranking or undertaking to rank the privileges and claims against the New Orleans & Western Railroad Company, and no court has authority or power to tank [take] such privileges except this honorable court. Wherefore this defendant prays that the petition of the De La Vergne Refrigerating Machine Company may be rejected, with costs."

The intervention was referred to a master, who prepared the following draft of a report:

"The undersigned master in chancery, to whom the intervention of the De La Vergne Refrigerating Machine Company was referred by a decree rendered herein on September 2, 1899, directing him to hear and report fully both the facts and the law of said intervention, begs leave to submit his report as follows: This matter came up for hearing before the master on September 7, 1899, and the testimony of Robert W. Robertson, general agent of the intervener, was taken on behalf of the intervener, and the testimony of W. C. Dotterer, receiver of the defendant company, and John W. Mumper, mechanical engineer, on behalf of said defendant company. Various documents noted in the transcript of the testimony were offered in evidence. The master reports and filed herein the testimony of said witnesses and said documents. After being twice fixed for argument, the matter was recently submitted on briefs. Intervener prays for the permission of this honorable court to carry into effect a judgment in its favor and against the New Orleans & Western Railroad Company and its receivers for $32,000, rendered by the civil district court for the parish of Orleans, affirmed by the supreme court of Louisiana, with amendments, and now final; said judgment recognizing as existing in favor of intervener the vendor's lien and privileges on the two cotton compresses known as the 'Bierce Press' and the 'Webb Press,' with the boilers and appurtenances thereto belonging, supplied and erected by the intervener on the premises of said railroad company at Port Chalmette, Louisiana; and decreeing that said privilege be enforced as against said compresses, boilers, and appurtenances. To this petition of intervention William C. Dotterer, the

present receiver of the defendant company, answers, by declaring that, as he was appointed receiver after the occurrences set up in intervener's petition, he can neither admit nor deny its averments, and referring to the records of the civil district court as disclosing the facts. He denies the neglect and misuse of the presses in controversy, and sets up as reasons for preventing intervener from exercising its vendor's lien on said presses that it would seriously injure and inconvenience his company were it deprived at this time of the Bierce press, and that the proposed removal of said press and appurtenances would necessitate the tearing down of the building in which it was constructed. The State Trust Company, plaintiff herein, answers by a general denial, and specifically declares that the contract of intervener was merely a construction contract, from which no lien of any kind resulted, because said contract was not recorded within the period fixed by law. The matter at issue presents two questions for the decision of the court: (1) Does there exist a vendor's lien and privilege on the two presses in favor of intervener? (2) If there be a vendor's lien, is recordation thereof necessary for its enforcement as against the rights of prior mortgage creditors? The facts of the same have been so clearly stated in a decision of the supreme court of Louisiana rendered on May 15, 1899, in the matter entitled 'De La Vergne Refrigerating Mach. Co. v. New Orleans & W. R. Co.,' 26 South. 455, that the master cannot do better than refer the court to said decision for the facts (no evidence having been offered herein to controvert said facts), contenting himself with giving a brief résumé thereof. The intervener contracted with the Delta Construction Company on July 10, 1895, to construct, erect, and deliver to the last-named company on the premises of the defendant company in Louisiana the two presses in question for the price of $80,000, to be paid in installments; the last installment—$32,000—to be paid sixty days after the completion of the presses, and conditioned upon a satisfactory test of their capacity, to be made in Louisiana. The original contracting companies were New York corporations, and the contract was made in that state, to be finally executed in Louisiana. The defendant company herein subsequently took the place of the Delta Construction Company in said contract. The Bierce press was completed within the time limit. By a modification of the original contract, made on December 3, 1895, by written agreement, the time limit for the completion of the Webb press was waived. This was corrected by an oral agreement contemporaneously made that the Webb press should be completed by March 1, 1896. It was not completed at that time. The defendant company finally notified intervener that, unless the press was completed by August 1, 1896, serious damage and injury would result to the company, for which intervener would be held. The press not being completed on August 1, 1896, the defendant company notified intervener of the termination of the contract, and ordered it to remove the parts of the press from its premises. Intervener successfully enjoined defendant from interfering with the work, and finally completed and tendered it to defendant on September 17, 1896. Defendant declined to accept the press, and refused to make the test thereof required by the contract, or to allow it to be made by intervener, or pay the balance of the price due upon the two presses. Thereupon intervener sued defendant in the civil district court, claiming a balance of $32,000 due on the contract for the two presses, alleging said contract to be a Louisiana contract because designed to be carried out in this state, and claiming a vendor's privilege on both presses with their appurtenances. Defendant alleges in its answer that intervener's failure to complete the Webb press in time constituted a violation of the contract authorizing its cancellation, and asks in reconvention for damages resulting from failure to complete the press in time. The lower court gave judgment in favor of intervener for the sum demanded, with recognition of the vendor's privilege on both presses, and rejected defendant's demand in reconvention. The supreme court affirmed this judgment after amending it so as to allow defendant's reconventional demand for damages in the sum of $4,000 with 5 per cent. interest thereon from April 10, 1897. After a careful examination of the authorities and of the evidence, the master finds the decision of the supreme court of Louisiana, above cited, correct both as to the facts and the law. He finds that the contract was a Louisiana contract, that by its nature it imported a vendor's privilege for the unpaid portion of the

price on both presses with their appurtenances, that the vendor's privilege outranks that of the mortgagees, and that the vendor's privilege on a movable requires no registry for its preservation. See Rev. Civ. Code, art. 3227; Baldwin v. Young, 47 La. Ann. 1466, 17 South. 883, and authorities therein cited. The evidence shows that the presses and appurtenances may be removed without damage to the realty or other property of defendant. In conclusion, the master recommends that intervener be granted the relief prayed for."

To this draft of report the complainant filed before the master the following exceptions:

"Now comes the State Trust Company before George C. Preot, special master in chancery, and files the following exceptions to the draft of the master's report on the intervention of the De La Vergne Refrigerating Machine Company: First. That the master has failed to find as a fact that the New Orleans & Western Railroad Company contracted with the Delta Construction Company to erect two cotton presses upon its premises in the parish of St. Bernard as a part of a general contract between said two companies to construct the terminal facilities of the New Orleans & Western Railroad Company, said contract having been set up by the State Trust Company, and offered in evidence before the master. Second. The master fails to find that the Delta Construction Company subcontracted with the De La Vergne Refrigerating Machine Company to construct the two presses mentioned in the contract aforesaid, and fails to find what the terms of the contract between the Delta Construction Company and De La Vergne Refrigerating Machine Company were, although such contract is in writing, and was offered in evidence before the master. Third. The master fails to find that the State Trust Company was no party to the suit in the state court between the New Orleans & Western Railroad Company and the De La Vergne Refrigerating Machine Company. Fourth. The master fails to find that there was no issue in that case as to the character or the rank of the privilege claimed by the De La Vergne Refrigerating Machine Company, the only issue in said case being the question as to whether the contract between the Delta Construction Company and the De La Vergne Refrigerating Company was a Louisiana contract or a New York contract. Fifth. That the master fails to find and hold, as a matter of law, that the character of the privilege, if any, held by the De La Vergne Refrigerating Machine Company, grows, as a matter of law, out of the character of the contract it held with reference to this property, and not out of the judgment of the state court. Sixth. That the master fails to find as a matter of mixed law and fact that the De La Vergne Refrigerating Machine Company was a mere subcontractor in the construction and erection on the premises of the defendant of the presses in question. Seventh. That the master fails to find as a matter of fact that neither the contract between the New Orleans & Western Railroad Company and the Delta Construction Company nor the contract between the Delta Construction Company and the De La Vergne Refrigerating Machine Company were ever recorded in the parish of St. Bernard. Eighth. That the master fails to find as a matter of fact shown by the record that the two presses in question were built upon foundations deep in the soil. Ninth. That the master ought to have found as a matter of law from these facts that these presses were part of the immovable property of the defendant company, and were stricken by the mortgage in favor of the State Trust Company recorded upon said property prior to the time when the contracts were made between the Delta Construction Company and the De La Vergne Refrigerating Machine Company, and that such mortgage attached as soon as said presses were constructed and erected upon the mortgaged premises and fastened thereto as aforesaid. Tenth. That the master ought to have found as a matter of law, under the provisions of article 3274 of the Revised Civil Code, that failure to record the contract of the De La Vergne Refrigerating Machine Company gave said company no privilege on said property as against the mortgage of the State Trust Company. Eleventh. That the master erred in holding that article 3274 does not apply to the vendor's privilege, and the authorities quoted by him to maintain his position do not hold any such doctrine. Wherefore the State Trust Company prays that the master may consider these exceptions, and may amend the draft of his report to accord thereto."

On these exceptions the master reported as follows:

"Solicitors for plaintiff, the State Trust Company, have filed exception to said draft report, setting up eleven grounds of exceptions, which said exceptions the master reports and files herewith: First. To the first exception the master answers that he reported the general contract between the New Orleans & Western Railroad Company and the Delta Construction Company as one of the documents offered in evidence in the hearing before him. He now finds specifically that said last-named company agreed in said contract to erect two cotton compresses upon the premises of said railroad company in the parish of St. Bernard. Second. The master reported in detail the contract between the Delta Construction Company and intervener, giving fully the terms and conditions thereof. There is nothing in said contract, which is filed in evidence, to show its connection in any way with the contract between the railroad company and the construction company first above cited. Third. The State Trust Company was not a party to the suit in the state court. This will appear from the pleadings in said suit, all of which have been reported and filed herein by the master in his original report. Fourth. The master found that the character of the privilege was at issue in the state court; that it was decreed to be a vendor's privilege, which, by its nature, outranked other privileges; and he maintains this finding. Fifth and Sixth. These being exceptions as to questions of law, the master submits that his findings in the original report are correct. Seventh. Neither of the contracts was recorded in the parish of St. Bernard. The master found that there was no necessity for recording the contract importing a vendor's privilege. Eighth. The testimony shows that the two presses were built upon foundations deep in the soil. Ninth, Tenth, and Eleventh. These are all exceptions as to questions of law. The master can see no reason for changing his original findings."

The draft of report, the exceptions, and supplemental report were all filed January 3, 1900, whereupon the State Trust Company renewed in detail all of the above-named exceptions, and further averred "that the master's supplemental report fails and neglects to correct the errors complained of by said exceptions in the original report, and as against said supplemental report exceptor renews and re-avers all the exceptions taken before the master to his original report, and particularly excepts to the incomplete and evasive finding contained in the second paragraph of said supplemental report, which purports to answer the second exception taken to the original report, on the ground that the master was asked to find as a fact that the contract between the Delta Construction Company and the De La Vergne Refrigerating Company for the construction of the two presses therein covered was in execution of the contract between the Delta Construction Co. and the New Orleans & Western Railroad Company, and that this request is not answered by saying that there is nothing in the former contract to show its connection with the latter; that connection being the necessary legal inference from all the facts shown in the record."

The court below overruled the complainant's exceptions, confirmed the report, and entered a decree accordingly, from which decree the State Trust Company has appealed, and has assigned as error in this court the following: "(1) That the court erred in not sustaining the exceptions of the appellant to the report of George C. Preot, special master. (2) That the court erred in holding that the State Trust Company was in any wise bound as to the character and rank of the privilege claimed by the De La Vergne Refrigerating Machine Company by the judgment in its favor in the state court. (3) That the court erred in holding that said company had a vendor's privilege on the presses and their appurtenances situated on the premises mortgaged to complainant, when the facts clearly showed that said company was a subcontractor, and not a vendor, and that it had lost its lien as subcontractor by failure to record the same as provided by the statutes of the state of Louisiana. (4) That the court erred in holding that, even if the said company had a vendor's lien on said presses and appurtenances, it was under no obligation to record the same in order to preserve it against the mortgage of complainant."

E. H. Farrar, for appellant.

J. P. Blair, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After reciting the facts as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

The first assignment of error is general, and needs no particular attention.

The second assignment of error is not well taken. It does not appear in the record that the circuit court held that by the judgment of the state court the State Trust Company was in any wise bound as to the character of the privilege claimed by the De La Vergne Refrigerating Machine Company. The holding below was apparently that, as between the parties thereto, the De La Vergne Refrigerating Machine Company and the New Orleans & Western Railroad Company, the judgment was conclusive, and as to the State Trust Company not conclusive, but strongly persuasive.

The third assignment of error raises the question whether, as between the De La Vergne Refrigerating Machine Company and the New Orleans & Western Railroad Company, the former was a subcontractor having only a subcontractor's lien, or was a vendor with a vendor's privilege; and whether any lien that the refrigerating company had as subcontractor was lost for failure to record the same as required by the statutes of Louisiana. The case shows prima facie that originally the De La Vergne Refrigerating Machine Company was a subcontractor, and afterwards became a direct contractor, when the New Orleans & Western Railroad Company intervened in the contract, asserted that it was made for its benefit, and assumed all its obligations. However this may be, by the judgment of the supreme court of the state the relation between the parties as that of vendor and vendee is clearly established, and we are of opinion that the matter is not open for rehearing in this proceeding.

The fourth assignment of error assumes that the De La Vergne Refrigerating Machine Company had a vendor's lien on the presses and appurtenances, and raises the question whether or not, as against the prior mortgage creditor, it was necessary to record the privilege under the laws of the state of Louisiana. Rev. Civ. Code, arts. 3271, 3273, 3274. This assignment presents the really difficult question in the case, and, as it is one of the construction and effect of the registry laws of the state of Louisiana, we must look to the decisions of the supreme court of that state for the proper rule to follow and apply. In Gary v. Burguieres, 12 La. Ann. 227, it is held that an engine and gearing attached to a plantation with the presumed consent of the vendor must be considered a part of the immovable itself, citing Louisiana (Old) Code, arts. 455, 460; and that a privilege of the vendor can only be preserved by registry of the contract under article 3239 (Old) Code, as follows:

"Architects, contractors, masons and other workmen, those who have supplied the owner with materials for the construction or repair of his buildings or other works, those who have contracted, in the manner provided by the police regulations, to make or put in repair the levees, bridges, canals and roads of a proprietor, preserve their privileges, only in so far as they have recorded with the register of mortgages, the act containing the bargains they

have made, or the amount or acknowledgment of what is due to them, in all cases where the amount of the bargain or agreement, or the amount of the account or acknowledgment, exceeds the sum of five hundred dollars."

In Lapene v. McCan, 28 La. Ann. 751, the question as to whether boilers not paid for, but attached to the sugar house with vendor's consent, were a part of the immovable, was not decided, because held to be res adjudicata under a previous judgment; but Judge Wyly, concurring, said:

"I agree with the district judge that defendants, having judgment with vendor's privilege on the four boilers, could enforce it by seizing and selling the said boilers separately from the plantation. When they were set up at the sugar house the vendor's privilege was upon them, and I know of no law whereby the purchasers could destroy the privilege by using the property for the purpose it was adapted. I cannot consent that a vendor's privilege on a movable can be lost simply because the purchaser may use it on his plantation. If such were the case, the vendor's privilege would furnish but little security in an agricultural district. The law has not declared that the use of a movable by a purchaser shall destroy the vendor's privilege. 'Privileges become extinct: First—By the extinction of the thing subject to the privilege. Second—By the creditor acquiring the thing subject to it. Third—By the extinction of the debt which gave birth to it. Fourth—By prescription.' Rev. Code, art. 3277. As defendants have a privilege upon the boilers as separate things, I see no reason why they may not sell them separately from the plantation. If they remain separate things, so that a privilege may rest upon them, they remain separate for the enforcement of such privilege. They cannot be things, and not things. If they are movables, the vendor's privilege is upon them. If they are part of the plantation—an immovable—there can be no vendor's privilege, because defendants did not sell the plantation. Defendants had a privilege upon them as movables when they sold them to plaintiffs, and that privilege has been recognized in the judgment sought to be executed."

This quotation is particularly pertinent because of its subsequent approval by the supreme court in Carlin v. Gordy, 32 La. 1285. This last-cited case was a contest between a mortgage creditor and the holder of a subsequent vendor's lien claimed on a sugar mill and machinery. The court held that recording the note given for the price on the day of its date was a sufficient registry; and as to the status of the mill and machinery, movable or immovable, and of the vendor's privilege, said:

"Defendant had a privilege on these movables, perfectly valid, not only as between the parties, but against all third persons. The purchaser subsequently set up this mill and machinery upon his plantation. They were thereby converted into immovables by destination; but this conversion did not and could not operate to the prejudice of the vendor's privilege existing thereon prior to their attachment to the plantation. * * * The evidence fully establishes that the mill and machinery in this case can be removed without damage to the sugar house, and the case falls fully within the facts and principles of the case of Lapene v. McCan, 28 La. Ann. 749, the doctrine of which case is much more satisfactory to our minds than the contrary doctrine of Gary v. Burguieres, 12 La. Ann. 227, where we think the court puts too narrow an interpretation upon the expressions of Troplong. The concurring opinion of Justice Wyly in the case of Lapene v. McCan, while perhaps too broad in its general statements, we think is thoroughly correct, so far as it applies to movables, which, though attached to a plantation, are capable of removal without damage to the structures in which they are contained, or with which they are connected. In such case there is no reason why the vendor's privilege which attached to them as movables prior to their being placed on the plantation should not continue in force, and why they should not be sep-

arately sold in satisfaction thereof. The privileges resting upon movables are, in some cases, affected by the changes which may take place in the nature or destination of the things. But such changes must be so radical as to create a new species of things, and destroy that species which originally existed; as, to use the illustration of Cujas, when a pine or cypress log is converted into a ship, or when wool is converted into a garment, or when marble is made into a statue. In the case at bar the mill and machinery have suffered no such change by the use which the vendee has made of them. They remain the mill and machinery which were sold, and the privilege subsists in all its force. Had their destination as immovables been effected in such manner as to preclude their detachment without injury to independent rights of ownership in the soil or structures, the privilege might have been subjected to such limitation in its exercise as would prevent the separate sale or removal of the thing subjected to it. But where, as in this case, no such difficulty exists, or, if at all, to an inappreciable extent, we see no reason for imposing any restriction upon the rights of the privileged creditor. The privilege of the vendor is founded on the right of property. Payment of the price is essential to the vesting of an indefeasible title in the vendee. The vendor's right to and securities for the payment of the price have always commended themselves to the favorable consideration of our courts."

In Baldwin v. Young, 47 La. Ann. 1466, 17 South. 883, the contest was between the unpaid vendor in a conditional sale and the mortgage creditor as to the right of the vendor to remove a heating apparatus attached to the realty, and we quote at length as directly bearing on the question, when do movables attached to the realty become a part of the immovable as against the unpaid demand of the vendor for the purchase price?

"The principle that movables added to the immovable for its improvement, while inflexibly applied as between the owner and his vendee or mortgagee, is yet subject to well-defined exceptions. The Code itself recognizes the right of the third person to remove or claim compensation for his works or constructions on the immovable of another; yet, if made by the owner, the improvements would undoubtedly be subject to any mortgage by him on the immovable. Civ. Code, arts. 506, 507. So the privilege accorded by law to the vendor of movables still subsists, though the movables are attached by the purchaser to the immovable, and will be enforced against the mortgage creditor. The French commentators state the law by a commonplace illustration: The workman sells the farmer a tub, which he places on his farm for its improvement. The tub thus becomes a part of the immovable. But shall this change deprive the workman of his privilege? The commentators answer in the negative, and affirm, until paid for, the vendor, notwithstanding the change, preserves un droit reél on the article sold. 1 Troplong, Priv. & Hypoth. No. 113; Lapene v. McCan, 28 La. Ann. 749; Hall v. Wyche, 31 La. Ann. 735; Carlin v. Gordy, 32 La. Ann. 1285. The authorities, we think, sustain the right of the unpaid vendor to enforce his privilege on the movable sold, although by the act of the purchaser it has become part of the immovable. The vendor of a movable is apprised by law that without registry he preserves a privilege on the thing sold. Civ. Code, art. 3227; Const. art. 176. It is difficult to see, in the light of the provision in the constitution, that the privilege can be defeated by the use the purchaser makes of the thing sold. There is a decision in 1857 that the privilege must be recorded to avail if the thing sold has been incorporated with, so as to become part of, the immovable. The decision has no support in the French authorities, nor in the later adjudications of this court; and where they deal with registry at all it is because the constitution in existence required all privileges to be recorded. Gary v. Burguieres, 12 La. Ann. 227; Const. 1868, art. 123. In this case it is not his privilege for the price on which the vendor insists. It is his ownership of the movable he demands. If the law will not allow the mortgage creditor to defeat the privilege on the movable which, unpaid for, happens to be placed in the building subject to the mortgage, it is not easy to appreciate why, on the

same principle, the ownership of the movable should not be equally protected against the mortgage creditor. On what principle can the mortgage be extended beyond the property of the debtor? Civ. Code, art. 3278. Instances are not infrequent of the property of third persons placed by them on the mortgaged property, but it has never been supposed such articles were subject to the mortgage. In this case there is no controversy on the issue of the ownership of the heater. It belongs to the vendor under his conditional sale. It is the case of the property of the third person never subjected to the mortgage, unless it is to be maintained that our Code transforms the property of the vendor, who has never parted with his ownership, into that of the purchaser. Can it be said the law will enforce against the mortgage creditor the privilege of the vendor for the price of the thing sold on the mortgaged premises, but for the benefit of the mortgage creditor will not permit the vendor to remove that property, though no price has ever been paid, and under the conditional sale the vendor is the owner of the property? We find no warrant in our Code for this view of the law. It seems to rest on the protection it is claimed the law gives to the creditor who takes the mortgage on the faith of the public records showing no incumbrance on the property, or who spreads on the records his mortgage; notice to all, it is urged, that no lien can be acquired to the prejudice of the mortgage. There are striking analogies, at least, opposed to this view. The law, notwithstanding the unrecorded mortgage, will enforce against the creditor the claim of the workman for work on the property mortgaged. The owner of the immovable is not permitted to profit by the construction or works of a third person on the immovable. The mortgage creditor must pay for the improvements of the third possessor; and we think it beyond doubt that the mortgage yields to the vendor's privilege on the movable sold and attached to the mortgaged property. Civ. Code, arts. 507, 3268; Penn v. Bank, 32 La. Ann. 195; Bank v. Miller, 44 La. Ann. 199, 10 South. 779; Lapene v. McCan, 28 La. Ann. 749; Carlin v. Gordy, 32 La. Ann. 1285; 1 Troplong, Priv. & Hypoth. No. 113. It seems to us on the same principle the claim of the vendor who remains the owner of the movable placed in the mortgaged premises must be admitted against the mortgage creditor, and in reaching this conclusion we have given the fullest consideration to the argument and authorities cited by plaintiff's counsel."

In Walburn-Swenson Co. v. Darrell, 49 La. Ann. 1044, 22 South. 310, Hall v. Hawley, 49 La. Ann. 1046, 22 South. 205, and Association v. Johnston, 51 La. Ann. 470, 25 South. 383, it is again held that the privilege of the unpaid vendor on the movable is not lost because it has been attached to the immovable. In each of these last three cited cases the contest was between the mortgage creditor and the vendor of the movable, but in neither is there any reference to any registry of the vendor's privilege as in any wise affecting the rights of the parties. The opinion of the court in Baldwin v. Young, supra, so far as it overrules and modifies Gary v. Burguieres, supra, is vigorously attacked as obiter, because the case showed that the movables involved were sold under a contract that, until paid for, the vendor should be the owner of the thing sold, and registry vel non was not in question. So far as the necessity of registry was concerned, we think it depended on the determination of an issue as to whether quoad the vendor the movable sold had been so merged in the immovable that the vendor could no longer assert his privilege on the identical thing sold; and, to the extent that this question was involved, we cannot agree that the enlightened views so well expressed by Mr. Justice Miller, delivering the opinion of the court, were obiter; and, so far as anything favorable to appellant here can be claimed, because the sale in Baldwin v. Young, supra, was a conditional sale, we may inquire what substantial difference can

be urged between a so-called conditional sale and an ordinary sale in which the vendor's privilege is preserved, so far as the right to recover the unpaid price is concerned? "The privilege of the vendor is founded on the right of property. The payment of the price is essential to the vesting of an indefeasible title in the vendee." Carlin v. Gordy, supra. Whether the sale be conditional or absolute, retaining the vendor's privilege, the vendor in each case may subject the thing sold to the payment of the unpaid purchase money; and in equity the results in each case are the same. In Louisiana it is well understood that, as against third persons, the vendor's privilege on an immovable must be recorded. Rev. Civ. Code, art. 3274. See Act No. 45 of 1877. In substance, this has been the law since the Code of 1825. The variations have been with regard to the manner and time of registry. It is equally understood in Louisiana that the vendor's privilege on a movable is not lost by failure to record the same. This has been the law since the adoption of the constitution of 1879. The real question considered in the above-cited cases was, when, in favor of third persons and against the vendor, does a movable attached to land, tenement, or building become an immovable, or part thereof, by destination? And we understand the decisions of the supreme court of the state to be uniformly (except in Gary v. Burguieres, supra) to the effect that, so long as the price is unpaid, and the movable has not lost its identity, and can be separated from the land, tenement, or building to which it has been attached without injury to the immovable, as to the vendor it remains a movable, and he may subject the same to his vendor's privilege, the registry of the same being immaterial. This seems to be in accord with the equities of the case as they are regarded in De L'Isle v. Succession of Moss, 34 La. Ann. 166:

"The privilege accorded for the payment of the unpaid price of sale is one of great value, resting on considerations of the plainest equity. It would, indeed, be unjust to place an unpaid vendor on a footing of equality with the other creditors of the purchaser, and permit these to devour his substance; for it is only on the condition that the price of the thing sold has been paid that the purchaser acquires an indefeasible title of ownership to the property, and that his creditors can be paid. * * * It confers rights of a high character, superior to those which flow from a mortgage. * * * It is the price which is protected by the privilege. By the sale the vendor increases the estate of the purchaser. It would be iniquitous to permit the property sold to become the prey of the creditors of the purchaser, without requiring, as a condition precedent, the payment of its cost. * * * The word 'price' signifies the sum stipulated as the equivalent of the things sold, and also every incident taken into consideration for the fixing of the price, put to the debt of the vendee, and agreed to by him."

The decree of the circuit court is affirmed.

AMERICAN TIN-PLATE CO. v. TROTTER et al.

(Circuit Court, E. D. Pennsylvania. December 26, 1900.)

SALES—CONSTRUCTION OF CONTRACT—ACTION BY SELLER FOR BREACH.

Where a contract for the sale and purchase of tin plates specified the brand and size of the plates, but gave the purchaser the privilege of specifying other sizes before the time for the making of each shipment, it was not obligatory on him to make any specification, and his failure to do so was not a refusal to carry out the contract which relieved the seller from the necessity of delivering or tendering delivery of the quantity and size named in the contract before he could maintain an action for its breach.

At Law. Action for breach of contract. On motion by defendants for judgment notwithstanding the verdict.

John Weaver, for plaintiff.

C. Berkeley Taylor, for defendants.

J. B. McPHERSON, District Judge. The facts in this case, which are not in dispute, are as follows: In January, 1897, the parties to the suit entered into a contract that contained, inter alia, these provisions:

"The American Tin-Plate Co., of Elwood, Indiana, agrees to sell, and Nathan Trotter & Co., of Philadelphia, Pennsylvania, agrees to buy:

"Description of Goods: 'Kanner' brand tin plates.

"Quantity: 5,000 boxes, surface 14x20, 112 sheets. * * *

"Sizes: Buyers to have privilege of specifying any of the following sizes [naming eighteen sizes from 10x14 to 20x28].

"Place of Delivery: Car lots Philadelphia, Pa.

"Time of Delivery (each delivery to be considered and treated as a separate contract): One-sixth each month, July, 1897, to December, inclusive.

"Specifications: To be given not later than the 20th of each month preceding the month's delivery.

"Not less than 50 boxes of a single size and gauge."

Trotter & Co. never availed themselves of the privilege to specify sizes allowed them by the contract, and the tin-plate company never delivered or offered to deliver plate of any size. This suit is brought to recover as damages the profits that would have been made by the plaintiff if the plates had been delivered.

There is some conflicting testimony concerning the existence of a trade custom that requires a buyer of tin plates to specify before a certain day in each month the sizes that he desires to have delivered during the following month. But I do not consider the testimony to be relevant, for the reason that, even if such a custom were clearly established,—and it is not thus established,—it could not prevail against the clear and unambiguous terms of the contract in suit. As I view the controversy, it must be determined by a construction of the contract, taken in connection with the undisputed failure of the plaintiff to make or tender performance on its part. To my mind, the contract is free from doubt. The plaintiff agreed to sell, and the defendants agreed to buy, 5,000 boxes of a particular brand and size of tin plate, the brand being "Kanner," and the size being 14x20, each box to contain 112 sheets. One-sixth of this amount was to be delivered each month at Philadelphia. If the

buyers desired other sizes than 14x20,—which is the standard size in the trade, probably 90 or 95 per cent. of all plates sold being of these dimensions,—they had the right to make their wishes known, and, if they did so in due season, to have such wishes complied with. But they were not bound to specify any other size than 14x20. In the absence of specifications, the contract provided clearly that the tin-plate company was to deliver each month at Philadelphia one-sixth of 5,000 boxes of a distinctly described kind and size of plate; and, if the delivery was neither made nor tendered, the tin-plate company acquired no right to sue for the contract price or for profits. Without such delivery or tender, and a refusal by the defendants to accept, it could not be certainly known either that the plaintiff had the goods to sell, or that the defendants would not keep their contract to buy. I have no doubt that the defendants had determined to break the contract, being led to this decision by so large a decline in the market price that they would probably lose less by paying damages for a breach than by paying the contract price. But mere intention to break is not breaking in fact. Intention leaves room for repentance, and the period for repentance does not expire until the determination to break is carried into action. The intention and the fact must concur before the buyer's legal liability is established, and such concurrence exists either when a buyer declares the contract at an end,—and there was no such declaration in the present case,—or when the seller performs, or offers to perform, his part of the contract, and the buyer refuses to accept the goods. In either event, the default is definitely made to appear; but, until one or the other event takes place, the default is not legally ascertained. It follows that, as the present plaintiff failed to make the necessary offer of performance, no right of action accrued, and that judgment must be entered upon the reserved point in favor of the defendants.

This conclusion is supported by the following authorities: Smith v. Loomis, 7 Conn. 110; Hapgood v. Shaw, 105 Mass. 276; Nelson v. Elevating Co., 55 N. Y. 480; Kunkle v. Mitchell, 56 Pa. St. 100. The plaintiff has cited two cases—De Loach v. Smith, 83 Ga. 666, 10 S. E. 436, and Posey v. Scales, 55 Ind. 282—in behalf of the proposition that no delivery or tender was necessary until the defendants furnished specifications. It will be found, however, upon examination of these decisions, that they each differ in a material point from the case in hand. There each contract imposed the duty of furnishing specifications upon one party, and under such circumstances the other party could not perform or tender until the duty to specify was discharged, for he could not know what his own obligation was until the specification made it clear. In the case before us, however, there was no such duty. The buyers had nothing more than a privilege, of which they might or might not avail themselves. It was a mere option, which they were not bound to exercise, and therefore failure to exercise it imposed no obligation upon them, and gave no corresponding right to the plaintiff.

Judgment will be entered upon the reserved point in favor of the defendants notwithstanding the verdict.

## McCANN v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 716.

RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Plaintiff was struck by defendant's train while he was standing between two tracks at a crossing waiting to board a work train of another company by which he was employed. The tracks were 7 feet apart, so that when two trains were passing the space between the coaches was only about 20 inches. Instead of remaining in a place of safety, where the other workmen were waiting, he deliberately stepped between the tracks, and remained there, knowing that the trains were approaching, and would meet at the crossing, and that there was no safe standing room between the tracks while trains were passing. *Held*, that it was not error to take the case from the jury, and direct a verdict for defendant on the ground that the evidence showed contributory negligence on plaintiff's part.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Action by Marquis H. McCann against the Chicago, Milwaukee & St. Paul Railway Company. The case was taken from the jury, and a verdict directed for defendant, and plaintiff brings error. Affirmed.

This action is for a personal injury sustained by the plaintiff in error (plaintiff below), caused by being struck by a train of cars while standing at a crossing on Leavitt street, in the city of Chicago, waiting to board a train on the Pittsburg, Cincinnati, Chicago & St. Louis Railroad on December 13, 1897, by means of which he was thrown to the ground, and his leg crushed by being passed over by the engine of the said train. Leavitt street runs north and south, and at the place where the accident happened it is crossed at right angles with several railroad tracks running east and west. The two most northerly of these tracks are the main tracks of the Galena Division of the Chicago & Northwestern Railway Company. Immediately south of these, and adjoining, are two other main tracks of the first above named road known as the "Pan Handle," but used also by the defendant company. The north track is used for out or west bound trains, and the south track for east-bound trains. Just north of these tracks lie two main tracks of the Chicago & Northwestern Railway Company, and just south extend the switch tracks of the Pan Handle road. These joint tracks are 7 feet apart, so that when two trains are passing upon adjoining tracks the space between the passenger coaches is only about 18 or 20 inches,—too narrow for safety for a person standing between the tracks; and it is evident it was never intended that a person should so stand. These tracks, besides being fenced, had crossing gates maintained on either side, and a flagman stationed there to give warning; so that for a grade crossing it was made as safe as could well be, and as safe as other like grade crossings in the city. For two years prior to this accident the Pan Handle Company had run a work train west over the north joint track above referred to, in the early evening, in order to carry its own employés to and from their places of work along the line of its road. This train did not carry passengers generally, but only employés of the road starting from their round house at Curtis street, and running to the Englewood yards at Sixty-Third street. It carried no passengers, and was not put in for that purpose. It ran on a schedule as No. 42 of the time-card issued by the superintendent of terminals controlling the operation of the joint tracks between the Union Depot and Western avenue in the city. It was not scheduled to stop at Leavitt street, but had been accustomed to do so every evening to accommodate the workmen of that road residing near the crossing. There was no depot there, nor any platform, but simply an ordinary street crossing, planked as such like those over the other highways in the city. The joint time-table shows that no train was scheduled

to stop at this crossing, and none did so in fact except this work train, which had been accustomed to stop to pick up the employés of that road who wished to go west to their work. About the same time in the evening the defendant's Pioneer Limited train of empty sleepers, coaches, and baggage cars was regularly backed east upon the adjoining track to the Union Depot to go out on its run to St. Paul. It was scheduled upon the joint time-card as coach train No. 1, and its time was 15 minutes from Western avenue to the Union Depot, a distance of three miles. These two trains—one on the Pan Handle, the other on the defendant's road—usually met, as they did on this evening, at or near Leavitt street. The plaintiff was a flagman at Fifty-Ninth street for the Pan Handle Company. He lived northwest from the place of the accident, and for 15 months had been accustomed to take this work train at Leavitt street to go to and from his work. On the evening of the accident he reached this crossing about 10 minutes before train time. His relation of the accident is this: "On this night I turned south on Leavitt street. Was waiting at the railroad tracks with the rest of the men to take the work train out to Fifty-Ninth street. Waited at crossing about 10 minutes. The train was about on time, and due there at 5:40. I was waiting on the north side of the joint main tracks. When I saw it, I think the work train was about 80 feet east of the east sidewalk on Leavitt street, but slowed up when she saw I was between the two tracks,—just as she got about to the east sidewalk. In the meantime I went across, so as to get on the south side of the car as she pulled over the crossing, to save the rush, because she only stopped a minute there to let us on, and I thought I would have a better chance to get on, being an old man, about 59 years, at the time of the accident. After I stepped over there, I waited, and saw both trains were approaching pretty close on to me. After I crossed over to the south, I stopped between the two tracks as near the middle of the crossing as could be. I saw the St. Paul train backing up when she was about 40 feet from me. Seeing the other train coming up, I tried to gauge myself as near as I could in the center of the two tracks, so as not to get hurt. I saw the St. Paul train was coming pretty fast. The Pan Handle engine was about the same distance east from me. As the first Milwaukee coach passed me, I turned around to see if I could catch hold of the hand rail of that car. I found she was going too fast for me, and I could not catch it. I wanted to catch hold of the rail of the St. Paul coach in order to get to the rear end of the work train to avoid getting hurt by either one of them. I saw she was going too fast, and I could not do it. Then I turned around, and, just as I turned, it struck me in the shoulder. I faced right north, fell over against the Pan Handle engine, and struck my head against it. The second coach of the St. Paul struck me on the left shoulder, and knocked me over against the Pan Handle engine. I knew just what was up at the time. Of course, I was knocked senseless, but regained consciousness when I found the driving wheel was on my foot. They took me out and to the County Hospital, where they cut off my leg about eight inches below the knee. I used to go there every night and take that train for about fifteen months. There were about twelve or thirteen workmen there that night. There was only one car in the work train. The speed of the St. Paul train was about twenty miles an hour. To the best of my judgment at the time, it was impossible for me to get across the track the St. Paul train was on after I saw the train. I was in the middle of the two main tracks." On cross-examination he says: "I did not pay any attention to know whether the workmen standing there were yelling to me or to some one else. I had come to this crossing and had taken this work train there every night for fifteen months before the accident. I got there that night about ten minutes before the train came. I stood on the north side of the Pan Handle tracks. There were some other workmen who were standing on the same side with me, to take the train. I noticed the Pan Handle work train coming from the east, and thought I would go over to the south side of the car as she pulled up to the crossing, so as to have more room to get on the train when it did stop there. I went over to the south side, between the two joint tracks, for that purpose. I did not remain on the side where the rest of the workmen got on. I went over to the south side alone. When I went over to the south side, the Pan Handle engine was just east of the east sidewalk on Leavitt street and the St. Paul train was close

to the crossing on the west side of it. They were about equal distances apart when I crossed over to the south side. I think, if anything, the St. Paul was nearer. Before I crossed over, I did not look to the east nor to the west. After I had got over, and between the tracks, then I looked, and saw both trains coming. The gates were down at that time. When I got between the tracks I was alone in there, and all the other workmen were on the other side. Could not swear whether there were lights on the rear end of the Milwaukee coaches, because I did not notice them. The east end of the Milwaukee coaches reached me first, because the Pan Handle train slowed up so. The second coach is where it caught me. The Milwaukee coach got to me before the Pan Handle engine did. The second coach hit me. I think it was the side of the coach that hit me. The Milwaukee train never stopped. I do not know whether I touched the handle of the coach or not. I either turned around or whirled around in such a way that my left shoulder was struck. I have been quite deaf about twenty years. The trains met where they usually did." At the close of the testimony, on motion of defendant's counsel, the court took the case from the jury, and directed a verdict in favor of the defendant, on the ground that the evidence on the part of the plaintiff showed contributory negligence on his part. It is to reverse that direction of the court below that this writ of error is brought.

Frank B. Grover, for plaintiff in error.

Charles B. Keeler, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

Upon the foregoing statement of the facts, BUNN, District Judge, delivered the opinion of the court.

The facts are mainly conceded. The case rests upon the plaintiff's testimony as given in the statement of facts. There is a material conflict in the testimony as to which coach struck the plaintiff; three witnesses on the part of the defendant testifying that he was not struck by a coach of the defendant's train, but was struck by a coach of the Pan Handle train. But that is quite immaterial according to the view we have taken of the case. We think, upon the plaintiff's own statement of his case, the direction of the court was right, and fully supported by the evidence. Indeed, we think the court might have made the grounds of its decision still broader, and held: First, that the negligence of the plaintiff was the proximate cause of the injury, and, second, that the testimony showed no negligence or want of proper foresight and caution on the part of the defendant company or any of its officers or employés. The situation and the running and operating of these trains at this crossing were well known to the plaintiff. From his own statement he knew all about them. He had taken the same Pan Handle train every day for 15 months. He knew the trains were expected to meet at that time and place, and that there was no safe standing room between the tracks. He went deliberately into a place of imminent danger, without so much as looking to the east or west to see if the trains were coming, and remained there until the trains came, knowing well that there was not safe standing room between the tracks. The evidence shows that he was warned by other workmen to cross back over the tracks, but that he paid no attention to the warning. Knowing the situation as he did, it was negligence to cross over the tracks and remain between them until the trains came. It was, no doubt, possible, after he saw the trains coming, by the exercise of good judgment in an

emergency, to have escaped the peril, either by standing still flatwise upon the 18 or 20 inches space that he had between the tracks, and making no effort to get hold of the handles upon the coaches of the Milwaukee train; or, what would perhaps have been better still, to have thrown himself flat on the ground lengthwise between the tracks and allowed the trains to pass over him. Still he might be excusable for not exercising the best judgment in such an emergency when the peril was full upon him. But he was not excusable for voluntarily putting himself in and remaining in a position of such imminent danger without any sufficient reason. And no doubt the jumping to catch hold of the handle of the car while under motion was itself a danger and a peril in the circumstances. He was not a passenger on the defendant's road, and as a passenger that company owed him no duty. Indeed, he was not a passenger upon the Pan Handle road, though that question is not material here, but was, while going upon its train to and from his work on the line of that road, its workman and employé. Elwald v. Railway Co., 70 Wis. 420, 36 N. W. 12, 591. He knew the speed of the defendant's trains at that point, and that it did not stop at Leavitt street crossing. That company did not owe him the usual duty owing to a passenger upon its road. It was, no doubt, under obligation to do all it could to prevent injury after its officers and employés in charge of the train were cognizant of the plaintiff's peril. But there is no evidence that this was not done. The defendant had no station or stopping place at that point. The ordinance of the city allowed trains a speed of 20 miles an hour. There is no evidence tending to show that the defendant's train was running at a higher rate of speed. On the contrary, the evidence shows the train to have been going at from 12 to 16 miles an hour.

There are several grounds of negligence alleged, but the one mainly relied upon was the speed of the defendant's train. But there is no evidence of negligence in this respect, or in any other respect. Another ground of negligence alleged was the lack of train lights, but no case is made under this head; the evidence without conflict showing that the rear or east end of the backing train was furnished with a large bulls-eye reflector 10 to 12 inches in diameter, throwing a continuous red light, and placed at the outer edge of the platform in the center of the vestibule. By it stood a white hand lamp, and on each side of the coach, at the end, hung a small red lamp or "marker." All these lights were burning that evening, and were plainly seen 150 to 200 feet from the crossing by several witnesses, and also by the engineer and fireman of the Pan Handle train two blocks away from them. But the lights were of no use to the plaintiff, as he says he did not look to the east nor to the west. If he had said he was 59 years old, and did not greatly care longer to live, his words would have corresponded fairly well with his actions in going into such a place of peril without so much as looking in any direction for danger, and remaining after he saw the peril was upon him. If he could not hear, he was under all the more obligation to use the senses he had. In any case it was his duty to have looked all ways for danger. Houston v. Railway Co., 95 U. S. 697, 24 L. Ed. 697; Schofield v. Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Railroad

Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; Walker v. Kinnare, 22 C. C. A. 75, 76 Fed. 101; Blount v. Railway Co., 9 C. C. A. 526, 61 Fed. 375; Stowell v. Railroad Co., 39 C. C. A. 145, 98 Fed. 520; Neininger v. Cowan, 42 C. C. A. 20, 101 Fed. 787; Gilbert v. Railroad Co., 97 Fed. 747, 38 C. C. A. 408; Railroad Co. v. Peebles, 14 C. C. A. 555, 67 Fed. 591; Pyle v. Clark (C. C.) 75 Fed. 644. If precedents were needed upon so plain a proposition, all of the above cases are authority in point for the action of the court below in directing a verdict in favor of the defendant on the ground of contributory negligence. Knowing the situation as the plaintiff did, it was negligence per se to stand between the tracks while the trains passed. Beach, Contrib. Neg. (3d Ed.) § 216; Moore v. Railroad Co., 108 Pa. St. 349; McGeehan v. Railroad Co., 149 Pa. St. 188, 24 Atl. 205; McClary v. Railroad Co. (C. C.) 46 Fed. 343; Bjork v. Railroad Co., 85 Ill. App. 269; Cunningham v. Railroad Co. (C. C.) 17 Fed. 886. As was said by the supreme court, speaking through Mr. Justice Miller, in Ellicott v. Railway Co., 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068:

> "But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travelers on the highway and employés on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom."

In the case at bar the plaintiff not only went upon the track without looking, but he remained there for 10 minutes waiting for trains that he expected and had every reason to believe would come, and this while he could have remained with the other workmen on the other side of the tracks in perfect safety. It is not necessary to multiply authority upon the question.

Upon the question of the negligence of the defendant company there was nothing upon which a verdict could have been based. Each and all the grounds relied upon failed in the proof. The crossing was properly guarded, and the crossing gates down. The speed of the train was not excessive or unlawful. The train was properly lighted. The engine had an automatic bell ringer, which was always ringing when the engine was in motion, and was ringing that night on the occasion in question, and the gateman's bell was ringing constantly, the flagman upon the crossing calling out a verbal warning when the train was approaching and while it was 200 feet away, with the plaintiff standing only 10 feet from him. In addition to these things, an air whistle or "tail hose" whistle on the rear end of the backing train was sounded, and it was not the company's fault that the plaintiff could not hear. It is quite evident, however, from his own testimony that it would have made no difference if he had heard it, as his deliberate purpose was to get away from the crowd, and to board the train on the south side, from between the tracks. Indeed, it is difficult to see what the defendant company could have done that was not done to prevent such an accident. The judgment of the circuit court is affirmed.

BAHUAUD et al. v. BIZE et al.

(Circuit Court, D. Nebraska. January 14, 1901.)

1. CITIZENSHIP—TREATIES — CONSTITUTIONAL LAW — DISABILITY OF ALIENS—RIGHT TO INHERIT—NATURALIZATION—RESIDENTS OF TERRITORY.
   Residents and inhabitants of the territory of Nebraska at the time of its admission as a state to the Union, who had previous thereto declared before a court of record their intention to become citizens of the United States, were by the enabling act created naturalized citizens of the United States.
2. TREATIES—EFFECT.
   By article 6 of the constitution of the United States, all treaties with foreign countries are the supreme law of the land, binding upon the several states.
3. SAME—ALIENS—INHERITING REAL ESTATE.
   It is within the power of the United States by treaty to remove the disability of aliens to inherit real estate within the several states.
4. SAME.
   By the terms of the treaty between the United States and France entered into in 1853, citizens and subjects of France are entitled to acquire by inheritance and otherwise real estate in all respects the same as a citizen of the United States in those states by whose laws an alien is permitted to hold real estate.
5. SAME—CONSTITUTIONAL LAW.
   As the constitution and statutes of Nebraska permit resident aliens to hold and acquire real estate in the same manner as citizens, *held*, that the provisions of the statute prohibiting nonresident aliens from acquiring real estate by inheritance or otherwise is inoperative so far as it relates to citizens or subjects of France.

(Syllabus by the Court.)

Runnels & Burry, for complainants.
Kelligar & Ferneau, for respondents.

MUNGER, District Judge. This is an action for the partition of certain real estate in Nemaha county, Neb., and an accounting for the rents and profits therefrom. The material facts are that one Julien Bahuaud, a native citizen and subject of France, came to the United States and settled in Nemaha county, Neb., in 1860, and resided there to the time of his death, June 16, 1899. In 1865 he declared his intention of becoming a citizen of the United States before a court of record in said Nemaha county, and received from said court a certificate to that effect. He never took out any other naturalization papers, but participated in the various annual elections held in said county. At the time of his death he was the owner of certain real estate in said county, described in the petition, of the value of about $40,000. He died intestate, leaving no will or children. Complainants are brothers and sisters of deceased, and descendants of brothers and sisters, and are each and all residents and citizens of the republic of France. The defendant Louise B. Bize is a sister of deceased, a resident and citizen of the United States. The several parties claim interest in said real estate by inheritance from deceased. On the part of complainants it is claimed: First, that deceased was not a citizen of the United States, but an alien, and hence they are entitled to inherit under the statutes of Nebraska; second, that, if deceased was a

citizen of the United States, the statute of Nebraska which prohibits a nonresident alien from inheriting the real estate of a citizen of Nebraska is inoperative, by virtue of the treaty of 1853 between the United States and France. On the part of the defendants it is claimed that the deceased was a citizen of Nebraska, and that the statute of Nebraska is operative notwithstanding said treaty. The two questions, then, for consideration are: (1) Was deceased a citizen of the United States? (2) Is the statute of Nebraska which prohibits nonresident aliens from inheriting real estate from a citizen of Nebraska suspended or inoperative, by virtue of the treaty referred to, as to citizens of the republic of France?

It is claimed on the part of respondents that deceased, being a resident and inhabitant of the state of Nebraska at the time the state was admitted into the Union, and having declared his intention to become a citizen of the United States, became naturalized by the terms of the enabling act; and in support of this contention the case of Boyd v. Nebraska, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103, is cited, as holding that the enabling act admitting Nebraska into the Union provided a collective naturalization of all inhabitants of Nebraska who had declared their intention to become citizens. On the part of the complainants it is contended that the case of Boyd v. Nebraska is not an authority in that respect, for the reason that the decision of the court, eight members only participating, was only upon the question as to the sufficiency of certain allegations in the petition to resist the effect of a general demurrer; that the law as to collective naturalization was only concurred in by four members of the court, three members dissenting therefrom, and a fourth dissenting from the judgment upon the ground that the court had no jurisdiction. I am of the opinion, however, that the case of Boyd v. Thayer is an authority sustaining the doctrine of collective naturalization, and as holding that all of the inhabitants of the territory of Nebraska who had theretofore declared their intention to become citizens were by the act of admission of the state into the Union naturalized as citizens of the United States. That such is understood to be the effect of that decision by the court of appeals in this circuit I think clear by the statement in City of Minneapolis v. Reum, 6 C. C. A. 31, 56 Fed. 576–580, wherein Judge Sanborn, referring to that case, says:

> "Governor Boyd was there held to be one of a class of foreign-born residents that was naturalized by the act of congress admitting the state of Nebraska into the Union."

That the supreme court of the United States so understand the effect of the decision of Boyd v. Nebraska I think clear by the statement of Justice Brown in Bolln v. Nebraska, 176 U. S. 83–88, 20 Sup. Ct. 287, 44 L. Ed. 382, wherein he says:

> "The legislation of congress connected with the admission of Nebraska into the Union, so far as it bore upon the question of citizenship, was fully considered by this court in the case of Boyd v. Nebraska, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103, and the conclusion reached that upon its admission into the Union the citizens of what had been the territory became the citizens of the United States and of the state."

I am therefore of the opinion that Julien Bahuaud was at the time of his death a naturalized citizen of the United States; that he became such upon the admission of Nebraska as a state of the Union. This leaves for consideration the remaining question, as to whether the treaty with France in 1853 suspends or renders inoperative the legislative enactment of the state of Nebraska approved March 16, 1889. The seventh article of the treaty, being the only provision applicable to the consideration of this case, is as follows:

"In all the states of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously, or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed. As to the states of the Union by whose existing laws aliens are not permitted to hold real estate, the president engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right. In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States the same rights within its territory, in respect to real and personal property and to inheritance, as are enjoyed there by its own citizens."

This provision of the treaty was construed by the supreme court in Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642, wherein it is said:

"As we read the article, it declares that in all the states of the Union by whose laws aliens are permitted to hold real estate, so long as such laws remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as citizens of the United States. They shall be free to dispose of it as they may please,—by donation, testament, or otherwise,—just as those citizens themselves. But, as to the states by whose existing laws aliens are not permitted to hold real estate, the treaty engages that the president shall recommend to them the passage of such laws as may be necessary for the purpose of conferring that right. * * * We are therefore of opinion that this is the meaning of the article in question,—that there shall be reciprocity in respect to the acquisition and inheritance of property in one country by the citizens of the other; that is, in all political communities in the United States where legislation permits aliens to hold real estate the disability of Frenchmen from alienage in disposing and inheriting property, real and personal, is removed, and the same rights of disposition and inheritance of property in France is accorded to citizens of the United States as are there enjoyed by its own citizens."

This provision of the treaty, as construed by the supreme court, permits a citizen of France to acquire, possess, and inherit real estate to the same extent and in the same manner as citizens of the United States in those states of the Union by whose laws aliens are permitted to acquire and hold real estate. By article 6 of the constitution of the United States it is provided:

"And all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

It is not an open question that the United States has power to make treaties removing the disability of aliens to inherit; that

such treaties are a valid exercise of and within the powers conferred by the constitution of the United States. Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628; Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; Opel v. Shoup, 100 Iowa, 407, 69 N. W. 560, 37 L. R. A. 583; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84, and cases cited therein.

Section 25, art. 1, of the constitution of Nebraska is as follows:

"No distinction shall ever be made by law between resident aliens and citizens in reference to the possession or descent of property."

The act of the legislature of Nebraska approved March 16, 1889 (Laws 1889, p. 483), by its first section, provides:

"Non-resident aliens and corporations not incorporated under the laws of the state of Nebraska, are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten (10) years and no longer, and if at the end of such time herein limited such lands so acquired have not been sold to a bona fide purchaser for value, or such alien heirs have not become residents of this state, such lands shall revert and escheat to the state of Nebraska, and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands as provided by this act."

By the third section of the act a nonresident alien who owned land in the state at the time of the taking effect of the act was authorized to dispose of the same at any time during his life. Section 4 provided that the act should not prevent nonresident aliens from having liens upon real estate, from taking a valid title to the real estate subject to such liens, or from enforcing such liens by judgment, and becoming the purchaser of such real estate at judicial sale, but providing that lands so acquired should be sold within 10 years after the title thereto was perfected, and providing further that nothing in the act should be construed to prohibit any nonresident alien or foreign corporation from purchasing or acquiring title to so much real estate as should be necessary for the purpose of erecting and maintaining manufacturing establishments. The act further provided that its provisions should not apply to any real estate lying within the corporate limits of cities and towns. The statute and constitutional provisions before referred to do not prohibit all aliens from acquiring and holding real estate. Their prohibitory provisions apply only to aliens who are nonresidents. A resident alien may acquire possession and hold real estate in the same manner, by the same title, as a citizen. As to real estate lying within the corporate limits of cities and towns, an alien, whether resident or nonresident, may hold and acquire real estate by inheritance or otherwise. Hence it is clear that Nebraska is one of the states of the Union which authorize aliens to hold real estate, and that the provision of the treaty referred to is applicable thereto. The provisions of the treaty, as construed by the supreme court, apply to all states by whose laws an alien, whether designated as resident or nonresident, is permitted to hold real estate. In such states, where a resident alien is permitted to hold real estate, the prohibition as to nonresidents

holding title to real estate by inheritance or otherwise is inoperative, by virtue of the treaty, as to citizens of the republic of France.

Judgment will be entered finding the several interests of the parties to the real estate described to be as alleged in the petition, and that partition thereof be made. If the parties are unable to agree as to the rents and profits of the real estate during the time stated, the case will be referred to a master to take proofs in respect thereof. Counsel for complainants will prepare the proper decree, saving to respondents all proper exceptions, and submit same to counsel for respondents before presenting same to the court for signature.

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## PECK COLORADO CO. v. STRATTON.

(Circuit Court, D. Colorado. November 6, 1900.)

PLEADING—RESPONSIVENESS OF ANSWER—NEW MATTER IN AVOIDANCE.

In an action by a corporation for money received the complaint alleged that defendant received from plaintiff, as its agent and assistant treasurer, a sum of money to plaintiff's use, which he failed to pay to plaintiff on demand. The answer, after pleading the general issue, as special defenses set out a contract between defendant and a third person, and alleged that it was by such contract that defendant, as an individual, obligated himself to place in the treasury of plaintiff the sum sued for, and that the contract was void for fraud and failure of consideration. *Held* that, as proof by plaintiff of such contract and its breach would not make a prima facie case under the complaint, such special defenses were demurrable as not responsive.

On Demurrer to Answer.

Thomas A. Banning, Orlando H. Manning, and Carpenter & McBird, for plaintiff.

Charles Hughes, for defendant.

MARSHALL, District Judge. A general demurrer is interposed to the second and third defenses of the amended answer. This answer is pleaded to a complaint alleging "that on, to wit, the 7th day of March, 1896, at Colorado Springs, in the county of El Paso, state of Colorado, the defendant received from the plaintiff, as the agent and assistant treasurer of said plaintiff, the sum of one hundred thousand dollars ($100,000), to the use of said plaintiff," and that the defendant failed to pay said sum to the plaintiff upon demand. Three defenses are pleaded; the first a denial of all of the allegations above quoted; the second and third, by way of confession and avoidance, each set up the following contract between Orrin B. Peck and the defendant:

"Colorado Springs, Colorado, March 7th, 1896.

"I have this day purchased of Orrin B. Peck twenty-five hundred shares, of one hundred dollars each, of the capital stock of the Peck Colorado Company, of Chicago, Illinois, at par, being one-fourth of the capital stock of said company, a corporation of the state of Illinois, and I have paid to him the sum of fifty thousand dollars in cash and one hundred thousand dollars to be placed in the treasury of said company, to be used and paid out in Colorado for the use of said company in said state from time to time as needed, in full payment for fifteen hundred of said shares, and for the remaining one

thousand shares I am to pay the sum of one hundred thousand dollars in payments at the time and in the amounts as follows, viz.: Fifty thousand dollars on or before six months from this date, and the remaining fifty thousand dollars on or before January 1st, A. D. 1897. Said payments to be made at Chicago, Illinois, by placing the amounts to the credit of the said Orrin B. Peck at the National Bank of Illinois, at the city of Chicago, Ill., provided that I may, instead of making any or all or either of said payments, return to said Orrin B. Peck any portion of said one thousand shares at any time before the said payments, or either of them, becomes due, and thereupon be released and relieved from any obligations to pay for any and all such shares so returned. In case the stock is returned, it shall be by the assignment of the number of shares so returned duly executed and delivered with the certificate so assigned to the said Orrin B. Peck, or to the said bank above mentioned for him. W. S. Stratton.

"I hereby agree to the above, and the terms and conditions above set forth are consented to and the same are satisfactory to me. Orrin B. Peck."

In each of these defenses it is alleged that the sum sued for is the particular $100,000 which, by the terms of the contract of March 7, 1896, was to be placed in the treasury of the plaintiff. The second defense proceeds to avoid the contract for fraud, and the third alleges a failure of consideration.

The questions presented have, in a great measure, been considered in an opinion sustaining a similar demurrer to a prior answer in this case. 95 Fed. 741. They have, however, been reargued with great ability, and, as the matter is of importance, it deserves a re-examination. The reargument has been principally directed against the conclusion heretofore reached as to the adequacy of the defendant's first defense to admit proof of a want or failure of consideration. As fraud is now pleaded, it is especially urged that evidence of fraud is always new matter, and must be affirmatively pleaded where there is opportunity to do so. The decision on the prior demurrer did not depend on the proposition questioned. In the former opinion it was held that in the averment of the complaint that "the defendant received from the plaintiff, as the agent and assistant treasurer of said plaintiff," the sum sued for, the allegation of the receipt from the plaintiff, and as its agent and assistant treasurer, was material, and could not be disregarded as surplusage. I do not find it necessary to repeat the reasons given in the former opinion for this conclusion. A re-examination of the question has but strengthened the view then entertained. The two defenses now to be considered are limited to a defense against the contract of March 7, 1896, and, unless the proof of that contract and its breach would make a prima facie case for the plaintiff, it is evident that the defendant has answered a cause of action not set up. The contract of March 7, 1896, was wholly between Peck and the defendant. The amended answer shows that the consideration for it proceeded from Peck, and not from the plaintiff. By its terms nothing was to come into the hands of the defendant as the agent and assistant treasurer of the plaintiff. I am not unmindful that it is also alleged in the second defense that the $100,000 which, by the contract of March 7, 1896, was to be placed in the plaintiff's treasury, was agreed by Peck and the defendant "to be paid by the defendant only as the same should be needed or required in the construction of concentrating mills for the reduction of ores and the

equipment thereof with the said patented process and machinery within the state of Colorado and outside said El Paso county, and then should be so paid out directly by this defendant for such purposes and on such conditions only." A similar allegation is found in the third defense. But, if effect is to be given to this agreement, it would simply convert an absolute promise into a conditional one. Until the condition happened, there would be no liability to pay. The defendant would not, from anything alleged, hold the money as the agent of the plaintiff. Proof of the contract of March 7, 1896, and its breach, would leave the plaintiff's cause of action unproved; and hence the avoidance of that contract cannot be held to be a defense to the complaint. The basis of the liability of the defendant is his receipt from the plaintiff, and as its agent, of $100,000. This receipt once admitted, the defendant is estopped on familiar principles from contesting the plaintiff's right to this money until he has paid it to the plaintiff, or in accordance with its instructions. The demurrer must be sustained.

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## BANK OF SAGINAW v. TITLE & TRUST CO. OF WESTERN PENNSYLVANIA.

(Circuit Court, W. D. Pennsylvania. December 26, 1900.)

No. 23.

1. BANKS—TRUST COMPANIES—POWER TO ISSUE CERTIFICATES OF DEPOSIT.
In the absence of statutory provisions on the subject, a trust company authorized to receive money on deposit has lawful authority to issue certificates of deposit therefor in the usual form.

2. FEDERAL COURTS FOLLOWING STATE DECISIONS—QUESTIONS OF COMMERCIAL LAW.
The courts of the United States are not controlled by the decisions of the state courts on questions of general commercial law, and a federal court will follow the decisions of the supreme court as to the negotiability of an instrument, notwithstanding a contrary holding by the courts of the state where the transaction took place.[1]

3. CERTIFICATES OF DEPOSIT—NEGOTIABILITY.
A certificate of deposit in the ordinary form, payable to the order of the depositor, is a negotiable instrument possessing the qualities of a negotiable promissory note.

Sur Motion for Judgment for Want of a Sufficient Affidavit of Defense.

Robinson & McKean and R. B. Ivory, for plaintiff.
Murphy & Hosack and Edward Willson Boyd, for defendant.

ACHESON, Circuit Judge. The plaintiff is a corporation of the state of Michigan, engaged in the banking business at Saginaw, in that state. The defendant is a corporation of the state of Pennsylvania, doing business at Connellsville, Pa. The suit is upon six certificates of deposit issued by the defendant, and of which the

[1] State laws as rules of decision in federal courts, see notes to Griffin v. Wheel Co., 9 C. C. A. 548, Wilson v. Perrin, 11 C. C. A. 71, and Hill v. Hite, 29 C. C. A. 553.

plaintiff is indorsee and holder. These certificates are alike in form, and the following copy of one represents the general character of all of them:

Certificate of Deposit. Not Subject to Check.

$500.00. $500.00. No. 2.

Title & Trust Company of Western Pennsylvania,
Connellsville, Pa., Feb. 5, 1900.

J. F. Barrows has deposited with this company five hundred dollars, payable to the order of J. F. Barrows on return of this certificate properly indorsed.

W. M. Ruth, Treasurer.

Indorsed: J. F. Barrows.

The sworn statement of claim sets forth that on or about February 12, 1900, J. F. Barrows, having indorsed each of these certificates in blank in the usual manner, presented them, so indorsed, at the plaintiff's banking house in Saginaw, asking that they be cashed, and that thereupon the plaintiff, in the usual course of its business as a bank, received and cashed them, paying therefor full value. These allegations are not denied in the affidavit of defense, and there is no suggestion therein that the plaintiff is not a bona fide holder for value of the certificates. Upon the pleadings the plaintiff must be so regarded.

That the defendant company is authorized to receive deposits of money is conceded, but it is denied that it had lawful authority to issue such certificates as those in suit. There is, however, no statutory or other inhibition of such certificates. These certificates are in the form commonly used everywhere in the commercial world by bankers and companies receiving money deposits, and the defendant's right to issue them in the course of its business and as an incident thereto is not to be doubted. At any rate, I do not see that it is open to the defendant to raise the question.

The case, I think, turns upon the question of the negotiability of the certificates sued on. Now, that such a certificate of deposit is a negotiable instrument possessing the qualities of a negotiable promissory note was determined by the supreme court of the United States in Miller v. Austen, 13 How. 218, 228, 14 L. Ed. 119. To the same effect are the decisions of all the state courts except those of Pennsylvania. 5 Am. & Eng. Enc. Law (2d Ed.) 805. The supreme court of Pennsylvania has held that a certificate of deposit, although containing negotiable words, has none of the incidents of a negotiable promissory note. Patterson v. Poindexter, 6 Watts & S. 227; Bank v. Mangan, 28 Pa. St. 452; London Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. St. 498. There is, however, no statute in Pennsylvania regulating this matter, and the question here is one of general jurisprudence. That courts of the United States are not controlled by the decisions of the state courts on questions of general commercial law is authoritatively settled. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Oates v. Bank, 100 U. S. 239, 25 L. Ed. 580; Brooklyn City & N. R. Co. v. National Bank of New York, 102 U. S. 14, 29, 31, 26 L. Ed. 61. Mr. Justice Bradley in Railroad Co. v. Lockwood, 17 Wall. 357, 367, 21 L. Ed. 627, said: "But on a question of general commercial law, the federal courts administering justice in New York have equal and co-

ordinate jurisdiction with the courts of that state." In Brooklyn City & N. R. Co. v. National Bank of New York, supra, the question related to the legal effect of a transfer by indorsement of negotiable paper before maturity as mere security for an antecedent debt. The transaction occurred in New York, and the question had been there determined by decisions of the highest court of the state. It was contended that, as the bank was located in New York, and the other parties were citizens of that state, and the contract had been made there, the federal courts were bound to follow the decisions of the state court, whether they met their approval or not. The supreme court of the United States rejected the argument, refused to follow the state decisions, and, speaking by Mr. Justice Harlan, said:

"The decisions of the New York court which we are asked to follow in determining the rights of the parties under a contract there made are not in exposition of any legislative enactment of that state. They express the opinion of that court, not as to the rights of parties under any law local to that state, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one state, or dependent upon local authority, but one arising out of the usages of the commercial world."

This is very pertinent to the case in hand, and furnishes a complete answer to the contention that the question at issue is governed by the decisions of the supreme court of Pennsylvania because this state is the place where the contracts were made and where they are to be performed. The parties to the commercial instruments in suit did not contract with reference to the state decisions any more than they did with reference to the decision of the supreme court of the United States. They contracted with reference to the general commercial law. In view of the authorities cited, it is clear that upon the controlling question of the negotiability of the instruments in suit the decision in Miller v. Austen is conclusive of this controversy. Judgment therefore must be entered in favor of the plaintiff for want of a sufficient affidavit of defense, and it is so ordered.

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## In re SWIFT et al.

(District Court, D. Massachusetts. December 17, 1900.)

No. 2,745.

1. BROKERS—LAW GOVERNING CONTRACTS.
   A contract with a broker for the purchase of stock on a margin is one which is governed by the laws of the state where it is made, as to the relations and rights of the parties thereto.
2. SAME—PURCHASE OF STOCK ON MARGIN.
   Under the law of Massachusetts, as established by decision, a broker who has purchased stock on a margin for a customer is not a pledgee thereof to secure his advances, but his contract is conditional, to deliver so many shares of the stock on payment of the remainder of the purchase price; and he may pledge the stock for his own debt, or even sell it, without being guilty of conversion or of a breach of the contract, until a demand has been made by the customer and refused.

3. SAME—BREACH OF CONTRACT.

Where a broker in Massachusetts, who had purchased stock on a margin for a customer, made a general assignment by which he transferred the stock to his assignee, such action did not constitute a conversion of the stock or a breach of his contract with the customer; but if it be considered a refusal to perform, which justified an action for the breach without demand of performance, the customer was not bound so to treat it, but might, at his option, treat the contract as subsisting.

4. BANKRUPTCY—PROVABLE CLAIMS—DAMAGES FOR BREACH OF CONTRACT.

Where a broker who had purchased stock on a margin for a customer, and whose contract under the local law was to deliver such stock to the customer on demand and tender of the remainder of the price, was adjudicated a bankrupt, and the stock passed to his trustee, his customer may treat the contract as broken by the act of bankruptcy, and prove his claim for damages, which are to be determined as of the time of the adjudication.

In Bankruptcy. On petition by trustee to reconsider allowance of the claim of a creditor.

The certificate of the referee was as follows:

I, James M. Olmstead, one of the referees of said court of bankruptcy, hereby certify that in the course of the proceedings in said cause before me the following question arose, pertinent to the said proceedings, to wit:

This was a petition filed June 21, 1900, by the trustee to reconsider the allowance of the proof of claim of James R. Dee, a creditor of said estate. The claim was allowed in the sum of eighty-three hundred sixty-seven and $^{65}/_{100}$ (8,367.65) dollars. The bankrupts, doing business as E. C. Hodges & Co., were stockbrokers in Boston, and followed the usual practice of brokers in buying stock for their customers and carrying the same upon margins. The creditor, James R. Dee, had dealt with the firm of E. C. Hodges & Co. in stocks, and the said bankrupts had pledged some or all of the stocks purchased on orders of said creditor with various banks, as collateral for loans. On the 27th of December 1899, the firm of E. C. Hodges & Co. made a voluntary assignment for the benefit of its creditors, and at the same time prepared and mailed notice thereof to its various creditors and customers. On or about the 10th of January, 1900, one of the firm wrote a letter to said creditor, referring to the "prospects of favorable settlement." On or about the 15th day of January, 1900, I find that the creditor, Dee, acknowledged the receipt of this letter of the 10th. On the 6th day of April, 1900, two members of the firm filed a voluntary petition, and asked that the firm be adjudicated bankrupt, and said firm of E. C. Hodges & Co. was subsequently adjudicated bankrupt.

The trustee claims that the securities for which E. C. Hodges & Co. were responsible to the creditor should be valued as of the time of the assignment, and that, if so valued, the claim should be reduced to the sum of sixty-six hundred fourteen and $^{15}/_{100}$ (6,614.15) dollars. The creditor, James R. Dee, contended that the securities should be valued as of the time of the commencement of the bankruptcy proceedings. This petition, therefore, presents the question as to whether the date of a voluntary assignment, or that of the commencement of the proceedings in bankruptcy, shall govern. Bankr. Act 1898, §§ 1 (10), 63a (1). The case of Chamberlain v. Greenleaf, 4 Abb. N. C. 178, relied on by the trustee in his brief, and the New York decisions, hold that the relation of a customer to a broker carrying stock for him is that of pledgor and pledgee. In Massachusetts the contract is said to be strictly conditional, to deliver so many shares on payment of so much money; that the doctrine of trover does not apply; and that, where the money was never paid, the title to have performance never accrued. Wood v. Hayes, 15 Gray, 375; Covell v. Loud, 135 Mass. 41. In Massachusetts the broker has a right to pledge stock he is carrying as security for his own debts, and such pledge does not constitute a breach of the contract. Covell v. Loud, supra.

The question in this case would seem to resolve itself into an ascertainment of the time when the creditor's title to have performance accrued, or, in other words, when the rights of the parties were fixed. It is a subject of common knowledge that voluntary assignments are frequently resorted to as expedients to tide debtors over their difficulties, and are intended to be merely temporary. In fact, the letter above referred to, sent by one of the firm, would seem to indicate that this was no exception to the rule; and the creditor seems to have accepted it in the same spirit, and to have waived for the time being any insistence upon or performance of the existing contracts between him and the firm. I find that the creditor, also, did not assent to the assignment, and hence, in one sense, was not affected by its provisions; but it is settled law that the status of creditors is affected by the institution of bankruptcy proceedings, and the referee is of the opinion that the better and sounder rule in such cases would be to ignore such assignments, and to determine upon the date of bankruptcy proceedings as the time when the rights of the parties are fixed. That a voluntary assignment constitutes a fraud upon the bankruptcy act has been repeatedly held. In re Gutwillig (D. C.) 90 Fed. 475, 478; George M. West Co. v. Lea, 174 U. S. 590, 596, 19 Sup. Ct. 836, 43 L. Ed. 1098. In the latter case Mr. Justice White, in delivering the opinion of the court, cites with approval the case of In re Gutwillig, supra. Wyles v. Beals, 1 Gray, 233; Edwards v. Mitchell, Id. 239. In the latter cases Chief Justice Shaw states the disadvantages and mischiefs arising under assignments, and sets forth eight cogent reasons against them, and in favor of the regular methods of administration. Inasmuch, therefore, as the court of bankruptcy exists for the purpose of enforcing the bankruptcy act, and not voluntary assignments, the referee is of opinion that the only true rule to be followed in this case is to adopt the date of bankruptcy proceedings as the time when the rights of the parties were fixed, and when the creditor was entitled to make a tender and demand fulfillment of his contract. The petition to reconsider is therefore disallowed, and the question is certified to the judge for his opinion thereon, together with the evidence taken at the hearings.

Dated at Boston this 12th day of October, 1900.

James M. Olmstead, Referee in Bankruptcy.

Elder, Wait & Whitman, for trustee.
Bancroft G. Davis, for creditor.

LOWELL, District Judge. In this case there was very slight reference by counsel to the evidence submitted with the referee's report, and his findings of fact are accepted.

The court has first to determine what was the relation of the creditor to the bankrupt, and what the nature of the contract created by the bankrupt's agreement to buy stocks on a margin. The contract was made in Massachusetts, and the law of Massachusetts governs its interpretation, determining the nature of the bankrupt's ownership in the stock bought, and of his lien upon the same. There are mercantile contracts, which, though made in a particular state, must yet be construed according to the general commercial law. Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co. (Sup. Ct.; October term, 1900) 21 Sup. Ct. 1, 45 L. Ed. ——. In some cases it may be hard to determine whether a given contract be of this sort or of the commoner sort governed by local law, but a contract for the purchase of stocks on a margin appears to me plainly of the latter class. The court has, therefore, to determine what was the nature of this contract according to the law of Massachusetts. In many, perhaps in most, states the relation of a broker who has bought stocks on a margin to the stocks so bought is that of a

pledgee for his customer's debt. Jones, Pledges, § 495. This appears not to be the case in Massachusetts. In Wood v. Hayes, 15 Gray, 375, a broker bought stocks for a customer without any advance from the latter. Subsequently the customer and broker settled an account, and found a balance due the latter of a certain sum of money, for which the customer gave the broker his note. The broker acknowledged that he held as security for the note a certain number of shares of stock. The broker died, and his representative called upon the customer for a settlement. The customer had never demanded the stock or offered to pay the note. The broker had pledged the stock, which had fallen in value; and the customer sought, by way of defense to the action brought against him, to charge the broker with the value of the shares at the time of their purchase, by reason of their conversion by the broker. Chief Justice Shaw said:

"The doctrine of trover does not apply. Lobdell [the broker] advanced the money to buy the shares for account of Wood, and held the shares in his own name. It stood on the footing of contract. The contract was strictly conditional, to deliver so many shares on payment of so much money. The money was never paid and the title to have performance never accrued. There was no claim for the balance. But as the balance was in favor of Lobdell's estate when he died, the result of this case is, judgment for the defendants."

In Wood v. Hayes there certainly was a pledge in writing of the stock, acknowledged by the broker, and accepted by the customer. The purchase was not on a margin, no advance having been made by the customer. Chief Justice Shaw laid stress upon the fact that the broker held the stock in his own name. Apparently he meant to decide that, where a broker advances the money to pay for stock ordered by his customer, his contract is simply to deliver the stock when the customer makes demand and tenders payment of the price current at the time the contract was made. In such case the broker's contract is like that of one who agrees to sell and deliver stock on demand at a fixed price. This original contract made by the broker was not deemed to have been modified by the subsequently given note and pledge. As the stock stood in the broker's name, it may be that the pledge was deemed purely equitable, so that no dealing with the stock by the broker could be a conversion of it. Possibly the great chief justice for once, like a lesser lawyer, saw his conclusion so plainly that he neglected somewhat the steps by which he reached it. The decision in Wood v. Hayes, if it stood alone, would have no great bearing on the case at bar. See Jones, Pledges, § 498; Day v. Holmes, 103 Mass. 306, 311. It has received an interpretation in subsequent decisions which goes far to establish the law in Massachusetts regarding the purchase of stocks on a margin.

In Covell v. Loud, 135 Mass. 41, a stockbroker bought stock on a margin. The stock fell in value, the customer failed on demand to make good his margin, and the broker sold the stock. The customer sued for conversion. Mr. Justice Devens said:

"We are aware that transactions of this nature have sometimes been held to make the broker who purchases the stock an agent for the customer, and to treat him as holding it thereafter as a pledgee for the money advanced

for its purchase. Markham v. Jaudon, 41 N. Y. 235; Stenton v. Jerome, 54 N. Y. 480; Baker v. Drake, 66 N. Y. 518; Gruman v. Smith, 81 N. Y. 25. But in Wood v. Hayes, 15 Gray, 375, it was held that a broker who advanced money to buy stock for another, and held it in his own name, might, so long as he had not been paid or tendered the amount of his advances, pledge it as security for his own debt to a third person, without making himself liable to an action by his employer, and this upon the ground that the contract was conditional to deliver the shares upon the payment of the money. It cannot make any difference that, in this case, a small portion of the money necessary for the original purchase was advanced by the customer."

The decision in Covell v. Loud might have been put solely on the ground that, upon the customer's failure to keep good the margin, the contract of pledge gave the broker, as pledgee of the stock, a right to sell it in the manner adopted, but the court reached its conclusion by another ratio decidendi. Mr. Justice Devens asserted that, by virtue of the decision in Wood v. Hayes, the relation of pledgee did not exist, and that a broker buying on a margin may pledge the stock so bought as security for his own debt, or may part with it altogether by an absolute sale. In Covell v. Loud the court went further than in Wood v. Hayes. To hold that the contract of a broker, who has agreed to buy with his own money stock for a customer, should be deemed a contract to deliver the stock on payment of a fixed price, is one thing; and to hold that this is the nature of the contract where part of the price is advanced by the customer is another. Mr. Justice Devens declared that the variation in the circumstances made no difference. Again, in Wood v. Hayes it was decided that to repledge the stock was no conversion. In Covell v. Loud it was held no conversion to make an absolute sale. It is true that the learned judge, in a paragraph following that just quoted, went on to show that, even if the transaction were treated as creating a pledge, yet the decision of the case would not be changed; but, in showing this, he merely stated an alternative ground on which the decision might be rested. That Covell v. Loud established the rule in Massachusetts that a broker who has purchased stock on a margin for a customer is not a pledgee thereof is recognized in Jones, Pledges, § 498.

In Weston v. Jordan, 168 Mass. 401, 47 N. E. 133, a broker had purchased stock on a margin, and had pledged it for a sum greater than the debt of his customer to him. Mr. Justice Allen said:

"When a broker buys shares on a margin and carries them for his customer, it has been held in some states that the relation between the customer and the broker is that of pledgor and pledgee. Markham v. Jaudon, 41 N. Y. 235; Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102; Brewster v. Van Liew, 119 Ill. 554, 8 N. E. 842. This view has not hitherto been accepted in Massachusetts. Wood v. Hayes, 15 Gray, 375; Covell v. Loud, 135 Mass. 41. The defendant seeks to have these decisions reconsidered; but the facts of the present case do not call for such reconsideration of the general doctrine."

The supreme court of Massachusetts thus recognized again the rule laid down, or supposed to be laid down, in Wood v. Hayes, but apparently there was doubt in the mind of the court concerning the correctness of the rule. A federal court, bound to follow the decisions of a state court, may be pardoned some perplexity in the face of these expressions of doubt. But to hold that a broker is the

pledgee of stock bought by him on a margin would revolutionize the theory and practice of stockbrokers in Massachusetts. If a stockbroker is the pledgee of this stock, then, in the absence of authority from the pledgor, he cannot rightfully transfer the stock to another by way of sale, or by way of collateral security for an amount greater than that due him. Indeed, if the pledgee makes any transfer of the pledge in Massachusetts, it seems that his act is criminal. Pub. St. c. 203, § 72. Yet it is matter of common knowledge that honest brokers in Massachusetts pledge stock bought and carried by them on a margin for their customers, as a security for their own debts, regardless of the amount of the customer's debt to them. To hold that in so doing they convert the stock and render themselves liable to indictment is a conclusion to be avoided if possible. Again, the persons to whom the stock is pledged by the broker are understood to hold it until the broker's debt to them is discharged, irrespective of the state of accounts between the broker and the customer. This is true, though the pledgee knows that the stock was bought on a margin. Under all the circumstances, I prefer to follow the deliberate expression of opinion of the supreme court of Massachusetts, which is in accord with the custom of brokers in Massachusetts, rather than a mere doubt of the correctness of its own decisions expressed by that court.

If, then, the relation between the customer and the broker is not that of pledgor and pledgee, it remains to consider what is the nature of the contractual relation between them. It was urged in argument before me that the opinion in Weston v. Jordan requires the broker always to have on hand shares enough to meet the customer's order, but this is not the true interpretation of the opinion. There the court first said that by the law of Massachusetts the broker's relation was not that of pledgee, and then it went on to say that even if he were to be deemed a pledgee, as he is in New York, yet the consequences contended for by the customer would not follow. "Under the doctrine as held in New York, Wheatland was bound always to have on hand enough shares to meet the purchase for Jordan." 168 Mass. 405, 47 N. E. 134. It was nowhere intimated in Weston v. Jordan that under the Massachusetts doctrine such an obligation is imposed upon the broker. Indeed, the Massachusetts doctrine plainly implies the contrary. Can it be said that a broker has on hand or under his control stock which is pledged to a third party for a sum greater than the debt of the customer to him? I think not. Yet both cases and daily practice support the broker's right to repledge in this way, and custom, at least, supports the right of the broker's pledgee to hold the stock against the customer. As has been said, Wood v. Hayes and Covell v. Loud assert, if they do not decide, that the contract between the customer and the broker, even where the former advances part of the price, binds the broker to no more than this: To deliver the stock to the customer at any time that the customer tenders the balance of the price. There is no obligation resting on the broker to buy shares in the first instance, or even to refrain from disposing of them during the existence of the contract, so long as he delivers them

when the customer tenders the money and demands performance. In Covell v. Loud it is said, indeed, that by the contract the broker agrees "to purchase and hold or carry" the stock in question. What is the difference between a broker's "holding" stock and "carrying" it is not stated, but apparently an obligation is recognized, binding the broker to do something before the stock is finally demanded. The custom of brokers probably recognizes a like obligation. I hardly think they would consider that one of them fulfilled his contract unless he purchased at once the stock for which the customer put up the margin. And I think they would consider that one of them exceeded his rights if at any time he was without some shadow of title to the stock he was supposed to be carrying. He might both practically and legally put this stock out of his control by pledging it for his general indebtedness. His power to recover it might depend upon the solvency of others. Yet some interest in the stock carried he is deemed by brokers under obligation to retain. In Covell v. Loud, however, the controversy concerned not pledging, but selling; and Mr. Justice Devens, after speaking of the broker's contract to hold or carry, treated this obligation as compatible not only with the broker's right to pledge the stock for his general debts, but also with the right of absolute sale. The court has to determine if a broker, agreeing to buy stock on a margin, agrees to buy at once the stock ordered, and during the existence of the contract to retain some interest in it, however slight that interest may be, or may, on the other hand, sell the stock bought, as well as pledge it for an amount larger than the customer's debt to him. On the one hand, there is the language of Mr. Justice Devens concerning the contract to hold and carry stock, and there is a vague impression of obligation on the part of brokers. On the other hand, there is the ratio decidendi of Covell v. Loud, which treated the sale of stock as analogous to pledging it. There is the language of the opinion in Wood v. Hayes, adopted by the opinion in Covell v. Loud as applicable to the purchase of stock on a margin; and there is the difficulty, in logic and common sense, of distinguishing between a pledging of stock for the broker's debts generally, and a parting with all interest in it. However the contract be construed, difficulties will arise, and the decision be unsatisfactory. Even if it be held that the transfer of the shares here made by the broker to his general assignee was in some sense a violation of his contract with his customer, yet it would seem that the customer could not at once maintain an action for that violation, without a proper demand. That demand was not made here, and so this case is distinguished from Weston v. Jordan, where it was said by the court:

"After Wheatland had parted with the control of the shares, and after repeated demands for them by Jordan and refusals by Wheatland to deliver them, Jordan had a valid ground of action against Wheatland, either for breach of contract or for a conversion; it matters not which. If Wheatland had refused on demand to deliver the shares when they were high, and they had afterwards fallen in value, we cannot accede to the defendant's contention that Wheatland could still have compelled Jordan to take them up, and pay the balance of the cost. But Jordan's right of action against

Wheatland had accrued; and this was a debt which would be provable in insolvency against Wheatland."

In the absence of stronger indications, I must take these words to imply that under a Massachusetts contract no right of action accrues to the customer until after demand. As no demand was made in this case by the customer after the general assignment, it follows that no right of action accrued to him. By this construction of the contract the customer is deprived of no practical advantage which he would enjoy under a rule requiring the broker always to retain some shadowy right in the stock, while permitting him to pledge it for his own debts to an unlimited extent. If the broker is solvent, the customer is protected in any case. If the broker is insolvent, he is protected in neither case. The general assignment made by the bankrupt, standing by itself, did not, therefore, constitute a conversion of the customer's stock, or a breach of the broker's contract, giving rise to an immediate and unqualified right of action. It was urged that the assignment was such a refusal to perform the contract as to justify a suit for its breach brought at once by the creditor. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. Even if this be true,—and no opinion is expressed upon the question,—yet the creditor was not required to treat the contract as broken by the broker's refusal to perform. "It seems reasonable to allow an option to the injured party either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." Hochster v. De la Tour, 2 El. & Bl. 678, quoted in 178 U. S. 10, 20 Sup. Ct. 784, 44 L. Ed. 957. Here the creditor did not exercise his option to treat the contract as broken, if any such option he had.

It follows that at the time of the bankruptcy there was a subsisting obligation on the part of the broker towards the customer. If this be so, it is argued that the obligation was not broken by the act of bankruptcy, and now subsists. The discharge in bankruptcy will not then free the broker from his liability, and after his discharge the obligation will still burden him. Can this be true? Can a broker who has bought stock on a margin for a customer be held upon his contract after his discharge in bankruptcy, provided the customer has not made proper demand and tender of payment before adjudication? Even if the customer's claim be in some sense contingent, and even if the bankrupt act does not permit the proof of contingent claims in general, so that in this case the creditor might keep the contract alive against the bankrupt even after discharge, if he saw fit to do so, yet I think the creditor can at any rate treat the contract as broken by the act of bankruptcy, and prove his claim. Bankruptcy does not work a breach of all contracts. In some cases the benefit of the contract does not pass to the trustee. Streeter v. Sumner, 11 Fost. (N. H.) 542. In others the trustee may adopt the contract, and thus keep it alive. But this case is wholly outside the classes mentioned. Not only has not the trustee adopted the contract in this case, but manifestly he could not do so; for to adopt

it would be a preference of this creditor, and an injustice to all others. That in a case like this the creditor may treat the contract as broken by bankruptcy seems to me obvious, and in this instance the creditor has done so. I am of opinion, therefore, that the contract was broken at the time of the adjudication, and that the measure of damages is to be fixed as of that time. The decision of the referee is affirmed

## In re RUSSELL.

(District Court, N. D. California. December 28, 1900.)

No. 2,741.

BANKRUPTCY—REFEREE'S DECISION—REVIEW—PETITION.

Where a creditor, whose claim has been disallowed by the referee, fails to file a petition for review with the referee, as required by General Order No. 27 (18 Sup. Ct. viii.), the application for review will be dismissed.[1]

DE HAVEN, District Judge. It appears from the certificate of the referee that H. L. Davis filed his claim against the estate of the bankrupt for the sum of $416.39. Written objections were made to its allowance by other creditors, and upon consideration the claim was rejected by the referee. The opinion and order of the referee are accompanied by his certificate, which recites that, "the attorney for said claimant having duly excepted to my ruling herein, said question is hereby certified to the Honorable John J. De Haven for his opinion." Rule 27 of the general orders in bankruptcy (18 Sup. Ct. viii.) prescribed by the supreme court is as follows:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

This rule does not seem to have been complied with by the creditor. It does not appear from the certificate of the referee or from any paper returned to this court that any petition for the review of the order of the referee rejecting his claim has been filed by him with the referee. In the absence of such a petition, this court is not authorized to review the action of the referee. The application for a review of the ruling of the referee will therefore be dismissed.

[1] Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

## In re SLINGLUFF.

(District Court, D. Maryland. July 24, 1900.)

1. BANKRUPTCY—DISCHARGE—GROUNDS OF OBJECTION.

Omissions from or inaccuracies in a bankrupt's schedule, not made knowingly and fraudulently, are not grounds for refusing him a discharge.

2. SAME—FALSE OATH.

A bankrupt cannot be fairly charged with having knowingly and fraudulently sworn falsely in relation to the time of his knowledge of insolvency, so as to debar him from the right to a discharge, because his testimony shows him to have entertained the expectation of being able to continue his business longer than was justified by the facts.

In Bankruptcy. On application for discharge, and objections thereto.

Niles & Wolff, for bankrupt.

J. D. Ferguson, Wm. H. Brune, Allan McLane, and J. Alexander Preston, for objecting creditors.

WADDILL, District Judge. The specifications against granting the bankrupt's discharge aver omissions and inaccuracies in the bankrupt's schedule, false swearing by the bankrupt as to the time of the knowledge of insolvency, and the disposition of certain stock in the Baltimore Brick Company held by the bankrupt.

1. Omissions and inaccuracies in and from the bankrupt's schedule of the character specified will not bar a discharge. Upon proper application, errors and omissions in these particulars can be corrected or supplied. The objections to a discharge enumerated in the act of congress do not cover this class of exceptions.

2. It would be a harsh and unreasonable construction of the bankruptcy law to attribute to a failing debtor a purpose to "knowingly and fraudulently" swear falsely because he entertained the hope and expectation of being able to continue his business longer than it now appears the real facts justified. This is an hallucination frequently entertained by failing debtors. Indeed, those that have been most prosperous, and whose failure is overwhelming, seldom realize their changed condition until it has long since become apparent to others. And, besides, it does not appear that the oath in this particular was material, or that any one was prejudiced by it.

3. The evidence does not establish any purpose on the part of the bankrupt "knowingly and fraudulently" to swear falsely as to the disposition of the brick company stock. On the contrary, the reverse is true, and the bankrupt, Horace Slingluff, seems, with entire frankness and somewhat remarkable accuracy, to have been able to account for the disposition of the large number of shares of stock held by him. It would not have been a surprise if he had been unable to give the name of some of the holders of the stock, considering the number of hands it passed through.

4. Upon the whole case, I think the bankrupt, Horace Slingluff, is entitled to his discharge, and it will be so ordered.

## In re FLICK.

(District Court, S. D. Ohio, W. D. November 5, 1900.)

1. BANKRUPTCY—DEBTS HAVING PRIORITY—WAGES OF CLERK.
One employed as a salesman in a store or shop is a clerk, within meaning of Bankr. Act 1898, § 64b, subd. 4, giving priority to claims for wages due to "workmen, clerks, or servants" which have been earned within three months before the date of the commencement of proceedings.

2. SAME.
Where, by agreement, a clerk permits his employer to retain a certain portion of his wages each week to form a fund which is to be paid to the clerk or used for his benefit later, on the bankruptcy of the employer the clerk cannot claim priority for the sums so retained during the preceding three months as wages; such fund having become, by the contract between the parties, a debt of another class.

3. SAME—APPLICATION OF PAYMENTS—PREFERENCES.
Payments made by a bankrupt to a clerk within three months prior to the filing of the petition, in the absence of a specific application to other debts, are to be applied in payment of the wages earned by the clerk during that time; but such payments, up to the amount of wages so earned, do not constitute a preference which must be surrendered under Bankr. Act 1898, § 57g, before the clerk can prove his claim for the remainder due him, unless the bankrupt's assets are insufficient to pay all preferred claims, since it does not enable the creditor to obtain a greater percentage of his debt than other creditors "of the same class," within the provisions of section 60a.

4. SAME—PREFERENCES.
Under Bankr. Act 1898, § 57g, it is not necessary, to constitute a preference which must be surrendered by a creditor before he can prove his claim, that he should have had knowledge or notice of his debtor's insolvency, and it is immaterial that a payment made on his debt within the four months was received by him through a collection agency.

5. SAME—PAYMENT OF SEPARATE CLAIMS.
Where a general creditor of a bankrupt made him further short loans, which were repaid within four months prior to the filing of the petition and while the debtor was insolvent, although the transactions were separate, such payments constitute preferences upon the entire debt, which must be surrendered, under Bankr. Act 1898, § 57g, before the creditor can prove his claim.

6. SAME—SURRENDER OF PREFERENCE.
An offer by a creditor to allow the amount of preferences received by him to be deducted from any dividend payable to him on his claim is not a compliance with the requirement of Bankr. Act 1898, § 57g, and does not entitle him to prove his claim.

7. SAME—PROVABLE CLAIMS—FRAUDULENTLY INCREASING AMOUNT.
Where one creditor of a bankrupt has attempted to obtain an advantage over others, by fraudulently including in his account fictitious items or incorrect amounts, he forfeits his right to have his claim allowed in any sum.

In Bankruptcy.

The following is the opinion of Referee GEIGER:

"This matter has come on for hearing before the referee upon the petition of the trustee and certain creditors for the re-examination and disallowance of the claims of Clarence E. Edmondson, E. C. Edmondson, Fred Kaufman, and Charles W. Flick, which claims were filed with the referee, and heretofore allowed, for the purpose of voting for trustee. On November 4, 1898, the bankrupt, Claude W. Flick, purchased of the administrator of E. C. Mellott a stock of gents' furnishing goods, located on South Fountain avenue, Springfield, Ohio, paying therefor the sum of $800. He continued in the business until December 11, 1899, when he made an assignment to his brother, Charles

W. Flick. On December 22, 1899, Edgar G. Stearns and other creditors of the said Claude W. Flick filed their petition in the United States court. asking that the said Claude W. Flick be declared a bankrupt, and on the 20th day of January, 1900, said Flick was declared a bankrupt by the United States court, and the case was referred to the referee.

"I will examine the several claims which have been asked to be disallowed, separately.

"Claim of Clarence E. Edmondson.

"Clarence E. Edmondson has filed his claim for $269.13, 'for work and labor done and performed as employé as wages within three months from the date of Claude W. Flick's assignment to C. W. Flick, which affiant (Clarence E. Edmondson) claims for wages under state as well as United States laws.' Claude W. Flick, the bankrupt, and Charles W. Flick are brothers. E. C. Edmondson is the brother-in-law of the bankrupt, and Clarence E. Edmondson is his son and the nephew of the bankrupt. Clarence E. Edmondson had been employed by E. C. Mellott, the former owner of the store, as a clerk, or, more properly speaking, a salesman, at $5 per week, and he served as such under said Mellott until the death of Mellott, in 1898. When his uncle, Claude W. Flick, bought the stock of goods from the administrator of Mellott, November 4, 1898, Clarence E. Edmondson was employed, as is claimed by him and his uncle, as salesman and buyer, at the rate of $18 per week, only $5 per week of which was paid to him in cash, he claiming that the balance ($13 per week) was retained by the uncle, with his consent, for the purpose of accumulating a fund in his uncle's hands to furnish him with the means for a collegiate education. He continued his services at $18 per week until September 1, 1899, when his salary was raised by his uncle from $18 to $20 per week, he continuing to receive $5 a week in cash. Clarence E. Edmondson, at the time he first began business with Mr. Mellott, was about 18 years old, and at the time of the assignment of his uncle was about 22 years old. It is claimed by the creditors on the one hand that the contract purporting to have existed between Clarence E. Edmondson and his uncle for the payment of $18 and $20 per week for his services was fraudulent; while, on the other hand, it is claimed by Clarence E. Edmondson, in which he is supported by his uncle, the bankrupt, that the contract was made in good faith, and that the services rendered by him were fairly worth the sums agreed to be paid by the uncle. Evidence has been introduced by the creditors tending to prove that in the city of Springfield the prevailing rate of wages for salesmen of the age and experience of Clarence E. Edmondson is much less than $18 per week; that $5 per week would have been a fair compensation for services of the young man. To the referee it appears that $18 and $20 per week was an exorbitant salary for the services of the claimant, and I must confess that I have some suspicions concerning the matter. But we have the direct testimony of Clarence E. Edmondson as to the contract, and the direct testimony of the bankrupt concerning the contract, and nothing to disprove it except that the amount seems entirely out of proportion to the services rendered. Yet we are not justified in saying that the claim is fraudulent, because the bankrupt made an improvident contract with his nephew. It may be argued that the plan to thus enhance the services of the nephew was a part of a general scheme begun at the very inception of the business to enrich the various members of the bankrupt's family at the expense of the creditors. This feature of it I will mention further along in the examination of the claim of Charles W. Flick. Clarence E. Edmondson maintains that his claim should be allowed by the trustee as a preference, and paid in full. The bankruptcy act, by section 64b, subd. 4, provides that wages due to workmen, clerks, or servants, which have been earned within three months before the date of commencement of proceedings, not to exceed $300, shall have priority. The petition of the creditors was filed December 22, 1899. Three months prior thereto would be September 22d. Clarence E. Edmondson served as clerk from September 22d to December 11th, 11½ weeks, at the rate of $20 per week, which amounts to $230. During that time he received in cash $60, as shown by his account on pages 71 and 72 of the ledger of the bankrupt. But, as shown by page 234 of the ledger, from October 3d to October 18th he was paid in merchandise $208.40, upon which merchandise account he paid in cash $11, leaving a balance

against him on account of the merchandise received in the month of October of $197.40, which, together with the cash received by him, amounts to $257.40, which he received in cash at $5 per week, and in merchandise within the period of three months prior to the beginning of the action. I am not clearly convinced that the employment as salesman and purchasing agent, and the performance of such duties as devolved upon Clarence, would constitute him a clerk under the bankruptcy act, and thereby give him priority over general creditors. The strict meaning of the word 'clerk' is a person employed to keep accounts or do writing, or hired about an office or counting house, or the like. It is true that the bankruptcy act itself defines 'wage-earners' as an individual who works for wages, salary, or hire at a rate not to exceed $1,000 a year. But section 64 does not speak of wage-earner, but of workmen, clerks, or servants. I do not think it would be claimed that Edmondson would come within the term 'workman' or 'servant,' and it remains to be determined whether the word 'clerk' includes what is more properly known as 'salesman.' In taking the census, the United States census officers were very careful to direct the enumerators to distinguish between the clerk and the salesman,—the former being the designation of those who have charge of books or accounts; the latter, of those who sell merchandise. But I think that colloquially the term 'clerk' includes salesman, and the Standard Dictionary states that colloquially in the United States the word 'clerk' is made to include salesmen or shop assistants; and the latest edition of Webster defines a clerk as an assistant in a shop or store, and designates the definition a colloquialism. It is held in the Case of Scanlon, in the United States district court of Kentucky (2 Nat. Bankr. N. 58, 97 Fed. 26), that a traveling salesman does not come within the meaning of the terms 'workmen,' 'clerks,' or 'servants, as used in section 64b, subd. 4; and in the Case of Mayer, before Referee D. Lloyd Jones (2 Nat. Bankr. N. 719), it is held that a person selling goods for $5 per week and a commission is not a clerk entitled to priority under the section of the statute. But I am inclined to the opinion, and will so hold, that a salesman, properly speaking, will come within the term 'clerk,' and is entitled to priority, provided he has not surrendered his claim to priority or been paid in any way. But there are two reasons why this claim should not be allowed as a preference: First, that both Edmondson and Flick, the bankrupt, testified that the agreement between them was that $5 per week should be paid to Edmondson in cash, and that Flick should retain the balance to form a fund out of which to pay the expenses of a collegiate education for Edmondson. I do not understand that a person entitled to a priority as a wage-earner can allow his debtor to retain a portion of his wages under arrangements such as here existed, and then, when the debtor becomes insolvent, claim the entire amount of the wages as a priority. His lien as a wage-earner extends to wages as such, and not to his claim against his uncle for a balance of his wages which had by an arrangement between them become a debt of another class. Edmondson has received $5 per week in cash until the time of the assignment of Flick, which is the entire amount, by his agreement, that he should receive in cash. The balance is converted into a debt of another class by their agreement. The second reason why I think it should not be allowed as a preference is that, during the month of October, Edmondson received merchandise and cash in amount in excess of his salary, even at $20 per week. And, while it may be claimed that he would have the right to now apply the merchandise received by him in payment of the debt due him prior to the three months before the bankruptcy proceedings, yet nothing appears by which it can be determined that he did so apply it. In the Case of Kohn, 2 Nat. Bankr. N. 367, it has been held by D. Lloyd Jones, referee, that section 57g covers all creditors, and makes no distinction between classes; that a claim on which a creditor received a preference within the prohibited time cannot be allowed, even though it was entitled to priority. I am unable to agree with this decision, because I cannot see the reason why a claimant whose claim is entitled to priority should be compelled to refund a preference, and then immediately have it returned to him on his preferred claim. This, of course, would not be so where the fund is not sufficient to pay all the preferred claims. In that event, if one preferred claim had received a preference, section 57g would require that the preference be returned before the claim be

allowed. Section 60a provides that a person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of the creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. So that a preference to a person entitled to a priority would only be considered a preference as to other creditors entitled to the same priority, and not as to general creditors. Edmondson, for his 11½ weeks' services, performed within three months of the filing of the petition in bankruptcy, at $20 per week, is entitled to $230. During the four months prior to the petition in bankruptcy, during which preferences are prohibited, he has received in merchandise $197.40 and in cash $80, making a total of $277.40, which exceeds the amount for which he was entitled to priority by $47.40, which must be regarded as a preference upon his general claim of $269.13; and under section 57g it must be held that until he has refunded to the trustee the $47.40, which he has received as a preference upon his general claim, his claim shall be disallowed. But upon refunding the $47.40 it shall be allowed for the sum of $269.13, plus $47.40, making in all $316.53; that being the balance due on his whole period of employment after the preference is surrendered. This claim will be allowed in that amount after the surrender of the preference, as a general, and not as a preferred, claim.

"Claim of Fred Kaufman.

"The trustee opposes the allowance of the claim of Fred Kaufman for $89.75, on the ground that a preference was allowed to Kaufman by the payment of $55 within four months prior to the beginning of the action in bankruptcy, which Kaufman has refused to surrender. In answer to this claim of the trustee, the attorney for Mr. Kaufman files an affidavit in which he states that he received the collection from a collecting agency, and never had any acquaintance or business whatever with Fred Kaufman, the owner of the claim; and claims that, because he represented a collecting agency and not the claimant, his case comes within the case of Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392. But this case was under the bankruptcy law of 1867, in which it was provided that the preference should be made with the knowledge of the claimant; and that as the attorney was acting not directly for the claimant, but for a collecting agency, the claimant could have had no notice of the insolvency. But under the present bankruptcy law it is not necessary that a claimant receiving a preference should have notice of the insolvency, and the referee holds that, under the present act, it makes no difference whether the attorney collecting money from the debtor is acting directly for the creditor or for a commercial agency which represents the creditor. Therefore it will be ordered that, unless the claimant refund to the trustee the preference received by him amounting to $55, the claim be disallowed.

"Claim of E. C. Edmondson.

"As to this claim for $126.95, nothing appears which would convince the referee that the claim is fraudulent, even though it is held by a brother-in-law of the bankrupt. But it clearly appears from the evidence that Mr. E. C. Edmondson has received preferences on his claim within the prohibited period of four months, to wit: On October 13th, he received $50; on October 16th, $60; on November 13th, $50; and on November 21st, $50,—being a total of $210. It is true that Edmondson claims that these payments were made upon sums that were loaned for a short time, and were different in their character from the balance of his claim. But I am unable to distinguish between the character of the claims. All were for money loaned, except a small amount for merchandise, and it seems to me to make no difference whether the money was loaned for one day or for an indefinite period. And therefore the referee will hold that unless the claimant, E. C. Edmondson, refund to the trustee $210 paid to him within four months prior to the petition in bankruptcy, his claim be disallowed. I find my opinion in this matter sustained by the Case of Conhaim, in 2 Nat. Bankr. N. 148, 97 Fed. 923, where the court held that a payment of two of four promissory notes, and a part payment of the third, leaving a small balance of the third and the entire fourth note unpaid, is a

preference on the entire debt as evidenced by the four notes, and that the claimant cannot prove the one unpaid note, unless he surrender the amount paid on the two notes that were paid in full and the third that was partially paid. I consider the proposition that an innocently preferred creditor cannot share in the distribution of the bankrupt's estate, under section 57g, until he has surrendered the preference already received, too well established to need discussion. In re Conhaim, 2 Nat. Bankr. N. 148, 97 Fed. 923; In re Wise, 2 Nat. Bankr. N. 151; In re Ft. Wayne Electric Corp., 2 Nat. Bankr. N. 434, 39 C. C. A. 582, 99 Fed. 400. I find that the preferences were given while the bankrupt was insolvent, and within the period prohibited by the statute.

"In all the foregoing claims it will be ordered that the money paid as a preference be refunded within fifteen days after the service of notice upon the attorneys for the claimants of this finding of the referee, and that upon failure to refund the same within the fifteen days the claims be finally disallowed.

"Claim of Charles W. Flick.

"The most difficult matter, and that which has most embarrassed the referee, is the claim which was filed by Charles W. Flick, a brother of the bankrupt. The account filed by Charles W. Flick is practically all for money loaned between the 1st day of December, 1898, and the 21st day of August, 1899, amounting to $8,027.16. In addition to that there was loaned by Charles W. Flick to his brother, Claude, at a subsequent date, the sum of $200, which Charles designates as a short-time loan, and which was repaid by the bankrupt to his brother between October 24th and November 6th. Charles W. Flick files on April 19, 1900, what he calls a 'supplemental claim,' in which he states that the two accounts are separate and distinct; that the claim for $8,027.16 was closed on or about August 21st, and that thereafter he made short personal loans to his brother, amounting to $200, which was borrowed for a few days, and repaid by the bankrupt within four months of the filing of the petition in bankruptcy; that he made no charge of the $200 in his claim, and gave no credit, for the reason that it was not considered by him or the bankrupt as any part thereof. And claimant comes in good faith, not desiring any preference over creditors of the bankrupt, and authorizes the court to deduct and subtract from any dividend allowed him on his said claim the amount of said $200. As a matter of fact, the claimant has not paid to the trustee the $200, and I do not regard his offer to allow it to be deducted from any dividend payable to him to be a compliance with section 57g, which provides that the claims of creditors who have received preferences shall not be allowed unless said creditors shall surrender their preferences. Under the rule laid down in Re Conhaim, 2 Nat. Bankr. N. 148, 97 Fed. 923, it is not possible for the claimant to separate the items of his claim against the bankrupt by merely showing that at a certain time, to wit, August 21, 1899, the old account was closed, and that the subsequent loan was a different account. The $200 paid by the bankrupt within the prohibited period will be considered as a preference upon the entire debt, and the claimant must surrender and pay to the trustee the $200 before his claim can be allowed. * * *

"I have hesitated long in announcing my opinion in this case, thinking that possibly I might be able to reconcile the facts with the claims of the bankrupt and his brother, but in this I have failed, and now must reluctantly hold that the claim of Charles W. Flick be disallowed. I do not think that it is the province of the court to sift out any portion of the claim which may be a valid one from that which is invalid. I have no doubt that a portion of the money was paid as claimed in the account, but, the claimant having attempted to take advantage of the other creditors by padding his account, he stands in no position to have it allowed for any sum whatever. Every person seeking any benefits under the bankruptcy law must act in the utmost good faith, and, if a creditor attempts to obtain any advantage over any other creditor by fraudulent conduct, he must suffer the consequences. All creditors are supposed to stand upon an equal footing before the law, and the act is replete with provisions which seek to secure equality for all creditors. Under section 57g, the claim of any creditor who has innocently received a preference must be disallowed until the preference is surrendered. Certainly it is within the intent, if not the strict letter, of the act that he who has attempted to receive a preference by fraud shall not be allowed to participate in the fund distrib-

uted. The presentation of a false claim, by section 29b, cl. 3, is made a penal offense, which shows how the law would regard one guilty of such an act. In re Elder, Fed. Cas. No. 4,326; Marrett v. Atterbury, Fed. Cas. No. 9,102; In re Stevens, Fed. Cas. No. 13,365. It is therefore ordered that the claim of Charles W. Flick be disallowed."

Sherman T. McPherson and Wm. E. Bundy, for Claude W. Flick.
Stafford & Arthur, for trustee.
Keifer & Keifer, for creditors.

THOMPSON, District Judge. I have not considered all the questions discussed by the referee, but his order disallowing the claims above mentioned is affirmed.

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PHAIR et al. v. UNITED STATES. SCHROEDER v. SAME. MERCK et al. v. SAME.

(Circuit Court, S. D. New York. May 24, 1900.)

Nos. 2,923, 2,950, and 2,922.

CUSTOMS DUTIES—CLASSIFICATION—CHLORAL HYDRATE.

Chloral hydrate and salol are dutiable under paragraph 68 of the tariff act of 1897, as medicinal preparations in the preparation of which alcohol is not used, not specially provided for, and not under paragraph 67, as medicinal preparations in the preparation of which alcohol is used, not specially provided for; alcohol not being necessarily used in their preparation.

Appeals by the Importers from Decisions of the Board of General Appraisers.

Albert Comstock, for importers.
Chas. D. Baker, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The articles in question are chloral hydrate and salol, and were assessed for duty under paragraph 67 of the act of 1897 at 55 cents a pound, as "medicinal preparations, in the preparation of which alcohol is used, not specially provided for." The importers claimed in their protests that they were dutiable at 25 per cent. ad valorem, under paragraph 68 of said act, as "medicinal preparations, in the preparation of which alcohol is not used, not specially provided for." In view of the decisions in U. S. v. Battle, 4 C. C. A. 249, 54 Fed. 141, Schering v. U. S. (No. 2,137), and Engelhorn v. Same (No. 1,237), I feel obliged to reverse the decision of the board of general appraisers.

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BLISS v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. December 19, 1900.)

No. 337.

1. COUNTERFEITING—FORMER CONVICTION—DISTINCT OFFENSES.

The counterfeiting of notes at different times, although all apparently of the same series and printed from the same plate, constitutes distinct offenses, and a conviction for one is no bar to a prosecution for the other.

2. SAME—AIDING AND ABETTING—NECESSITY OF CONVICTION OF PRINCIPAL.

It is not necessary to the conviction of a defendant indicted under Act May 16, 1884, c. 52, § 1 (23 Stat. 22), for aiding and abetting another in counterfeiting notes of a foreign government, intended to circulate as

money, that the alleged principal should have been convicted; the offense being a misdemeanor, in which all who are concerned are principals.

In Error to the District Court of the United States for the District of Massachusetts.

Clarence B. Loud, for plaintiff in error.

Boyd B. Jones, U. S. Atty., and John H. Casey, Asst. U. S. Atty.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. There are five errors assigned in this case, but all raise the same question. This indictment was found under the first section of the act of May 16, 1884, c. 52 (23 Stat. 22), and charges the plaintiff in error with aiding and assisting one Davis in counterfeiting notes of the dominion of Canada, intended to circulate as money. Davis was indicted jointly with him, and pleaded guilty. The substance of the propositions submitted to us is as follows:

That Davis counterfeited a number of dominion of Canada notes, all of the same series, and bearing consecutive numbers in that series; that he had previously been convicted and sentenced for counterfeiting like Canada notes of apparently the same series, but not the same covered by the present indictment; that the notes on which the former conviction was based were printed from the same plates as those now in issue, but at a different time; that, in law, the entire matter, covering all the notes, was a continuous one, so that it could not be severed and made the basis of several criminal proceedings; and that the prior conviction could, therefore, have been pleaded by Davis in bar of this indictment, thus rendering it void, and consequently void as against Bliss as his aider and abettor.

The plaintiff in error cites no authority which sustains his propositions, and points out no rule of law which will guide us to his conclusions in the lack of authorities. On the other hand, the law is clear that, on the state of facts which this record shows, the counterfeiting of notes at different times, although all apparently of the same series and printed from the same plate, constitutes distinct offenses. This is a self-evident proposition, but, if it needed any support, we find it in U. S. v. Randenbush, 8 Pet. 288, 8 L. Ed. 948, in which two separate convictions for passing two counterfeit notes of the Bank of the United States of the same denomination were sustained. The rules of the common law in this particular, and the reasons for them, become apparent by comparing this case and O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450, with Ex parte Snow, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658.

But to allow the expression of our views to stop at this point would leave an implication to which we cannot consent. The conviction of Davis was not necessary to the conviction of Bliss, and therefore it is of no consequence whether the conviction of the former was void or not. Even in the case of felonies, it is now settled that it is not necessary to allege or prove the conviction of a principal in order to charge an accessory. Whart. Cr. Law (9th Ed.) § 237, and numerous

other authorities. The crime at bar is a misdemeanor, and the technical rules relating to this topic which at the early common law applied to felonies never applied to misdemeanors, where all who are concerned in the offense are principals. This was expressly ruled with reference to statutes of the United States framed like this at bar, and aimed expressly at aiders and abettors in cases of misdemeanors, in U. S. v. Gooding, 12 Wheat. 460, 476, 6 L. Ed. 693, and U. S. v. Mills, 7 Pet. 138, 141, 8 L. Ed. 636. Following out this rule, indictments against persons charged with aiding and abetting fraudulent misapplications of the assets of national banks have always been sustained, notwithstanding they may contain no allegations of the conviction of the alleged principals. U. S. v. Northway, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664; Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830. All these citations undoubtedly apply to the statute in question.

The judgment of the district court is affirmed.

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## ROSS v. FULLER & WARREN CO.

(Circuit Court, N. D. New York. December 27, 1900.)

1. PATENTS—ROYALTY UNDER LICENSE—FAILURE OF CONSIDERATION.

   Where the decision in a suit for infringement brought by a licensee in effect holds the patent void in its entirety because of lack of invention in the article patented, it absolves the licensee from the further payment of royalties required by his contract, although but one of several claims of the patent was directly in issue in the suit.

2. SAME—USE OF IMPROVEMENTS BY LICENSEE.

   The mere acquiescence by a patentee in the use by his licensee of improvements on the patented device covered by a subsequent patent does not bind the licensee to pay the same royalty for the improvements that is stipulated under the foundation patent, after such patent has been adjudged invalid.

At Law. Action by patentee to recover royalties from licensee. Tried by the court.

On the 23d of September, 1887, the parties made an agreement by which the plaintiff, who was the owner of letters patent for a sanitary privy furnace, granted to the defendant an exclusive license to make, use and sell the supposed invention throughout certain specified territory, during the life of the patent. The defendant agreed to pay the plaintiff a royalty of $2.50 for each seat of the furnace used and sold. The defendant further agreed to make up and return to the plaintiff at the end of each 60 days a correct report of the sales of all the furnaces and seats used and sold and at such times to pay the amounts due for royalties. On the 1st of January, 1889, the parties entered into a second agreement whereby the territory assigned to the defendant was materially extended. No other provision affecting the present controversy is contained in the second contract. The first cause of action is based upon an alleged breach of those two written agreements. On the 29th of September, 1891, letters patent were granted to the plaintiff for improvements in apparatus shown in the previous patent. These improvements were used by the defendant with the consent of the plaintiff. It is alleged that the conduct of the defendant in accepting the benefits of the second patent establishes an implied agreement upon its part to pay the stipulated royalty during the life of the patent. The second cause of action is based upon this alleged implied contract. A third cause of action, based upon letters patent granted by the dominion of Canada, was withdrawn at the trial. The defendant continued to pay royalties under the written agreements until September 15, 1892, when a decree was entered by the circuit court of the United States for the district of Massachu-

setts adjudging the principal claim of the patent void for lack of invention. This decree was affirmed January 24, 1896. Fuller & Warren Co. v. Town of Arlington (C. C.) 54 Fed. 166, affirmed in 18 C. C. A. 402, 71 Fed. 965. The amount of royalty, including interest, which has accrued since the last payment by the defendant is $9,155.49. The defense is that since the decision in the Arlington Case invalidating the patent there has been no consideration for the royalties and, therefore, that no obligation rests upon the defendant to pay them; in short, that the contracts are null and void. The answer of the plaintiff to this defense is that the issue in the Arlington Case was confined by the bill to "the first clause of the claim" of the patent and that the other three claims remained unaffected by the decision. The Arlington Case was presented by able counsel well versed in patent law. An examination of the record shows that every contention favorable to the patent was pressed upon the consideration of the court. That the court regarded the patent as wholly without merit is manifest. In the circuit court the opinion contains the following: "For this pit Ross substituted a metallic vault, open at both ends; at one end a flue; at the opposite end a fire chamber. The fecal matter falls from the seats upon a perforated platform, which separates the solid portion. When desirable to remove the contents, a fire is built, the piles of matter are rapidly dried, mixed with some combustible matter and burned. * * * When the case comes down to the concise form above given, it seems to suggest at once to any ordinary, intelligent mind, the common process of heating, drying, baking or burning, with such common changes of details as the daily occurrences of life constantly require, and nothing more. * * * If the complainant had any claim to any part of the suggestion or idea of first drying, and then consuming fecal matter as a sanitary measure, this might show an inventive mind within the meaning of the law. But its success in marketing a fireproof vault, with a grate and flue attached, for drying and consuming fecal matter, even though the vault is traversed by a perforated platform in order to make two currents of heated air or to separate the solid portions from the liquid, is not the result of inventive genius, but of the mechanical skill of complainant in meeting the ordinary emergencies of heating, drying, baking or consuming by fire, for either domestic or public uses." In the circuit court of appeals the patent was treated with even less respect. The court say: "Looking at the specification, we find nothing but an incombustible bottom to the ordinary vault, with a similar cover in which the matter to be destroyed is dropped. The solid matter is drained by dropping upon a grating, or a perforated plate. At one end of this vault is space for building and maintaining a fire; at the other end, a chimney or flue for supporting the necessary draft to sustain the combustion of the fire, and to carry off vapors and odors developed or set free in the process of drying. This is the whole thing. * * * The whole alleged invention, therefore, is nothing more than a form of hot-air drying chamber, in which, because of the nature of the substance to be dried, it is admissible to have the fire, with its smoke and gas, in the same chamber with that substance. We see no invention whatever in the device."

V. H. Lockwood, for plaintiff.

N. Davenport and George B. Wellington, for defendant.

COXE, District Judge (after stating the facts). There can be little doubt that if the Massachusetts decree had in terms declared each and all of the claims of the patent void it would have been a complete defense to the cause of action founded upon the written agreements to pay royalty. This proposition is amply sustained by authority and was not controverted at the trial. Herzog v. Heyman, 151 N. Y. 587, 45 N. E. 1127; Marston v. Swett, 82 N. Y. 526; White v. Lee (C. C.) 14 Fed. 789, 791; McKay v. Smith (C. C.) 39 Fed. 556; Walk. Pat. § 307.

It is perfectly plain that in the Massachusetts case the court regarded the patent as utterly devoid of merit and the patented com-

bination without a vestige of invention. The infringing structure was so similar to the patented apparatus that, after the dismissal of the bill, the attempt to hold anyone as an infringer, no matter what structure he used, was hopeless. The practical result of the decision was to destroy the exclusive right of the Fuller & Warren Company and place it on a par with all other persons who chose to make and sell the apparatus. The field which previously had been the exclusive preserve of the Fuller & Warren Company was now wide open and the company had no greater right therein than the most irresponsible poacher. In these circumstances the proposition to compel the defendant to pay $9,000 without a dollar's actual consideration is, indeed, a startling one. It is, of course, true that in an action of this character the defendant cannot set up the invalidity of the patent as an original defense; it is also true that where the patent has been examined and construed by a competent tribunal and the parties are not agreed whether it has been declared void as a whole or only in part, it is permissible for the court to examine the record to ascertain the scope of the former decision. Should it then appear that the decree is so sweeping as to amount to "something corresponding to eviction" it is a complete defense to an action for royalties. Again, it is true that where a patent contains several claims, one of the claims may be declared invalid without affecting the validity of the remaining claims. But this depends upon the wording of the decision and of the claims.

Turning to the Ross patent, No. 264,568, it will be found that all the claims are for combinations. The first claim is as follows:

"As an attachment for a privy, a horizontal metallic casing constituting the depository for the fecal matter, and provided with the hinged lids and fire-chamber, substantially as set forth."

The second and third claims, upon which the plaintiff chiefly relies, are for substantially the same combination limited to mechanism shown and described. It is argued that these claims have "the perforated false bottom C" for an element which is, presumably, new, and is not found in the first claim. It will be observed, however, that the first claim is susceptible of a construction making the false bottom an element of the combination as being essential to the horizontal depository, and that the circuit court so construed it. The court says:

"The specifications and claim fail to point out the advantages of the perforated platform and it may be that all relating to it could be omitted without changing the essence of the complainant's description of the pith of its own invention."

And, again, the opinion emphatically states that making a fireproof vault "even though the vault is traversed by a perforated platform in order to make two currents of heated air or to separate the solid portions from the liquid is not the result of inventive genius." This would seem to dispose of the contention that the specific introduction of the perforated false bottom adds an element of novelty to the second and third claims. In the statement of the invention quoted above from the opinion the perforated platform is specifically pointed out as one of the important elements. Indeed, in both opin-

ions, in the testimony of the expert and in the statement of counsel, every element of the least importance found in any of these claims was referred to as part of the patented apparatus. The combination, whether considered broadly or in connection with the mechanism described, was declared void for want of patentability. It is thought that no intelligent man, after reading the Massachusetts case, would hesitate for a moment to make the Ross furnace in every form suggested by the patent. That he could do so without the least danger of being held in infringement there can be no doubt. Suppose that such a suit had been brought on the second claim against one using the identical form of "perforated false bottom C," shown in the drawing—the Arlington platform not being the exact structure, but an equivalent. Is it possible that the court would listen to a claim of invention in view of the Arlington decision that it required no "inventive genius" to use the perforated platform, but only "the mechanical skill of the patentee in meeting the ordinary emergencies of heating, drying, baking or consuming by fire, for either domestic or public uses"? It is thought not. Another test. Assume that the patentee, after the final decision, had entered a disclaimer of all that the court said he was not entitled to hold, would anything have remained? Were the experiment tried it would probably be found that human ingenuity would be inadequate to discover what of value remained after the subtraction had been made. After a careful examination of the patent, the record and the decisions, the court is convinced that nothing was left of which to predicate invention. Theoretically it may be argued with plausibility that the last three claims were not invalidated, but the practical result of the Arlington decision was death to the first claim and hopeless paralysis to all the others.

It is admitted that there is no written agreement to pay royalties under the subsidiary patent of 1891, and the proof falls far short of establishing an implied agreement to this effect. Most assuredly there is no evidence from which an agreement can be deduced to pay the full amount of the royalty of $2.50 per seat for the use of this patent alone. It seems clear that the plaintiff intended that this patent should be used in connection with the principal patent without additional charge. If he expected to collect royalties for the use of the second patent he should have so stated and fixed the amount. It cannot be said that the mere acquiescence by a patentee in the use of a patent for improvements upon a patented device binds the user to pay the same royalty for the improvements that is stipulated under the foundation patent.

The proposition that the Massachusetts decree was not final until affirmed on appeal cannot be maintained.

Upon the entire case the court is convinced that there was a failure of consideration the moment the patent was declared invalid. The defendant agreed to pay the stipulated royalty in consideration of the monopoly. When deprived of this exclusive privilege by law the defendant occupied no vantage ground over any other manufacturer. The defendant took nothing from the plaintiff, for he had nothing to give. The estate which the parties supposed belonged to

the plaintiff was judicially determined to belong to the public. The defendant should not be compelled to pay a large sum of money for exercising a right, which, after the patent was destroyed, was no longer exclusive, but was free and common to all. The complaint is dismissed.

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## KRAJEWSKI et al. v. PHARR et al.

(Circuit Court of Appeals, Fifth Circuit. December 4, 1900.)

No. 849.

1. PATENTS—CONSTRUCTION OF CLAIMS.
   Features of a patented device described in the specification as preferable, but not enumerated in the claims, do not constitute limitations of such claims.
2. SAME.
   In construing the claims of a patent, the meaning of the language employed must be ascertained by applying it to the subject-matter which it describes; and whether a term is used in an exact or only in an approximate sense is to be determined by considering whether exactness is required, to accomplish the result to be attained.
3. SAME—PATENTABILITY—NEW AND IMPROVED RESULTS.
   A device for breaking and cutting sugar cane to facilitate its crushing when fed into the mill, by which the product of the mill is nearly or quite doubled, and a larger percentage of juice extracted from the cane, cannot be denied patentability because its parts, taken separately, are old and well known, nor because the change from prior devices designed to accomplish the same general result, but which were only successful in a small degree, to the device of the patent, would seem, after the device was made, to have been obvious, where in fact the patentee was the first to take the final step which made a successful machine.
4. SAME—MACHINE FOR CUTTING AND BREAKING CANE.
   The Krajewski patent, No. 349,503, for a machine for breaking and cutting cane preparatory to its being fed into the mill, shows patentable novelty, was not anticipated, and is valid; also, *held* infringed by a machine which accomplishes the same result in practically the same manner.

   Pardee, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The appellants, Thomas F. Krajewski, Alfonso Pesant, José A. Pesant, and Albert Grossman, under the firm name of Krajewski, Pesant & Co., filed a bill in the circuit court against the appellees, John N. Pharr and John S. Bussey, partners under the firm name of Pharr & Bussey, for the infringement of letters patent No. 349,503, issued on September 21, 1886, to the appellant Thomas J. Krajewski and to James L. Cochrane, as assignee, for a machine for breaking and cutting cane. Cochrane, the assignee, having died, the title to the one-half interest in the patent owned by him was duly assigned by his administratrix, Jeanette D. Cochrane, to the appellants. The object of the invention was stated by the patentees to be "to prepare any kind of cane and other substances, more especially sugar cane, so as to facilitate its crushing or pressing, and the extraction of juice." The machine is illustrated in the accompanying drawing.

And its construction and mode of operation may be best explained in the language of the specification: "In the accompanying drawings, Fig. 1 is a plan or top view of a mechanism embodying my invention. Fig. 2 is a vertical longitudinal section of the same. Similar letters of reference designate corresponding parts in both figures. The breaking or cutting mechanism consists, essentially, of two rollers, D, E. B designates the pressing rollers or the mill. C designates an endless carrier for the cane. The rollers, D and E, are preferably composed of a number of collars keyed to or otherwise

Fig. 1.

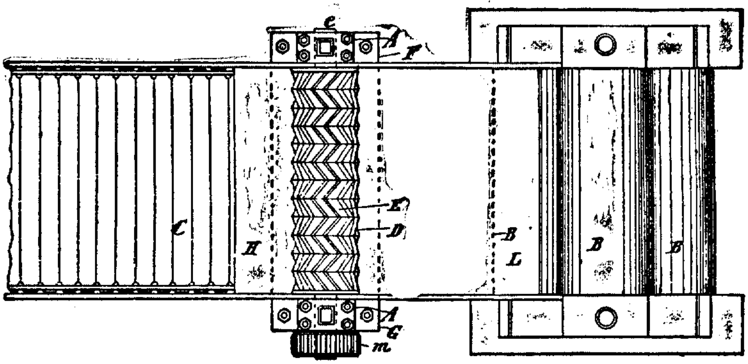
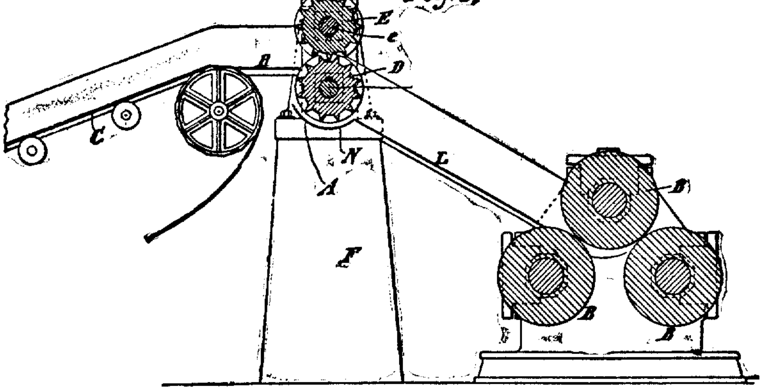



Fig. 2.




fastened on two shafts, d and e. The ends of these shafts, projecting beyond the collars, form journals, which are supported in bearings, A. These bearings are arranged on two pedestals or frames, F, G. These rollers, D, E, are provided externally with teeth. These teeth are approximately parallel to each other, and are zigzagged from end to end of the rollers, or parallel with the axes thereof. The teeth of each roller do not, however, touch those of the other roller. The rollers are made of collars fitted on shafts in the manner described, to facilitate their manufacture. The teeth on each collar run obliquely, and those of adjacent collars extend in reverse directions. In other words, the teeth on alternate collars extend in the same direction, and the teeth on the intermediate collars extend at reverse inclines thereto. It will therefore be seen that continuous zigzag teeth extending from end to end of the rollers are formed by properly adjusting the collars on the shafts. The edges of the teeth are made more or less sharp, so as to cut or to break only, and not to primarily act as pressing devices. At the ends of the shafts, d, e, are fastened two equal intermeshing gear wheels, m, only one of which is shown in the drawings. These gear wheels maintain the two rollers, E, D, in the same relative position with their teeth, intermeshing and equidistant from each other. Provision will preferably be made for adjusting one of the rollers bodily towards and from the other. This can be done by arranging the bearings of one in housings and combining screws with them in a well-known manner. Motion may be transmitted to these rollers through the agency of gear wheels or belts and pulleys in any known way. The pressing rollers, B, may be of ordinary form, provided with smooth surfaces, and arranged in frames in proper relation with each other to press the juice out

of cane supplied to them. They may be closer together than ordinarily, because they have only to press the cane, and not to additionally break and cut it up. The endless carrier, C, may be of any approved construction. The cane is carried by it up an incline to the rollers, D, E, and it descends thence along a downward incline or chute, L, to the rollers, B. A bridge, H, extends between the carrier, C, and the rollers, D, E. Below the roller, D, is a pan, N, for catching any juice which may run from the cane. The operation is as follows: Cane is carried on the cane carrier, C, and delivered on the bridge, H, thereby bringing it within reach of the teeth of the breaking and cutting rollers, D, E. These preferably run faster than the carrier, C, and will draw the cane between them, their teeth cutting and breaking it and partly squeezing it. Whatever juice is expressed will fall into the pan, N. The broken cane will fall on the incline or chute, L, and slide along the latter to the rollers of the grinding mill or rollers, B, which press out as much of the remaining juice as possible. By regulating the distance between the breaking and cutting rollers, D, E, the cane may be only broken, and the teeth made to only partly cut into it, or the cane may be cut up into short pieces, as may be desired. I prefer the teeth of the rollers, D, E, to run diagonally or in zigzag lines, because, as the cane is usually thrown on the carrier in various positions, it frequently reaches the rollers in a position parallel thereto, and, entering between the teeth thereof in the same parallel line would be delivered from the rollers without being cut; but, if the cane is placed on the carrier so as to reach the rollers in a position perpendicular thereto, straight teeth running parallel therewith can be used. The two cutting rollers may be placed in close proximity to the pressing rollers, and be even placed in the same pedestals therewith. They may be placed at any distance from the pressing rollers, or even in the position perpendicular to that of the pressing rollers. It may be desirable to have more than two cutting rollers used, so as to break and cut up cane in very small pieces." The machine used by the defendants, and which it is claimed by the appellants infringes theirs, was manufactured by the Birmingham Machine & Foundry Company, of Birmingham, Ala., but has not been patented. In their answer the appellees denied infringement, and submitted the following additional issues: "(1) Nonpatentability of the matters described in the specification and in the claim in the patent in suit, if tested by its own literature, or by the state of the art to which it relates. (2) Invalidity by reason of anticipation, prior publication, and public knowledge of the device, combination, or mechanism sought to be patented, and its prior public use before alleged invention of Krajewski." The cause was heard upon the pleadings and proofs, and the court directed a decree dismissing the bill. From the decree thus rendered the appellants have appealed to this court.

Edwin H. Brown and J. D. Rouse (Wm. Grant and Charles S. Jones, on the brief), for appellants.

J. R. Beckwith, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

There has been in use for a great many years what is known as the "three-roll mill" for compressing the juice from sugar cane. It consists of three rolls, mounted and framed, rotated by gear wheels. The rolls were made sometimes with and sometimes without grooves. The purpose of the grooves was to firmly hold the cane as it was drawn between the rolls. Cane of full length was passed between the upper and front lower rolls, and the crushed mass was then made to pass between the top and rear lower rolls. The juice pressed out was caught in a pan, and the bagasse removed by a belt. The mill was sometimes so constructed as to place the rolls upright in the

frame, and then, when the rolls contained grooves or channels, their function was not only to firmly hold the cane, but also to receive and carry the expressed juice to the pan or collecting trough below. In the use of these mills, unaided by any machine or process to prepare the cane, there was great loss, on account of the failure of the mill to express all of the juice. This is shown by the evidence, and seems to have been a matter of common knowledge. To secure better results, it was evident that the cane must have preliminary treatment. The record shows that several attempts preceded Krajewski's to make a machine to prepare the cane for the mill. The British patent, No. 2,586, of 1882, is a device for splitting and partially crushing the cane. Faure's patent, No. 250,720, Ferron's patent, No. 279,235, Chapin's patent, No. 321,007, Newell's patent, No. 186,-100, and the Hungerford patent, No. 346,817, are all devices intended to prepare the cane for the mill. Each of them may briefly be described as a cane shredder. They are devices for tearing or shredding the cane. The result was usually produced by toothed rolls geared to rotate at different speeds. The result of the work of the shredders is to break or tear or split the stalk longitudinally, and so reduce the work of the three-roll mill. None of these machines was constructed to cut or break the cane in short lengths transversely. The shredders did not cut the cane in short lengths, so as to secure a uniform feed of it to the mill. The Krajewski machine is not a shredder, but a machine for breaking or cutting cane. It is not made to tear, shred, or split the cane, but to cut or break it transversely in short pieces, so that the three-roll mill may be fed with it in a uniform manner. It does not tear the cane longitudinally, or lacerate the fibre, so as to produce a mass of shredded stalk, irregular in volume. The result produces pieces transversely cut or broken. The fact that the Krajewski machine produced results so different from the shredders indicates a difference in its parts and mechanism. The Krajewski machine contains two rolls having teeth which are zigzag and intermeshing, and when intermeshed equidistant from each other, and of such sharpness that they can transversely cut or break cane into short pieces. The rolls are maintained in position and proper relation by gear wheels, so that the teeth of the two rolls do not come in contact side to side, but pockets or spaces are left between them. Each roll with its teeth is different from the shredders. The two, being used together, are wholly unlike the shredders in the result produced. The Krajewski machine is much used in connection with the three-roll mill. When so used the function of the mill is to press the cane which is already cut and broken by the machine. The evidence shows that the use of the machine greatly increases, and probably doubles, the output or capacity of the three-roll mill. The machines have been on the market since 1886. They have been sold and are in use in Texas, Louisiana, Cuba, Mexico, Hawaiian Islands, and British West Indies. It has been introduced into nearly all sugar-growing countries, notwithstanding the fact that the cost of establishing a plant, including the three-roll mill, is from $8,000 to $13,000, according to the size of the rolls and the conditions under which the plant is erected.

The Krajewski patent contains the following claim:

> "The combination of rollers provided externally with more or less sharp teeth having a zigzag trend in the direction of the length of the rollers, said teeth intermeshing but not coming in contact with each other, and when intermeshed being equidistant from each other, said rollers being geared together in order to maintain their relative positions toward each other, substantially as specified."

A brief comment on some of these words and phrases is required. The patent does not require the rolls to be formed in sections. The specification provides that the rollers are "preferably composed of a number of collars keyed to or otherwise fastened on the shafts." Features described as preferable do not constitute a limitation of the claim. "When the inventor says, 'I recommend the following method,' he does not thereby constitute such method a portion of his patent. His patent may be infringed, although the party does not follow his recommendation, but accomplishes the same end by another method." Sewall v. Jones, 91 U. S. 171, 186, 23 L. Ed. 275. It will be observed that the teeth of the two rolls are to intermesh, but not come in contact with each other. This language does not mean that the teeth of one roll may not come in contact with the other roll. The phrase "more or less" has been commented on as being vague and uncertain. The rollers are provided with teeth "more or less sharp." If the word "sharp" had been used alone, it would have been subject to the same criticism. The phrase "more or less sharp" is indefinite, and necessarily so, because of the limits and imperfection of language. Taking the words in connection with the context and the specification (the only fair way to consider them), they mean sufficiently sharp for the purpose sought (the cutting of the cane). The phrase is in current use to describe or qualify. Mr. Justice Field, in Glue Co. v. Upton, 97 U. S. 3, 6, 24 L. Ed. 985, uses the phrase: "But to render the article new, in the sense of the patent law, it must be more or less efficacious, or possess new properties by a combination with other ingredients." No word, perhaps, exists, that the learned justice could have selected, that would show with certainty how efficacious the article must be. And no word can be selected to show exactly how sharp the teeth must be. It seems to us sufficient to say "more or less sharp," and that this means sufficiently sharp for the purpose shown by the specifications. The question of infringement, which will be considered later, has, in some of the arguments presented, been made to turn on the meaning of the word "equidistant" as used in the patent. The teeth when "intermeshed being equidistant from each other,"—what is meant by these words? We must, of course, look to the connection in which a word is used, to get its intended meaning. The drawings and specification show that the teeth of one roll fall between the teeth of the other, and in the depressions between them. The purpose of this adjustment is, in part, to leave spaces on opposite sides of the teeth, adapted to receive the pieces of cane cut or broken off by the teeth. Was it material that these spaces should be of the same size on each side of the teeth? If slightly different in size, they could still receive the cane. This fact indi-

cates that the meaning was that the teeth of one roll were to fall approximately rather than exactly midway between the teeth of the other. The word "equidistant" must, we think, include any position that is sufficiently midway to attain the purpose of the invention. The meaning of letters patent, like other grants or written instruments, must be ascertained by the language employed, as applied to the subject-matter. Robinson v. Sutter (C. C.) 8 Fed. 828; Adams v. Iron Co. (C. C.) 26 Fed. 324; Sayre v. Scott, 5 C. C. A. 366, 55 Fed. 971.

It is claimed by the defendants that the Krajewski machine contains no patentable novelty; that the combination is merely the aggregation of well-known devices. A machine must be constructed of known things. Unless the aggregation is clearly obvious, such as would be suggested to any one skilled in the art, it cannot be an answer to the claim of novelty in a machine consisting of many parts to segregate its parts, and say that each of them is well known and has been long in use. Invention would not often be equal to the test of originality and novelty if the parts of the machine invented are subjected separately to that test. The parts of a machine when segregated may be ancient and well known, and yet the completed device in the aggregate altogether novel. Originality sometimes consists in new combinations. If it be conceded that the machine is only a combination of old and known devices, the patent is not invalid, unless the combination was an obvious one for obtaining the advantages proposed,—one that would occur to any one skilled in the art. The idea of producing a combination or machine that would cut the cane in short lengths did not occur to any one of the many mechanics who designed and made the various shredders. They were intended to prepare the cane for the mill, but the machines made were shredders, and not cutters and breakers of the cane. To the mechanics making the shredders the combination of devices adopted by Krajewski was not obvious. When made, it appears to be very plain. It accomplishes the end sought in the art. It increases greatly the product of the three-roll mill. In Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177, an improvement in looms for weaving pile fabrics was held patentable which consisted of such a new combination of known devices as to give to a loom the capacity of weaving 50 yards of carpet a day, when before it could only weave 40. In that case the supreme court said, speaking through Mr. Justice Bradley:

"It is further argued, however, that, supposing the devices to be sufficiently described, they do not show any invention, and that the combination set forth in the fifth claim is a mere aggregation of old devices, already well known, and therefore it is not patentable. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed,—one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it, but they certainly failed to see it, to estimate its value, and to bring it into notice. * * * At this point we are constrained to say that we cannot yield our assent to the argument that the combination of the different parts or elements for attaining the

object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce fifty yards a day, when it never before had produced more than forty; and we think that the combination of elements by which this was effected, even if those elements were separately known before was invention sufficient to form the basis of a patent."

The aim of all these inventors and mechanics who invented and made the various machines for preparing the cane was to make one that would so prepare the cane that the three-roll mill could press out of the cane approximately all of its juice. For many years machines were produced that would only tear the cane longitudinally or strip it or shred it. This lessened to some extent the labor of the mill, and was of some benefit. But it was subject to many objections, as shown by the evidence. The idea of producing a machine that would cut or break, and not tear or shred, seems to have occurred first to Krajewski, or at least he was the first to produce such a device. In view of the fact that the shredded cane in full length, or the split and torn cane, would clog the mill, producing unequal pressure from want of uniformity, it is strange that Krajewski's idea did not occur to the prior inventors. The evident fact that a uniform feed of cane in short lengths would permit the rolls of the mill to run nearer each other, allowing greater and more uniform pressure, would, it seems, have suggested the necessity of a different device or combination. The shredders failed to properly prepare the cane for the mill. The Krajewski machine succeeds. In Re Barbed-Wire Patent, 143 U. S. 275, 282, 283, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, Mr. Justice Brown said:

"Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins. It may be strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to susbtitute a coiled wire in place of the diamond shape prong, but evidently it did not; and to the man to whom it did ought not to be denied the quality of inventor. There are many instances in the reported decisions of this court where a monopoly has been sustained in favor of the last of a series of inventors, all of whom were groping to attain a certain result, which only the last one of the number seemed able to grasp."

Other authorities may be cited tending to sustain our conclusion that the Krajewski patent is valid. Schroeder v. Brammer (C. C.) 98 Fed. 880, 888; Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co., 1 C. C. A. 158, 49 Fed. 61; Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co., 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; Smith v. Vulcanite Co., 93 U. S. 486, 495, 23 L. Ed. 952; Magowan v. Packing Co., 141 U. S. 332–343, 12 Sup. Ct. 71, 35 L. Ed. 781; Potts & Co. v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275.

The question of infringement remains to be considered. The machines alleged to infringe the patent were made by the Birmingham

Foundry & Machine Company. Moffett, the pattern maker and draftsman of the company, admits on cross-examination that he made the drawings of the machines from advertisements of the Krajewski machines, and from an inspection of two of the Krajewski machines which he examined on a Louisiana plantation. The evidence, including the drawings of the two machines, shows that they are substantially the same. They are each provided externally with zigzag teeth. The edges of the teeth are comparatively sharp. The spaces between the teeth are concave in cross section. The teeth intermesh, the rolls being arranged in such relation to each other that the teeth of the one project into the spaces between the teeth of the other, and this relation is maintained by gear wheels fixed to journals of the rolls. In neither machine is there contact between the teeth of the two rolls. Neither machine is operated by contact of the teeth of one roll with those of the other. The evidence shows that in the defendants' machine the teeth of one roll come in contact with the circular space between the teeth of the other roll. In the Krajewski machine it is specified that there is no contact of the teeth of one roll with the teeth of the other, but it is not specified that the teeth of one roll do not touch the concave space between the teeth of the other. The statement of the purpose to cut the cane would indicate such contact. This is a matter, however, dependent on the adjustment of the rolls. The evidence shows that in the defendants' machines the teeth of the rolls, as they intermesh, are not equidistant from each other. The teeth of one roll intermesh not in the center of the concave space between the teeth of the other roll, so as to be equidistant, but they touch the roll at one side from the center of the depression between the teeth. Does this make any substantial difference in the machines? The purpose and dimensions of the Krajewski machine indicate that it would not be possible to construct it so that the teeth would intermesh so as to be, with mathematical precision, equidistant from each other. The rolls of the machines, as manufactured, are from 5 to 6 feet long and 24 to 26 inches in diameter. If adjusted with mathematical nicety, the severe strain and work would make such adjustment temporary. The unavoidable backlash would make it impossible to use the machines and keep the teeth of one roll pointing to or touching the exact center of the depression between the teeth of the other roll. If it could be so cast, it would not so remain. The word "equidistant," as used in the patent, does not require adjustment with mathematical precision. The word must be considered in connection with the context. The idea was that the teeth were not to touch each other, but to come within the concave space or depression between the rolls. The fact that the two machines differ slightly as to the distance from each other of the intermeshing teeth cannot, we think, be very material. It seems to us that the machine manufactured by the Birmingham Foundry & Machine Company, and used by the defendants, is practically the same machine as Krajewski's, and that it produces the same results. In Potts & Co. v. Creager, 155 U. S. 597, 609, 15 Sup. Ct. 194, 39 L. Ed. 275, in holding that one machine infringed the patent of another, Mr. Justice Brown, delivering the opinion of the court, said:

"Defendants' machine, in its construction and operation, is substantially the same as plaintiffs'. Instead, however, of casting the shredding roller with a solid face, forming longitudinal grooves therein, and fixing the steel bars in the grooves, defendants cast the cylinder in the form of a skeleton or spider; the knives being respectively fastened to the several arms projecting from the hub, one knife to each arm, and forming the periphery by filling in metal plates between the knives. The cylinder, when its numerous parts are bolted together, is a perfect roll with a solid face, having cutting bars projecting from the slots or grooves thus formed, and adjustibly secured therein by means of bolts passing through them. The operation is the same as that of the Potts machine, and it accomplishes practically the same result by practically the same means."

Other authorities may be cited as sustaining the conclusion of the court that the patent has been infringed. Roller-Mill Co. v. Coombs (C. C.) 39 Fed. 25, 33; Schroeder v. Brammer (C. C.) 98 Fed. 880, 881; Beach v. Box-Machine Co. (C. C.) 63 Fed. 597; Manufacturing Co. v. Beach, 18 C. C. A. 165, 71 Fed. 420; Westinghouse v. Power-Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136. The decree of the circuit court is reversed, and the cause remanded for further proceedings in conformity with the opinion of this court.

PARDEE, Circuit Judge (dissenting). I cannot find that in the alleged patent there is sufficient novelty to warrant a monopoly. If, however, the patent is valid, then it is a combination patent of old and well-known elements, and ought to be strictly construed; and, in the matter of infringement, the case should show that all the elements of the combination are employed, and in the manner as set forth in the claim. It is shown by the file wrapper that in the original specifications the rollers are provided externally with teeth resembling those of a geared wheel. The teeth of each roller do not, however, touch those of the other roller, and the teeth are made to run lengthwise of the roller in zigzag lines, are more or less sharp, and the two rollers are maintained in such relative position that the teeth of one roller will always be midway between the two teeth of the other roller. In the second claim the rollers are provided with teeth extending past each other, but not touching. In the fourth claim the rollers are provided with zigzag teeth extending past each other, but not touching. The patent office had many criticisms to make upon the specifications, and particularly with reference to the zigzag teeth, and, among other suggestions, suggested striking out in the specifications the description as to the teeth being midway, etc., and the substitution of intermeshing teeth, and the office rejected all claims,—claims 1 to 5 on the patent of Ferrin, No. 279,235, and the patent of Vogel, No. 181,382, and claim 3 on the patents of Ferrin and Chapin. In a few days the applicant amended his application so as to provide for zigzag teeth with more or less sharp edges, to be maintained in such relative position to each other that their teeth should intermesh, and, still finding trouble at the patent office, a few days later again amended by putting in an alleged new claim for rollers provided externally with zigzag teeth extending throughout their lengths, the teeth upon one roller intermeshing with the teeth upon the other roller, and still another amendment canceling all claims, and making a claim for a combination of rollers provided externally with sharp teeth inter-

meshing, but not coming in contact with each other, and when intermeshed being equidistant from each other. In the argument submitted with these amendments, it was claimed that the nature of the zigzag teeth was now more clearly described, and that the objections of the patent office were otherwise fully met. Thereupon the office ordered an interference in the matter with regard to the patent of Henry Hungerford, which related to the collars which were used on the rollers. This interference seems to have been settled by agreement between the parties, and thereupon the applicant filed an amendment canceling all other claims, and substituting therefor a claim for a combination with pressing rollers; the rollers provided externally with sharp teeth extending approximately parallel with each other throughout the length of the rollers, and said teeth intermeshing, but not coming in contact with each other, and when intermeshed being equidistant from each other; said rollers being geared together in order to maintain their relative positions towards each other substantially as specified,—following that with another amendment striking out the word "pressing," as describing the rollers, and inserting the words "more or less," as descriptive of the sharp teeth, suggesting that this amendment would be found to conform to the suggestions of the examiner, and not be met by references. An interference was ordered with regard to that claim which was subsequently decided in favor of the applicant, and the patent was allowed. It will be noticed from these extracts from the file wrapper that the office required an amendment positively and distinctly regulating the intermeshing of the teeth on the rollers, and only passed the application when the applicant distinctly described his claim in regard to the teeth that they should be, when intermeshed, not midway, but equidistant from each other. In this suit the counsel for appellant claims that the word "equidistant" is immaterial, and may be wholly omitted, and still the validity of the patent maintained; and the opinion of the court seems to be that the word "equidistant," as used in the claim, is elastic, and means no more than "about midway." It seems that the patent went through the office on striking out "midway" and inserting "equidistant," and now goes through this court by practically reversing,—construing "equidistant" to mean near or about midway. On the case made, I am not satisfied that the defendants and appellees should be held as infringers of a valid patent.

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## MILLER v. MAWHINNEY LAST CO.

(Circuit Court of Appeals, First Circuit. December 13, 1900.)

No. 319.

PATENTS—CONSTRUCTION OF CLAIMS—SHOE LASTS.

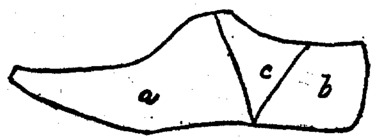
The Smith patent, No. 395,668, cl. 2, which describes a shoe last divided transversely into two sections, connected by a hinge "at or near the bottom portion of the last," is fatally defective in failing to definitely specify the point at which the parts should be hinged, which is an essential feature of a successfully operative last made in two sections.

Appeal from the Circuit Court of the United States for the District of Massachusetts. See 96 Fed. 248.

William Quinby, for appellant.
Edward S. Beach and Frederic H. Betts, for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This suit is based on the alleged infringement of a patent issued to George E. Smith and William A. Knipe, bearing date on the 1st day of January, 1889, No. 395,668, on the invention of Smith. The parties are arranged in this court as in the court below, and therefore they may well be described merely as complainant and respondent. Smith's purpose was to invent a last which would yield while being inserted into the boot or shoe, and then be made rigid while in operative condition. He sought to do this by dividing the last into three sections, called by him sections a, b, and c, as shown by the following drawing:




Section c is described by him as "V-shaped," and it is removable for the purpose of being inserted after the last is in place, so as to assist in holding the other sections apart. Sections a and b are the heel and toe portions of the last, and are hinged together where they impinge near the bottom of the last. Nowhere in the specification does the patent describe the proper point at which sections a and b should be hinged, nor what should be the extent of the bearing surfaces where they impinge on each other at the place of hinging. All it says in reference to this is in the claims, where it locates the hinge "at or near the bottom portion of the last."

The only claims in issue are the second and third, as follows:

"(2) A last divided transversely through its body and bottom into two sections, each having a solid bottom, said sections being connected by a hinge at or near the bottom portion of the last, whereby the rear section is enabled to swing upward and forward, as set forth.

"(3) In a last, the sections a and b, connected by a hinge or pivot located at or near the bottom of the last, whereby the section b is enabled to swing forward and upward, as shown, combined with a holder, whereby the section b may be rigidly secured in operative relation to the section a, as set forth."

Clearly, the circuit court was right in determining that the third claim was not infringed, because the respondent's last has not the holder which is called for by it, nor is there any equivalent therefor.

A fatal defect in claim 2 arises out of the words, "at or near." We have seen that there is nothing in the specification to limit the indefinite nature of these words. Consequently, there is not enough in the patent to meet the requirements of the statute, pointing out the method by which a successful last can be made in accordance with the claim, and no useful last without a holder was ever made until the respondent came into the field. There is nothing to suggest that the inventor had any correct notion how such a last should be constructed. It is necessary that, in use, it should be firm with reference to the pressure of its ends downwards, and also upwards.

In order to make the last firm with reference to the pressure of the ends downwards, it is necessary that the pivot of the hinge should be at a sufficient distance from the bottom to leave efficient bearing surfaces below it. Nothing of this nature is spoken of in the specification, or plainly shown by the drawings. Indeed, there is nothing to show that the inventor had any notion of any method of doing this, except by the use of a spring which engaged a holder and operated to lock the parts together.

It is also clear that the inventor failed to show how the ends of the last could be protected against pressure upwards without a holder. The V-shaped section was not firm enough in place to accomplish this. The respondent accomplished it in his last, as shown in his patent of March 29, 1898. This points out that the hinge is so located that "the axis of rotation of the heel section is concentric with the arc of" a circle "bounding the rear side of the heel section, from the bottom of the heel" "to the center of the heel." It says that "the location of the pivot in or above the line of pressure between the heel and toe, tending to collapse the last, prevents the last from collapsing topward." Afterwards it describes accurately the line of this pressure. Thus the respondent's patent points out, on mathematical principles, exactly what was required to make a last operative. The result is that, so far as claim 2 is concerned, the patent in suit accomplished only a crude experiment, without practical success. As the latter was reached in the respondent's last, the complainant is not entitled to stand in its way. The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellee.

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## BOWERS et al. v. CONCANON.

(Circuit Court, N. D. California. December 8, 1900.)

No. 13,003.

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where the alleged infringement of a patent consisted in the use, within territory covered by an exclusive license to complainant, of a dredge boat built under a license from the patentee for use in another territory, upon which repairs had been made, but which did not appear to have been altered sufficiently to change its identity, it is not sufficiently clear that the question involved is one of infringement, and not merely a violation of contract rights, of which a federal court would not have jurisdiction, to warrant the granting of a preliminary injunction.

On Order to Show Cause Why Preliminary Injunction Should not Issue.

J. H. Miller, for complainants.

R. Percy Wright, for defendant.

MORROW, Circuit Judge. A. B. Bowers and the Bowers California Dredging Company, a corporation organized and existing under and by virtue of the laws of the state of California, brought suit in this court on September 6, 1899, against John McMullen, W. N. Concanon, Raymond A. Perry, William A. Perry, Herman Krusi, and the San Francisco Bridge Company for the infringement of certain claims of United States letters patent No. 318,859, for improve-

ments in dredging machines; No. 318,860, for improvements in the art of dredging; No. 372,956, for improvement in excavators; and No. 484,763, for apparatus for dredging and transporting spoil. The complaint set forth a contract, dated December 16, 1899, wherein A. B. Bowers granted to the Bowers Dredging Company of Illinois the full and exclusive right to use and to manufacture, from drawings and supervision furnished and approved by the said Bowers, all the Bowers hydraulic dredging apparatus and appliances for which letters patent of the United States had been or might thereafter be granted to said Bowers, to the full end of the term for which said patents had been or might be granted, for use in the state of Washington, exclusive of Gray's Harbor, and in that portion of Oregon lying north of and including the Columbia river and its tributaries, but nowhere else. The bill of complaint described a dredger by the name of "Python" as being constructed under the foregoing contract, and operated for some time within the territory mentioned, but which at the time of the filing of the bill, it was alleged, was being used in prohibited territory, namely, in the harbor of Eureka, Cal. Upon the bill and affidavits filed, this court issued an injunction restraining the defendants from the use and operation of the dredger anywhere in the state of California or the state of Oregon south of the Columbia river and its tributaries. This injunction was directed particularly against the defendant Concanon, none other of the defendants having appeared or answered in the case. An appeal was taken from the order granting this injunction to the circuit court of appeals, where the decree of the court was reversed on May 7, 1900, and the cause remanded, with instructions to dismiss the bill; the court holding that the question as to whether there had been any infringement depended upon the construction that should be placed upn the covenants contained in the contract, and not upon the construction of any act of congress in relation to patents. The court say:

"In the present case no question is presented as to the validity of any of the appellee's patents. There is no question in the case that involves the construction of any act of congress in relation to the patent laws. All the cases hold, where the question is discussed, that suits growing out of contracts made in relation to patent rights are governed by the general principles of law and equity, and not by the patent laws, and are triable in the state courts, and that the rights of the patentee under the patent laws of the United States must be directly, and not collaterally, brought in issue, to give the United States courts jurisdiction." McMullen v. Bowers, 42 C. C. A. 470, 102 Fed. 494, 501.

On the 3d day of November, 1900, the present suit was brought by A. B. Bowers and the Bowers California Dredging Company against William N. Concanon. These are the same complainants and the same defendant as in the above case. The bill alleges the infringement of the same letters patent, with the exception of No. 484,763, and alleges, as before, that on the 21st day of April, 1897, the complainant Bowers California Dredging Company acquired by purchase certain rights and privileges to operate under said letters patent throughout the state of California and all of that portion of the state of Oregon lying south of the Columbia river (the same contract considered by the court of appeals in the former case), and

ever since said date has been, and now is, the sole and exclusive owner and holder of all such rights and privileges within that territory; that notwithstanding such ownership the defendant Concanon, well knowing the same, and without the license or consent of the complainants, has made and used since the 7th day of May, 1900 (the date of the decision of the court of appeals), and is now using and threatens to continue to use, within the district licensed to the complainant corporation, a dredging machine containing and embracing the inventions patented by said letters patent; that said dredging machine is an infringement upon said several letters patent, and its use by the defendant, unless restrained by the court, will work great and irreparable injury, loss, and damage to the complainants. Upon affidavits being filed, a restraining order was issued, and an order to show cause why a preliminary injunction should not issue. The complainants in this case do not set up the contract as a basis for their cause of action, but contend that it is a case upon infringement, and not upon contract. The contract is, however, set up in the affidavit of R. Percy Wright, solicitor for the defendant, and the jurisdiction of this court is denied in the present case upon the grounds held by the court of appeals to control in the case of McMullen v. Bowers, namely, that no federal question is involved. The ultimate question before this court will be whether or not this is also an action upon contract, or an action for infringement. But for the present it will be sufficient to determine whether the plaintiff has made out a case for the granting of an injunction pendente lite. The decision of the court of appeals in the case of McMullen v. Bowers does not appear to have turned upon a question of pleading, but upon the question of fact, and that court decided that this court had no jurisdiction of the questions there involved. It is manifest, therefore, that this court will not review any of the issues involved in that case, whether disclosed in the pleadings or otherwise, but will concern itself with the question whether the facts presented constitute a new case.

Testimony has been introduced by the complainants in this case to the effect that the dredger Python, involved in the case of McMullen v. Bowers, and being operated in the harbor of Eureka, Cal., at the time that suit was instituted, has been given the name of Portland, and brought to Oakland Harbor, in this state; that certain changes and alterations have been made in said dredger, which it is claimed constitute a variance to the detriment of the original machine, but which are nevertheless infringements of the rights of the complainant Bowers under his said letters patent; that said dredger, so altered, is now being used and operated by the defendant in said Oakland Harbor, which it is claimed is an infringement of the rights of the corporation complainant. The principal changes and alterations complained of are the following: Two spuds passing through well holes in the hull of the boat, in place of the spud crane or turntable mechanism originally in the Python; a rotary excavator varying in details of mechanism from that used by the complainant Bowers in the construction of said dredge; a centrifugal pump differing from the one originally put into said dredge; a different ladder frame; a metallic ball and socket joint in place

of the flexible joint connecting the dredge with the floating discharge pipe; additional lengths of suction pipe, and a number of pontoons. An examination of the evidence discloses the fact that some of these changes and alterations were made before the defendant Concanon took the dredger from the Puget Sound Dredging Company, in April, 1899, namely, the change in the rotary excavator and the spuds. The claims of the complainant with respect to those details of mechanism, having been involved in the case of McMullen v. Bowers, will not be considered by this court in the present action.

As to the remaining claims of infringing mechanism, arising upon changes made in the dredger by the defendant since September 6, 1899, it appears that there were six pontoons fully constructed and transferred with the dredger to the defendant Concanon in April, 1899, and some evidence to the effect that there were some eight or ten more in knockdown condition. Prior to the commencement of the work in Oakland Harbor some pontoons were borrowed from the Atlantic, Gulf & Pacific Company, at Mare Island, as well as some extra lengths of suction pipe, and two ball joints. These do not appear to be the property of the defendant Concanon. Some 20 feet of new pipe was bought, to replace a section that had become worn out, and to make proper connections with the new pump, which required different fittings. These constitute the only changes of note that have any connection with the rights of the complainant Bowers under his patents, which have been made to the dredger since September 6, 1899. Other changes made do not affect the patented mechanism. It was held by this court in the case of Alaska Packers' Ass'n v. Pacific Steam-Whaling Co. (C. C.) 93 Fed. 672, that the sale of an entire machine carries with it the right to replace a part which, in its relation to the whole structure, is temporary in its nature, and that the replacing of such temporary parts by the purchaser is not infringement, as long as the identity of the machine is retained. The changes above mentioned are apparently in the nature of repairs, and do not affect the identity of the machine as a whole, or render it a new machine. The articles borrowed merely served to assist in the carrying on of the same work in the same manner, and did not alter or affect the identity of the dredger in any respect. It is established as a rule in equity that a preliminary injunction ought not to be granted unless the rights of the complainant and the infringement of the defendant are free from reasonable doubt, and the jurisdiction of the court is clear. High, Inj. § 938; Parker v. Sears, 1 Fish. Pat. Cas. 93, Fed. Cas. No. 10,748. In view of the decision of the circuit court of appeals in McMullen v. Bowers, the jurisdiction of this court over the present cause of action is not entirely clear; and the testimony presented at this stage of the proceedings having established the fact that the dredger Portland, complained of herein, is substantially the same machine involved in the former case under the name of "Python," and it appearing that no changes have been made materially affecting its identity under the patents controlling it, the right to an injunction has not been established beyond a reasonable doubt. The temporary restraining order will therefore be dissolved, and the preliminary injunction denied.

## LEDERER v. SIRE.

(Circuit Court, S. D. New York. October 16, 1900.)

REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—DEFAULT OF ONE DEFENDANT.

Where one of two defendants in an action in a state court, who is a necessary party, is a citizen of the same state as the plaintiff, his suffering a default to be taken against him does not eliminate him from the controversy, so as to render the cause removable by his co-defendant on the ground of diversity of citizenship.[1]

On preliminary objection to plaintiff's motion for injunction pendente lite and application to vacate temporary stay, and on motion for preliminary injunction.

Roger M. Sherman, for plaintiff.
Robert C. Beatty, for defendant.

LACOMBE, Circuit Judge. Too little time intervenes between the submission of the briefs on this preliminary objection and the hour fixed for the hearing of the principal motion to prepare an opinion. The objection is that two certain dispossess proceedings heretofore begun in the state court, and in which the petitions, etc., for removal were filed, have not been removed to this court, and therefore the court may not, under section 720, Rev. St. U. S., enjoin the further prosecution of such proceedings in the state court. The complainant in the dispossess proceedings (defendant here) is a citizen of New York. The complainant in this suit is one of the defendants in the dispossess suit, and is a citizen of New Jersey. The other defendant in the dispossess suit—one Gall—is a citizen of New York. The petitions for removal in the dispossess proceeding were filed more than 20 days after answer was due and answers had been served. Subsequently Gall withdrew his answer, and gave notice that he was prepared to suffer default; that he should not contest the plaintiff's right to the relief prayed for; whereupon petition for removal was filed. The complainant here contends that the time allowed for removal should be 20 days from the disappearance of Gall from the controversy, because then for the first, as he contends, was there a controversy between citizens of different states, where the defendant was a nonresident, and entitled to removal. The authority cited—Powers v. Railroad Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673—entirely supports the contention that the time is to be reckoned from the date when the situation first becomes such as to entitle a party to remove. The difficulty here is, however, that the withdrawal of Gall's answer did not make the case a removable one. It is not disputed that Gall was a necessary party, nor that, while he remained in the case, his citizenship is such that the other parties defendant may not remove. The only question is, does he, by failure to answer, by suffering a default, by ceasing further contention with the complainant, eliminate himself

[1] Diverse citizenship as ground for federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 479.

from the controversy, so as to make a case of removal? In view of the decisions of the supreme court in Putnam v. Ingraham, 114 U. S. 57, 5 Sup. Ct. 746, 29 L. Ed. 65, Brooks v. Clark, 119 U. S. 502, 7 Sup. Ct. 301, 30 L. Ed. 482, and Wilson v. Oswego Tp., 151 U. S. 66, 14 Sup. Ct. 259, 38 L. Ed. 70, the answer to this question must be in the negative. The withdrawal of the answer has not eliminated Gall from the cause, and therefore we have citizens of New York on both sides of the controversy presented in the complaint in dispossess proceedings, and the nonresident defendant is not entitled to remove. To this extent, therefore, the preliminary objection is sustained, and the order for a temporary stay is modified by striking therefrom in its entirety the first paragraph thereof, found in folios 5 and 6, and by striking from the third paragraph thereof the words "special proceeding removed as aforesaid to this court or any." The hearing as to the rest of the motion, namely, whether, upon the facts presented by the complaint and moving papers, the defendant shall be enjoined from instituting new summary proceedings, will be heard at the time and place already fixed.

(October 17, 1900.)

Examination of the authorities referred to has not satisfied the court that the modification of the restraining order made yesterday should be disturbed. As to so much of the restraining order, however, as still remains in force, if the affidavit of Bernard, which was to be submitted this morning, shall contain a categorical denial of the statements in defendant's affidavits touching negotiations for four months' extension, the stay will be continued until final hearing, or further order of the court, provided complainant shall (1) perfect the security heretofore ordered; (2) pay forthwith into the hands of the clerk of this court the amount of the rent stipulated by the lease for the months of September and October; (3) promptly, month by month, hereafter pay into the hands of the clerk of this court the amount of the monthly rent stipulated by the lease,—all moneys so paid to the clerk to be held to abide the event of the litigation; (4) upon the joinder of issue proceed forthwith to the taking of his proofs, and complete the same within the time specified by the rule.

## HADFIELD v. NORTHWESTERN LIFE ASSUR. CO.

(Circuit Court, E. D. Wisconsin. December 11, 1900.)

REMOVAL OF CAUSES—CLERICAL ERROR IN PETITION—AMENDMENT.

Where a petition for removal is filed in a state court in due time, containing the requisite jurisdictional averments to authorize the removal, and accompanied by a proper bond, the removal is not defeated because, through a mistake, both petition and bond name the court to which the removal is sought as the district court of the United States, instead of the circuit court, and the order of removal is to the district court. Such proceeding operates to transfer jurisdiction of the cause to the circuit court by virtue of the statute, notwithstanding the error, and that court may permit the proper correction to be made in the petition and bond by amendment.

On motion by defendant for an order docketing the cause as one removed from the circuit court of Fond du Lac county, and to allow the filing nunc pro tunc of corrected petition for removal, and bond in lieu of the petition, and bond filed in the state court, and on further motion by the plaintiff in the district court to remand the cause as one improperly removed to that court.

E. S. Bragg, for plaintiff.

Geo. P. Miller and Clark Varnum, for defendant.

SEAMAN, District Judge. The petition filed in the state court properly avers the jurisdictional fact of diverse citizenship to authorize removal of the cause to the circuit court of the United States under the statute, and it was filed in due time, and accompanied by a bond executed on the part of the defendant. Both petition and bond are defective in naming the court to which removal is sought as the district court instead of the circuit court of the United States, and the record certified from the state court shows that the word "circuit" is crossed with a pen, and "district" interlined in the petition and bond, and the blunder is thus made. The state court thereupon ordered the removal to the district court, and the record as certified was presented to the clerk of this court, who is clerk of the district court as well, but, because of such defect in the papers, was not filed by him in either court. The motion on the part of the defendant is supported by an affidavit of counsel showing that the petition and bond were executed in proper form, but were changed through mistake of the counsel who filed them and obtained the order of removal, and like affidavit is filed in the district court in opposition to the motion to remand.

The complication arising out of this mistake, from the want of co-ordinate civil jurisdiction in the circuit and district courts, respectively, impresses me as the only question which is not directly ruled by the decisions cited in the brief of defendant. It is well established, however, that a petition duly presented in the state court, which makes a case for removal within the act of congress, operates as a transfer of jurisdiction to the circuit court of the United States when a bond is filed which is either sufficient in itself, or is approved as sufficient by the state court, and that no order of removal by that court is essential to complete the transfer. The petition in the case at bar clearly alleges the jurisdictional fact which gives the right of removal to the circuit court of the United States, and clearly shows the purpose of the defendant to take the benefit of such statutory right. I am of opinion, therefore, that the statement of fact is not nullified by the obvious error in naming the district court instead of the circuit court as the one to which removal was sought. The intention being clear, and the state of facts duly presented, the transfer of jurisdiction to the circuit court results by operation of the statute, and not through the action or order of the state court, or any action by the parties beyond that of setting in motion the statutory provision. So considered, jurisdiction of the state court was devested, and that of this court was obtained; and the right of amendment to correct the petition or

bond in this court, after jurisdiction is acquired, is well recognized. Powers v. Railroad Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; Martin's Adm'r v. Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; Crehore v. Railway Co., 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; 18 Enc. Pl. & Prac. 324, 334. An order will be entered that the cause be docketed, and that the corrected petition and bond presented on behalf of the defendant be allowed and filed herein.

NOTE. An order will be entered as well in the district court denying the plaintiff's motion to remand.

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NEW JERSEY STEEL & IRON CO. v. CHORMANN et al.

(Circuit Court, S. D. New York. December 10, 1900.)

FEDERAL COURTS—JURISDICTION—DISTRICT OF SUIT.

Query, whether Rev. St. § 740, authorizing suits against two or more defendants residing in the same state, but in different districts, to be brought in one of such districts, and a duplicate writ issued to the other, was repealed by the provisions of the judiciary act of 1887-88, which prohibits the bringing of an action against a defendant in any district other than that of his residence.

Application for an order instructing the clerk to issue a duplicate subpœna to the marshal of the Northern district of New York against the defendant Chormann, under section 740, Rev. St. U. S.

Henry B. Clason, for the motion.
Arthur H. Mastens, opposed.

LACOMBE, Circuit Judge. The situation in this district touching the questions raised in the present application is unsatisfactory, and some final disposition of the subject is desirable. Several years ago the question was first presented to the writer. Upon an examination of the statutes, he was convinced that section 740 was repealed by the provisions of the acts of 1887 and 1888. These acts expressly repealed statutes inconsistent with their provisions, and it was difficult to understand why a provision prohibiting the bringing of an action against an individual in any district except that of his residence was not inconsistent with a provision that he might be sued in some district not of his residence, provided it was within the same state. The care with which congress expressly reserved from the operation of the repealing clause section 641 and others seemed to indicate that that body understood quite well what was the meaning of the language it employed, and intended that it should be interpreted according to its grammatical construction. No opinion, however, was written at the time, although the clerk was instructed thereafter not to issue duplicate subpœnas under the provisions of section 740. Subsequently the same question arose in this district before Judge Coxe, in Goddard v. Mailler (C. C.) 80 Fed. 422. There being no opinion in the earlier case, Judge Coxe was not advised of the former decision, and considered the point as one of novel impression in this district. He followed Bank v. Harrison (C. C.) 8 Fed. 721, and East Tennessee,

V. & G. R. Co. v. Atlanta & F. R. Co. (C. C.) 49 Fed. 608, 15 L. R. A. 109, and held that section 740 was still in force. An examination of the careful opinions filed in the three cases last cited has failed to change the writer's impression as to the proper construction of the acts of 1887 and 1888. Under these circumstances, the best disposition to make of the present application seems to be to instruct the clerk to issue the duplicate subpœna. When it is served, the defendant Chormann may appear specially for the purpose of contending that the court in the Southern district of New York has no jurisdiction of him, and raise the point either by plea or in some other appropriate way. From the decision rendered upon such plea, an appeal will lie to the appropriate court of review, and the question thus be finally disposed of.

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## SHEARSON v. LITTLETON et al.

(Circuit Court, S. D. Georgia, W. D. December 14, 1900.)

1. EQUITY JURISDICTION—SUIT TO ENFORCE TRUST.

Where a firm of debtors gave an order on a bank, which held a quantity of cotton as security for an amount due it, for the payment of the surplus proceeds of the cotton to another creditor, who agreed to receive the same on behalf of himself and certain other creditors, who were parties to the arrangement, and the bank accepted the order, but made no payment thereon, a court of equity has jurisdiction of a suit by one of the creditors who was to share in the fund, brought on behalf of himself and the others who chose to join, to enforce the trust and require an accounting from the bank, upon an averment that the person in whose favor the order was made refused to enforce it.

2. JURISDICTION OF FEDERAL COURTS—REARRANGEMENT OF PARTIES—UNNECESSARY PARTIES.

To such a suit the creditor in whose favor the order was given is not a necessary party, since his agreement to act for the others in receiving or enforcing payment thereon was without consideration, and his joinder as a defendant, although his interests are in fact as a complainant, and he is a citizen of the same state as the other defendants, will not defeat the jurisdiction of a federal court; the complainant being an alien, and the amount involved sufficient to give the court jurisdiction.

In Equity. On demurrer to bill.

Charlton, Mackall & Anderson, for complainant.

Allen Fort and Guerry & Hall, for defendants Littleton & Lamar.

SPEER, District Judge. This question has originated in the following manner: Charles A. Shearson, an alien, subject to the queen of Great Britain and Ireland, has brought this bill against Edward Littleton and Charles W. Lamar, as co-partners doing business under the firm name and style of Littleton & Lamar, and against the Planters' Bank of Americus, and Joseph J. Wilder, all citizens of this district, and allege as follows: That the plaintiff is a creditor of Littleton & Lamar, and that with other creditors of Littleton & Lamar, among them Wilder, they went to Americus to attempt to enforce their claims against their debtor. They demanded payment, whereupon Littleton & Lamar, being informed that the plaintiff and other creditors were then and there prepared and disposed to take

legal steps to secure and recover the several amounts due to them, assured their creditors that, while they did not have money in hand to pay the debts at once, they did have pledged with the Planters' Bank of Americus 749 bales of cotton, which was at the time of the value of about $20 per bale. They were indebted to the Bank of Americus the sum only of $7,596.94, and they were willing to give an order upon the bank to pay the balance of the proceeds of the cotton, over and above the bank's debt, to discharge the claims of the creditors who were then present and insisting upon payment. This was agreed to, according to the averments of the bill, and the following letters, annexed as exhibits, express this agreement. The first, dated at Americus, Ga., May 13, 1899, addressed to the Planters' Bank, Americus, Ga., is as follows:

> "Gentlemen: As it appears from the records of our books that we are indebted to you in the sum of $7,596.94 on the 11th of May, 1899, and that against same you hold lien upon collateral to the extent of 794 B. cotton, this, therefore, is to direct you to pay over to Wilder & Co., of Savannah, Ga., the net proceeds of said 794 B. C., after deducting the amount of $7,596.94 shown to be due you, and the amount of interest which may be found due to you. Please address a few lines to Messrs. Wilder & Co., Savannah, informing them that you have received this order, and will comply with same.
> "Yours, truly, Littleton & Lamar."

In compliance with this request, on the same day, the Planters' Bank of Americus addressed a letter to Messrs. Wilder & Co., Savannah, Ga., as follows:

> "The amount due this bank by Littleton & Lamar, as stated in their letter, is virtually correct, and as soon as this bank is satisfied we will take pleasure in conforming to Messrs. Littleton & Lamar's wishes."

Now, it is alleged that no payments have been made from the balance of the proceeds of this cotton over and above the amount of the debt due by Littleton & Lamar to the bank. Now, it will be observed that this arrangement was made for the benefit of the creditors of Littleton & Lamar, for whom Wilder undertook to act as agent to collect and disburse the fund thus set apart. Wilder has, it is alleged, taken no steps to enforce the collection of the claims. The other creditors have done nothing. This bill is brought against the parties named as defendants for the purpose of having that fund declared a secret trust, and subject to an equitable lien for the payment of his debt.

The bill is demurred to upon several grounds, the principal ground being that it has no equity, that the plaintiff had an adequate right at common law, and that Wilder was really a plaintiff to the bill, and ought to have been joined as plaintiff, which the court should now accomplish by a rearrangement of the parties, with the result that the court would be defeated of its jurisdiction.

Now, it strikes me that there is rarely presented to the court a case where the grounds for equitable jurisdiction are clearer than in this case. There is the substantial claim of Shearson, evidenced by his account annexed to the bill, showing an aggregate indebtedness on the part of Littleton & Lamar of $3,871.17. There is the distinct agreement that the balance of the proceeds of this cotton over and above $7,596.94 would be held by the bank and paid

to Wilder, and that has not been paid. It appears, it is true, upon the face of the papers, that Wilder & Co. only have the right to collect this sum; but the averments of the bill are that the collection was to have been made, not merely for Wilder & Co., but for Shearson and other creditors. Shearson's rights, therefore, are obscured by the form of the correspondence; but the court of equity will look through that form, in fact through all forms, and ascertain if a party really has a substantial right. There, too, is the necessity existing of taking an account, which is another ground of equitable jurisdiction, and there is also some averment of conspiracy between Littleton & Lamar and the bank, with the unlawful purpose to prevent the payment of this sum. If these facts be true,—and they are assumed to be true,—why was there a refusal of payment? Ought not the court to exercise its equitable powers on the application of a creditor to reach this fund, which was like a deposit in a bank for the benefit of creditors? Is it not true the bank has no more right to retain it than it would have to retain a deposit in the face of proper demand for its payment?

But it is said that the court will be defeated of its jurisdiction because Wilder ought to be considered a plaintiff. It is true that, if Wilder necessarily appears here at all, he must appear as plaintiff. And there is an averment in the bill that they were under obligation to compel this payment, and looking merely at this averment of the bill, without regard to the legal effect of the averment, in view of the rest of the plaintiff's case, the court would be obliged to take the view presented by the ingenious argument of Mr. Guerry, make Wilder a plaintiff, and dismiss the bill because one of the parties plaintiff is a citizen of Georgia. But what is the correct view of it? Wilder was under no legal obligation to compel the payment of this balance. He undertook to do it, but it does not appear that any consideration was paid him by other creditors. His agreement, then, was a mere nudum pactum. He can ignore his rights to enforce payment of his debt if he thinks proper. If he did this, as it appears he did, is Shearson, who has a claim of $3,-871.17, to be denied his rights? Clearly not, in my opinion. He asks no relief against Wilder, who should be stricken from the bill as an unnecessary party, whose presence would defeat jurisdiction, and deprive this alien of his rights the constitution intended to secure him. Shearson has a right to an accounting, and a right to a decree, on these averments establishing his equitable lien upon this fund, and the consequent duty devolves upon the court to distribute the remainder of the fund to other creditors, who have the right to intervene if they see fit to do so. The fact that Shearson is an alien imposes upon this court jurisdiction of his controversy, and the case, as I have already said, seems, in its entirety, to be a remarkably clear instance for the exercise of the equitable powers which are sought by the pleadings, and I therefore feel obliged to overrule the demurrers on all the grounds.

ANGLO-AMERICAN PROVISION CO. v. DAVIS PROVISION CO. et al.

(Circuit Court, S. D. New York. November 17, 1900.)

JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—RIGHTS UNDER CONSTITUTION AND LAWS OF UNITED STATES.

Where the effect of a state statute limiting the right of foreign corporations to sue in its courts is to deprive a corporation of another state of the equitable right to set off against a judgment rendered against it in such courts a judgment in its favor against the plaintiff therein, rendered in another state, such corporation is deprived of its constitutional right to have full faith and credit given to such judgment, and also of the right to the full and equal benefit of all laws and proceedings given it by Rev. St. § 1977; and under section 1979 and section 629, subd. 16, a circuit court of the United States has jurisdiction to afford it appropriate relief.[1]

In Equity. On demurrer to bill.

Henry Wilson Bridges, for plaintiff.
Frank E. Smith, for defendants.

WHEELER, District Judge. These corporations are both of the state of Illinois. The bill alleges, in short substance, that the plaintiff, in 1899, recovered judgment against the defendant the Davis Provision Company, in Illinois, for $5,049.98, no part of which has been paid, and that the defendant is insolvent; that defendant has recovered judgment arising out of the same transactions against the plaintiff and its surety on an appeal bond in New York for $9,678.64; and that the plaintiff has brought suit in the state court of New York to have its judgment set off against the defendant's judgment, which has been denied because of section 1780 of the Code of Civil Procedure, which provides that:

"An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: (1) Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof. (2) Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state. (3) Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state."

The constitution of the United States provides (article 4):

"Section 1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

And the laws of the United States provide by the Revised Statutes:

"Sec. 1977. All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

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[1] Jurisdiction in cases involving federal questions, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

"Sec. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

And by section 629 that the circuit courts shall have jurisdiction:

"Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, or any right, privilege, or immunity secured by the constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

This suit is brought for the deprivation of the right to have these judgments, which are, according to the allegations of the bill, in effect mutual, set off against each other in New York. The bill is demurred to for want of jurisdiction and of equity, and the cause has now been heard upon the demurrer.

That these judgments are, upon these allegations, proper subjects of equitable offset upon general principles of law, is not, and could not well be, much disputed; but the principal argument against the bill is based upon the idea that it is brought to review the decision of the state court. This is not, however, the theory of the bill at all, as it is now here understood. The decision of the state courts may have been entirely correct under that law of the state limiting the right of a foreign corporation to sue in those courts; but, whether correct or mistaken, the plaintiff has been deprived of its right of offset under color of that statute of the state; and this suit is not at all framed to review in any way the judgment by which this was done, but for independent relief under these laws of the United States, provided for because of that statutory deprivation. The state may have the right to exclude foreign corporations from its courts, or to limit suits by them there (Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650), but then that exclusion or limitation, if of a right secured by the constitution and laws, may afford ground for the relief deprived of in the courts of the United States. Full faith and credit to the Illinois judgment is not only not given to the plaintiff in New York, but the plaintiff is deprived of the right, by being deprived of the right to sue, to have any faith or credit whatever given there to that judgment. The right of equitable offset arises under the general principles of law, but the right to have it done in this manner arose under the constitution and laws of the United States. Bank v. Stevens, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807; Northwestern Fertilizing Co. v. Hyde Park, 3 Biss. 480, Fed. Cas. No. 10,336. Demurrer overruled; defendants to answer over by December 10th.

HOUSTON et al. v. FILER & STOWELL CO., Limited.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 706.

COSTS—GROUNDS FOR IMPOSING—FAILURE TO SHOW JURISDICTION.

Where the time of a court has been taken up in the trial of a cause upon a declaration which does not show jurisdiction, the fault is essentially that of plaintiff or his counsel, and he may properly be charged with the costs; and the court will not undertake to inquire whether counsel for defendant had knowledge of the fact, and failed in his duty to bring it to the court's attention.

On Motion to Modify Mandate. For former opinion, see 104 Fed. 163.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

PER CURIAM. The defendant in error has moved for a modification of the mandate in respect to costs, and, in a brief upon the motion, has called attention to the opinions and ruling in Hunt v. Howes, 21 C. C. A. 356, 74 Fed. 657, decided in the Fifth circuit. The court in that case gave an impressive exposition of the duty of counsel for defendant to disclose to the court any defect in the averments of the declaration touching the jurisdiction of the court, but in the first opinion, besides proceeding upon an essential mistake of fact, notably left out of consideration any corresponding duty or responsibility on the part of counsel by whom the declaration was prepared, and the suit prosecuted through the numerous steps rehearsed. In the end it appeared that counsel who conducted the trial were guilty of no intentional dereliction of duty, and that the defect in the declaration was not discovered until after the removal of the cause to the court of appeals, and then by new counsel employed by the plaintiff in error; and, this fact having been brought to the knowledge of the court on the petition for a rehearing, it was held that there had been a mutual mistake, which justified the judgment of the court charging the entire costs of the writ of error upon the plaintiffs in error as "not only proper, but considerate in its leniency." The primary and essential fault in every such case is necessarily with the plaintiff, whose duty it is to embody in his declaration or bill the requisite jurisdictional averments. There is no corresponding duty on the part of defendant or his counsel, and there cannot, therefore, be a mutual mistake for which, equally with the plaintiff, the defendant should be held responsible. The neglect of the plaintiff is of a positive duty. The fault of the defendant, unless intentional, can be only negative. If the time of the court is taken either for a great or a short while in the hearing of a case upon a declaration which does not show jurisdiction, blame necessarily belongs to the plaintiff, and the costs, therefore, may be justly charged against him. To exempt him from costs is to encourage a like carelessness on the part of other suitors; and to undertake an inquiry whether counsel for the defendant, with knowledge of the fact, had failed, as in duty bound, to call attention to the lack of

jurisdiction, would lead in most cases to contention, likely to be unseemly and derogatory to the public interest in the orderly administration of justice. There has been here no assertion or attempt to show that the plaintiffs in error or their counsel were guilty of misconduct in the premises. The motion is denied.

## LITTELL v. ERIE R. CO.

(Circuit Court, S. D. New York. November 7, 1900.)

JURISDICTION OF FEDERAL COURTS—SUFFICIENCY OF ALLEGATION OF CITIZENSHIP.

An allegation in a complaint that plaintiff is a citizen of the United States, and an actual resident of a state named, is a sufficient allegation of his citizenship in such state for jurisdictional purposes.

At Law. On demurrer to complaint.

Wayland E. Benjamin, for plaintiff.
Allen Wardwell, for defendant.

WHEELER, District Judge. Jurisdiction of this case depends upon citizenship. The complaint alleges "that the plaintiff now is, and at all times hereinafter mentioned was, a citizen of the United States, and an actual resident of the state of New Jersey." The defendant has demurred, assigning this to be an insufficient allegation of citizenship in New Jersey. But citizens of the United States residing in any of the states are citizens of those states. Gassies v. Ballon, 6 Pet. 761, 8 L. Ed. 573; Dred Scott v. Sandford, 19 How. 393, 15 L. Ed. 691; Boyd v. Nebraska, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103. This allegation is, therefore, a full equivalent of what a direct one would be that the plaintiff is a citizen of New Jersey. In the cases cited in support of the demurrer there does not appear to have been any such allegation relating to citizenship of the party in question as this. Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057; Insurance Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380; Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. 873, 30 L. Ed. 914; Wolfe v. Insurance Co., 148 U. S. 389, 13 Sup. Ct. 602, 37 L. Ed. 493; Horne v. George H. Hammond Co., 155 U. S. 393, 15 Sup. Ct. 167, 39 L. Ed. 197; Cooper v. Newell, 155 U. S. 532, 15 Sup. Ct. 355, 39 L. Ed. 249. Such a one was held to be sufficient in Gassies v. Ballon, and was so recognized in Dred Scott v. Sandford, which have not been either expressly or impliedly overruled as to this. Demurrer overruled.

## MORTON TRUST CO. v. NEW YORK & O. R. CO. et al.

(Circuit Court, S. D. New York. December 4, 1900.)

FEDERAL COURTS—PLEA TO JURISDICTION—DEFENDANT TO BILL IN INTERVENTION.

Where a creditors' bill in a federal court against a corporation showed the requisite facts to give the court jurisdiction, a creditor who is subsequently brought in as a defendant to an intervening bill for the foreclosure of a mortgage on the property of the corporation, which is in

**the hands of the receiver, cannot attack the jurisdiction by a plea alleging that the original suit was brought by collusion between complainant and the corporation in procuring the assignment of the claim to complainant in order to give the court jurisdiction, when it is not shown that the intervener was a party to such collusion.**

In Equity. On plea to bill in intervention.

Henry L. Stimson, for Morton Trust Co.
Frank E. Smith, for Henning.

WHEELER, District Judge. This is an intervention by leave of court by foreclosure in a creditors' suit in which the defendant John L. Henning, a creditor, has been made a party, and has been heard on his plea to the jurisdiction set down for argument. The substance of the plea is that the bondholders and others interested procured and assisted the creditor in the original bill, Alanson T. Enos, a citizen of New Jersey, to buy a claim against the railroad company of less than $2,000, and to get it into a judgment for more, and to bring the bill, and have the receiver appointed, and:

"(14) That said Enos, in taking an assignment of the said claim against said railroad company, and in bringing suit thereon as aforesaid, acted in collusion with the railroad company, its officers and directors, and with said banking firms; and the purpose of said parties in causing said claim to be assigned to said Enos, and in bringing suit thereon in the city court as aforesaid, was to create a cause of action or suit against said railroad company which should be within the jurisdiction of this court, and not to assert or enforce the rights of said Enos as a creditor, to the end that a receivership of said railroad property and the foreclosure of the mortgages might be had in this court."

The jurisdiction was good on the face of the original bill, and the receivership is to be, of course, taken to have been proper and correct. This party could make no objection to being brought in, except such as would apply to the propriety of bringing him as a party to the cause in the situation in which it actually was when he was made to come in. The Morton Trust Company is the only party plaintiff in the foreclosure, and it could proceed for that purpose in no other way. Its motives in becoming a party are not impeached by the plea, but only those of others interested. It is suggested that, as jurisdiction here must be shown, the failure to include the motives of the trust company with those alleged to be improper does not affect the sufficiency of the plea. But jurisdiction was shown before, and the office of the plea was to take it away, and if it omitted what was essential for that purpose it would be bad. If the motives of any party would be essential to defeat the apparent jurisdiction as to Henning, they would be those of the trust company, and, as they are not impugned, the plea, apparently, must be held bad. Plea disallowed.

## HEDLUND v. DEWEY.

(Circuit Court, N. D. Illinois, N. D. October 29, 1900.)

No. 25,142.

BANKS—STOCKHOLDER'S LIABILITY — TRANSFER OF STOCK—EQUITY—ADEQUATE REMEDY AT LAW.

In an action in equity to cancel a transfer of stock as fraudulently made by defendant to avoid a stockholder's liability, and for a decree against defendant for an assessment on the stock, a demurrer to the bill because plaintiff had an adequate remedy at law by ignoring the transfer and suing defendant as actual owner will be overruled, since the plaintiff is entitled to the relief prayed for, which could not be had at law, though such relief be only a technical advantage to plaintiff.

Prussing & McCulloch, for complainant.
Wilson, Moore & McIlvaine, for defendant.

KOHLSAAT, District Judge. This is a suit in equity, brought by the receiver of a national bank against a former stockholder of said bank to recover unpaid stock liability upon the ground that the transfer by defendant of said stock prior to the receivership was fraudulently made for the purpose of avoiding such stock liability. The prayer of the bill asks a cancellation of said transfer, an entry of said stock upon the books of the bank in the name of defendant, and a money decree against defendant for the amount of the assessment against said stock. Defendant demurs on the ground that, inasmuch as said receiver can ignore the fraudulent transfer, and sue defendant at law as the actual owner of said stock, the technical equitable relief prayed for would, if granted, be useless and unnecessary. For this reason defendant insists that an adequate remedy at law exists, and he should not be deprived of his right to a trial by jury simply by reason of technical relief sought by this proceeding in equity. I am of the opinion that, as the bill asks for relief to which complainant is entitled, and which cannot be granted at law, equitable jurisdiction must be entertained, even though such relief may, as a matter of fact, be only of technical advantage to complainant. The demurrer is overruled.

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## NEWTON v. WOOLEY et al.

(Circuit Court, E. D. Arkansas, W. D. December 31, 1900.)

1. SPECIFIC PERFORMANCE — GROUNDS OF REMEDY — CONTRACT FOR SALE OF STOCK.

A court of equity may decree the specific performance of a contract for the sale of stock in a corporation, where such stock cannot be purchased in the market, and has no market value.

2. SAME—PAROL EVIDENCE TO VARY CONTRACT.

In a suit for specific performance of a written contract, parol evidence is admissible on behalf of the defendant to show that the contract does not express the actual agreement of the parties, but that an important provision was omitted through mistake.

3. SAME—NATURE OF REMEDY—EQUITIES OF PARTIES.

Specific performance of a contract cannot be demanded as a matter of absolute right, but rests in judicial discretion, to be exercised according

to settled principles of equity, but always with reference to the facts of the case; and where a contract as written is unconscionable, and its specific enforcement under existing circumstances would be inequitable, and work hardship to the defendant, its performance will not be decreed.

In Equity. Suit for specific performance of a contract.

This is a bill for specific performance of the following contract: "This memorandum of agreement, made and entered into this day by and between J. N. Wooley, party of the first part, and Charles M. Newton, party of the second part, witnesseth: That whereas, the party of the first part is now the owner of a sawmill and a railroad or tramroad running from a switch on the Iron Mountain Railroad known as 'Wooley No. 2'; and whereas, said party of the first part contemplates turning his sawmill into a stock company with a capital stock of not less than $25,000, and also changing his said railroad or mill tramroad into a railroad corporation under the laws of Arkansas, running from said switch of Wooley No. 2 to the town of Lonoke, Arkansas, and then on, say, to some point beyond Lonoke, Arkansas; and whereas, said Newton is about to undertake to assist said Wooley in securing money to equip said railroad, now said parties hereby agree to the following: The party of the first part agrees to incorporate said milling company under the laws of Arkansas with a capital stock of not exceeding $25,000. (2) The party of the first part agrees to incorporate a railroad under the laws of Arkansas, which shall begin at a point at Wooley station No. 2, and run first to Lonoke, Arkansas, and on beyond if the parties in interest shall so determine; but said line is to be completed from Wooley No. 2 to Lonoke, Arkansas, first, and is to include the line, ties, rails, etc., now owned and used by said Wooley. (3) The said Wooley is to grade and prepare the roadbed from Wooley No. 2 to Lonoke, and have the same ready for the rails, as soon as convenient. (4) The party of the second part agrees to undertake to procure parties who will sell rolling stock for said road, to be delivered as soon as said road is ready for same, of a quality and at a fair market value satisfactory to said Wooley. (5) The said Wooley agrees that he will execute a first mortgage on said road, ties, iron, rolling stock, and franchise to secure payment of the purchase money for said rolling stock; also to include in said mortgage all his right, title, and interest in all lands adjacent to said road, which land is estimated at 4,000 acres, more or less; said purchase money to be paid in equal annual payments, with interest at ——— per cent. per annum. (6) The said Wooley is to receive for his interest in said railroad the sum of $20,000 of preferred stock (if the same can be lawfully issued) with six per cent. annual dividends guarantied; or, if said preferred stock cannot be lawfully issued, then $20,000 bonds. The remainder of stock issued shall be equally divided between said Wooley and said Newton, and the stock so issued to said Newton shall be in lieu of all compensation for all services which said Newton may have performed. Preferred stock shall not vote. (7) The said milling corporation shall guaranty the interest on the purchase money for a period of not exceeding five years. Chas. M. Newton.

"J. N. Wooley.

"This 16th day of October, 1897, at Little Rock, Ark."

The bill alleges the execution of the contract, and that on February 2, 1898, the defendant Wooley organized the railroad corporation, issuing $26,900 of capital stock, of which defendant received $23,000 and $3,900 was issued to other incorporators, complainant not receiving any of the stock; that complainant made the financial arrangements contemplated by the contract, and has at all times been able and willing to comply with all the stipulations of the contract binding upon him, but that defendant has wholly failed and refused to comply with his part thereof, or to issue to complainant any of the stock in the railroad corporation to which he is entitled. It is further charged that the stock of the corporation is not for sale upon the market; that it is not salable in the market, and its value is entirely prospective, depending upon the future development of the country through which it runs for its value, and it will soon be of great value. The prayer of the bill is that the defendant Wooley be required to assign enough of his stock to make complainant the owner of half the capital stock of the railroad corporation. The answer ad-

mits the execution of the contract, but charges that it does not contain all the terms of the agreement, which were that, in addition to complainant procuring parties who will sell rolling stock for said road on credit, he was also to procure parties who would sell the rails, bolts, and spikes on credit at the fair market value, or that complainant would furnish the funds necessary to procure the same, but which provision was omitted from the contract by mistake of the scrivener who prepared the contract, and was not noticed by either of the parties until a short time before the institution of this action; that complainant was unable to secure the iron for the road, and went out of the enterprise.

The evidence shows that the defendant Wooley was the owner of a sawmill at Wooley No. 2, in Lonoke county, Ark., and of a railroad from the sawmill extending about seven miles towards the town of Lonoke, which was used as a log road; and he desired to extend the road to Lonoke, where it would connect with a trunk line. He had the right of way and the means necessary to grade the roadbed and procure the ties, but he had not the means to purchase the rails, iron, and rolling stock necessary to complete the road. The rails and iron not being purchasable on credit, he entered into negotiations with complainant, who was a broker in the city of Little Rock, to secure them for him on credit, or else obtain a loan of the money to purchase the same, which would require about $11,000; the rolling stock, which would cost about $3,000, being easily obtainable on credit. The complainant immediately entered into extensive correspondence with dealers in these materials, attempting to get the rails and rolling stock on credit. The negotiations between complainant and Wooley had been verbal until the 16th day of October, 1897, when they called on defendant's solicitors, and had them prepare the contract. Mr. Blackwood, the attorney of the defendant, dictated it to his stenographer, who afterwards transcribed it, and then the contracting parties called for it on the same day, and the clerk handed it to them, Mr. Blackwood, the attorney, being absent, and not having read it. It was signed by the parties, who supposed it stated the agreement entered into between them correctly. Complainant continued to make efforts to secure the iron and rolling stock on credit, but failed to find any person willing to sell the rails and iron on credit, or furnish the money necessary to purchase them, but succeeded in obtaining an offer to sell the rolling stock on credit. In all of his correspondence, before as well as after the execution of the written contract, complainant negotiated for the rails as well as the rolling stock. Complainant positively insists that the written contract expresses the exact terms of their agreement, while defendant Wooley is equally positive that it does not, and that it should have included an obligation on the part of complainant to procure the rails as well as rolling stock. From a careful review of the evidence and the actions of the parties immediately before and after the execution of the contract, the court finds that issue in favor of the defendant, and that the verbal agreement of the parties included the rails and iron, and was omitted from the written contract by mistake. The corporation to construct and operate the railroad was formed by the defendant and certain other parties under the laws of the state of Arkansas, and complainant was to be one of the incorporators, and each was to be the owner of one-half of the common stock. Merchants at Lonoke, who were anxious to see the road built, also became subscribers for some of the stock, expecting to pay their subscriptions; and also that complainant would pay his subscription in cash at the face value of the stock. Complainant failing to secure the iron, the Lonoke stockholders asked him about paying for the stock, and upon his refusal to talk about the matter to them they declined to remain in the proposed corporation, which had not yet been incorporated, unless complainant would either pay his subscription in money or withdraw; whereupon complainant withdrew from the corporation, and thereupon it was incorporated under the laws of the state, he not appearing as one of the incorporators or stockholders in the articles of incorporation as filed in the office of the secretary of state. The other incorporators paid their subscriptions in money, defendant Wooley receiving for his road $23,000 in stock, and also advancing of his own money $9,012.62, the other subscribers advancing $5,780.12 in money and materials in addition to the amounts paid by them for their stock; and with this money the rails and iron

were bought and the road built. No preferred stock or bonds were ever issued by the corporation or Wooley for his road, but only the common stock. Mortgages were executed by the railroad company for the money loaned and materials furnished by the parties, which are the only liens now on the road.

Rose, Hemingway & Rose, for complainant.
Blackwood & Williams and J. W. House, for defendants.

TRIEBER, District Judge (after stating the facts). It is insisted that a court of equity has no jurisdiction to decree the specific performance of a contract for the sale or delivery of corporate stocks, but that the remedy is exclusively at law in an action for damages sustained by reason of the breach of the contract. While it is true that, as a rule, the remedy for failure to deliver stock is at law for damages, there are exceptions to this rule. One of the exceptions is where the value of the stock is not easily ascertainable, or the stock is not obtainable on the market at all. In such case a court of equity may decree specific performance. 1 Cook, Stock, Stockh. & Corp. Law, 338, where the authorities are collected. In the case at bar it is alleged and proven that the stock is not in the market, and that in fact it is nearly all owned by defendant, so that complainant cannot obtain it in any other way than from the defendant. For these reasons this plea cannot be sustained.

The important question to be determined is, "Shall a court of equity decree a specific performance upon the facts of this case?" Specific performance is not of absolute right, but rests entirely in judicial discretion, to be exercised according to settled principles of equity, but always in reference to the facts of the case. Mr. Pomeroy, in his work on Equity Jurisprudence, says (section 400):

"A contract may be perfectly valid and binding at law; it may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate; but if the plaintiff's conduct in obtaining it, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy of a specific performance, and will leave him to his legal remedy by action for damages. It is sometimes said that the remedy of specific performance rests with the discretion of the court, but, rightly viewed, this discretion consists mainly in applying to the plaintiff the principle, 'He who comes into a court of equity must come with clean hands,' although the remedy, under certain circumstances, is regulated by the principle, 'He who seeks equity must do equity.' The doctrine, thus applied, means that the party asking the aid of the court must stand in conscientious relations towards his adversary; that the transaction from which his claim arises must be fair and just, and that the relief itself must not be harsh and oppressive upon the defendant. By virtue of this principle, a specific performance will always be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, by taking undue advantage of his position, or by any other means which are unconscientious; and when the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and when the specific enforcement would be oppressive upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice. This application of the principle, better, perhaps, than any other, illustrates its full meaning and effect, for it is assumed that the contract is not illegal, that no defense could be set up against it at law, and even that it possesses no features or incidents which could authorize a court of equity to set it aside and cancel it. Specific performance is refused simply because the plaintiff does not come into the court with clean hands."

In Story's Equity Jurisprudence the law is stated as follows:

"In truth, the exercise of this whole branch of equity jurisprudence respecting the rescission and specific performance of contracts is not a matter of right in either party, but it is a matter of discretion in the court; not, indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself, as far as it may, by general rules and principles, but at the same time which withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. On this account it is not possible to lay down any rules and principles which are of absolute obligation and authority in all cases, and therefore it would be a waste of time to attempt to limit the principles or the exceptions which the complicated transactions of the parties and the ever changing habits of society may at different times and under different circumstances require the court to recognize or consider. The most that can be done is to bring under review some of the leading principles and exceptions which the past times have furnished, as guides to direct and aid our future inquiries." Section 742.

In Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501, Mr. Justice Field, speaking for the court, after carefully reviewing the authorities, says:

"The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general, it may be said that the specific relief will be granted when it is apparent from a view of all the circumstances of the particular case that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice; for, if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accomplished with conditions which will obviate that result." 8 Wall. 567, 19 L. Ed. 504.

See, also, Marble Co. v. Ripley, 10 Wall. 339-363, 19 L. Ed. 955; Nickerson v. Nickerson, 127 U. S. 668-675, 8 Sup. Ct. 1355, 32 L. Ed. 314; Hennessey v. Woolworth, 128 U. S. 438-442, 9 Sup. Ct. 109, 32 L. Ed. 509; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655, 34 L. Ed. 200; Manufacturing Co. v. Gormully, 144 U. S. 224, 12 Sup. Ct. 632, 36 L. Ed. 414.

In the last-cited case, Mr. Justice Brown, in delivering the opinion of the court, says:

"Whether this contract be absolutely void as contravening public policy or not, we are clearly of the opinion that it does not belong to that class of contracts the specific performance of which a court of equity can be called upon to enforce. To stay the arm of a court of equity from enforcing a contract it is by no means necessary to prove that it is invalid. From time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive, or iniquitous contracts; and to turn the party claiming the benefit of such contracts over to a court of law. This distinction was recognized by this court in Cathcart v. Robinson, 5 Pet. 264, 276, 8 L. Ed. 124, wherein Chief Justice Marshall says: 'The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract and that which will induce a court to withhold its aid is well settled. 10 Ves. 292; 2 Cox, Ch. 77. It is said that the plaintiff must come into court

with clean hands, and that a defendant may resist a bill for specific performance by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscionable or unreasonable, or that there has been a concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid.'" 144 U. S. 236, 12 Sup. Ct. 637, 36 L. Ed. 419.

In the case at bar it was clearly the intention of the parties to require complainant to find a party willing to sell on a credit not only the rolling stock, which the evidence shows would not exceed in value $3,000, but the rails, spikes, and other iron necessary to build the road; and that the omission of this part of the agreement was an oversight on the part of the party who prepared or dictated the contract. It is unreasonable to suppose that any business man such as the defendant is shown to be by complainant would enter into such a contract unless he was of the opinion that it included the iron. The efforts made by complainant immediately before and after the execution of the contract to secure the iron show that he considered that a part of his obligation. As was said by Judge Caldwell in delivering the opinion of the United States circuit court of appeals for this circuit in Chicago G. W. Ry. Co. v. Northern Pac. Ry. Co., 42 C. C. A. 25, 101 Fed. 792, "It is a canon in the interpretation of contracts that the practice of the parties under them may furnish a solid basis on which their construction may rest." 42 C. C. A. 28, 101 Fed. 795. While in an action on a contract parol evidence might be inadmissible, in the absence of fraud, to show the intention of the parties to have been different from what is expressed in the contract, the authorities above cited are conclusive that in an action for specific performance such proof may be considered by the court. The contract itself, if prepared as intended, is unfair, one-sided, and unconscionable, and for this reason a court of equity should hesitate to compel a specific performance. To grant the relief prayed for in the bill would certainly work an unreasonable hardship on the defendant. The property has been conveyed by defendant to a corporation. He has received no preferred stock nor bonds for the $20,000, which, under his contract, was to be superior to the common stock, but received only common stock at par for the real value of the property. Other parties have subscribed for some of the stock, and paid money for it, and that money was used to pay for some of the iron. If defendant is required to perform the contract, he must not only transfer to the complainant one-half of his own stock free from the $20,000 preferential stock or bonds which he was to receive, but he must also give him half of the stock subscribed and paid for by the other stockholders. Complainant would thus receive $13,450 of defendant's stock, free from the $20,000 preferential lien, and free from the lien which would have been given to the parties who furnished the material which was bought with the $3,900, money paid in by the other stockholders; while defendant would only receive for his property, which seems to have been valued by the parties at $20,000, $9,550 in common stock,—a little over two-thirds of what complainant would receive for procuring a party who was willing to sell $3,000 worth of rolling stock on good security to be given by the corpora-

tion, which was to pay for the same when it matured. The court has no power in this action to compel the corporation to execute to the defendant Wooley preferred stock or bonds for the $20,000 specified in the contract, as the other stockholders of the corporation have vested interests in it which cannot be disturbed. These stockholders, the evidence shows, objected to any stock being issued to complainant unless he would pay therefor in money, as they expected and intended to do. Complainant, whose name appeared as a subscriber and one of the original incorporators, when advised of this, withdrew his subscription; and in consideration of his withdrawal the other stockholders remained in the corporation, and paid their stock subscriptions in money. While it is true that, as a rule, where the hardship has been brought upon a party by his own actions, such hardship is not a good defense to an action for specific performance if it is instituted by an innocent party, even this rule is subject to qualifications. The thing contracted to be done must be "reasonably possible" (Fry, Spec. Perf. § 258; Pom. Cont. § 187), and "not oppressive on the defendant" (Adams, Eq. pp. 183, 253; Shields v. Trammell, 19 Ark. 51). In the opinion of the court, owing to the conditions existing now, it is not "reasonably possible" to carry out this contract and enforce it specifically without being very oppressive on the defendant. A decree as asked by complainant would work a great hardship, and be very oppressive on the defendant, and for this reason complainant must be remitted to an action at law to recover the damages sustained by him by reason of defendant's breach of contract. As defendant Wooley was guilty of gross negligence when he signed the contract, and somewhat at fault, he should be taxed with all the costs of this proceeding. Let there be a decree dismissing the bill and taxing defendant Wooley with all the costs of this action.

## MIDDLETOWN NAT. BANK OF MIDDLETOWN v. TOLEDO, A. A. & N. M. R. CO. et al.

(Circuit Court, S. D. New York. November 27, 1900.)

JUDGES—INTEREST IN SIMILAR QUESTIONS—EXTENT OF DISQUALIFICATION.

The fact that a judge declines to pass upon the questions of law raised by a demurrer, because of his personal interest in a possible controversy which may involve the same questions in a different suit, does not affect his right or duty to hear other questions in the case, or to dispose of the question of costs, or other matters arising in interlocutory proceedings.

In Equity.

On demurrer to the bill the following order was entered:

The demurrers of the defendants to the bill of the complainant herein having come up for argument before me, and an order having been entered, dated September 28, 1900, directing the argument of said demurrers to be heard before some other judge, and granting leave to file an amended bill upon certain terms therein stated:

Now, upon motion of the defendants, it is ordered that the said order dated September 28, 1900, be, and the same hereby is, resettled so as to read as follows:

"It is ordered that all proceedings had before me in the above-entitled action be, and the same hereby are, vacated; and it is

"Further ordered that the complainant, if so advised, have leave to file an amended bill within thirty days, upon payment of costs and disbursements to

the defendants, but not including a docket fee, to be taxed by the clerk; and a copy of such amended bill is to be furnished to the solicitors for the defendants by the complainant."

Dated November 26, 1900.

Schuyler C. Carlton, for complainant.

Arthur F. Cosby, Lucius H. Beers, and Charles N. Judson, for defendants.

WALLACE, Circuit Judge. The order of September 28th was granted by me as embodying my views expressed to counsel when they were present before me July 24th. These were, in brief, that the argument upon the demurrers should be treated as though it had never taken place, and the complainant, if so advised, should be permitted to amend its bill as authorized by equity rules Nos. 29 and 35. Demurrers having been interposed, and disbursements incurred for printing points and otherwise, the terms to be imposed, the taxable costs up to the time of the argument, should cover these disbursements. As the argument is to be treated as though it had never been had, the docket fee taxable upon a hearing should not be allowed. The order was framed for the purpose of imposing these terms only. The circumstance that I am unwilling, because of my personal interest in a possible controversy in which similar questions may arise, to decide the law questions presented by the demurrers in the cause, does not in the least affect my duty to hear any other questions or dispose of any interlocutory proceeding, and should not trammel my judicial action. It is possible that the order, as read, may be capable of misconstruction; and I have therefore made a new order, which I trust will remove any ambiguity.

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## COMMONWEALTH TITLE INS. & TRUST CO. v. BELL, Clerk.

(Circuit Court, E. D. Pennsylvania. January 3, 1901.)

RECORDS OF FEDERAL COURTS—JUDGMENT INDICES—RIGHT OF EXAMINATION.

A corporation engaged in the business of insuring titles is entitled to permission to inspect the judgment indices kept by a clerk of a circuit court of the United States, in relation to transactions which are at the time depending, under proper regulations and restrictions.

J. B. McPherson, District Judge, dissenting.

See (C. C.) 87 Fed. 19.

John G. Johnson, for complainant.

Wm. M. Stewart, Jr., and James B. Holland, for respondent.

DALLAS, Circuit Judge. A decree may be prepared and submitted ordering the defendant to permit properly authorized representatives of the plaintiff to inspect and examine the judgment indices and cross indices kept by the defendant as clerk of this court, in such way and manner as will enable the plaintiff to prosecute its business as an insurer of titles, but subject to the following restrictions, to wit: (1) The inspection and examination must in each instance relate and be confined to a transaction or transactions which at the time being

shall be current or depending; (2) they shall be made only at such times and under such circumstances as will not interfere with the clerk or his assistants in the discharge of their duties, or with the exercise of the right of any other person or persons to have access to said indices and cross indices.

J. B. McPHERSON, District Judge, dissents.

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In re BUTLER'S ESTATE.

(Circuit Court of Appeals, Second Circuit. January 4, 1901.)

No. 46.

JUDGMENTS—EQUITABLE LIEN.

Where a contractor had erected a building for which plaintiffs had furnished certain labor and materials, a promise by the contractor that he would file a lien for the entire sum, and from the proceeds of any judgment thereon would pay plaintiff his claim, did not create an equitable lien in plaintiff's favor on a judgment on the mechanic's lien.

Appeal from the District Court of the United States for the Eastern District of New York.

George M. Pinney, Jr., and Aaron C. Thayer, for appellants.

Thomas S. Corey, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This appeal is from an order of the district court for the Eastern district of New York which denied the petition of the four appellants that they should be allowed an equitable lien upon a judgment upon a mechanic's lien which was recovered by the bankrupts in the supreme court of the state of New York. In April, 1899, the bankrupts, under the firm name of Butler Bros., had partially completed for one Hartung a building for a hotel upon land on Staten Island, in the construction of which the four appellants had furnished labor and materials to and for the bankrupts. The alleged foundation upon which the equitable lien of the appellants rests is that, more than four months prior to the date of the petition in bankruptcy, Butler Bros. and the four appellants separately made a verbal agreement that Butler Bros. should file one lien for their own debt, which should include the amounts due from them to these subcontractors; that this lien should be for their benefit; that the promisors would protect their interests; and that out of the proceeds of any judgment the four appellants were to be paid. The district judge found that "the conversations of the several petitioners with a member of the firm of Butler Bros. neither created a lien in favor of any petitioner, nor transferred any interest enforceable against the general creditors in bankruptcy." We agree with the finding of the district judge. The conversations which the several petitioners narrate do not establish an agreement for a lien upon the judgment, but amount merely to a promise that Butler Bros. would pay the subcontractors from the money to be received upon the judgment. For

example, the treasurer of the Tottenville Lumber Company testifies, in regard to the supposed contract, that in his conversation with Israel Butler the latter said "they would make an effort to get this money for all parties interested; that they would put on a lien to cover the amount, and when they win the case and get the money, he says, you will get your share." The other appellants and Israel Butler, when they use their own language and are not replying to leading questions, have the same vagueness as to the terms of the undertaking or agreement. It was, at most, a promise to pay the four appellants from the proceeds of the judgment their debts against Butler Bros. for work and materials which had been placed upon the hotel. This agreement created no lien upon the fund. Williams v. Ingersoll, 89 N. Y. 508; Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762. The order of the district court is affirmed, with costs.

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## ATLANTA, K. & N. RY. CO. v. HOOPER.

(Circuit Court of Appeals, Sixth Circuit. December 10, 1900.)

No. 823.

APPEAL—REVERSAL—MANDATE—VOLUNTARY NONSUIT.

A mandate which, after ordering a reversal, contains a direction "to grant a new trial, to sustain the plea of * * * limitations, * * * and to enter judgment for the defendant," does not make a new trial compulsory, but merely allows plaintiff one if he desires it, the further directions as to the plea and entry of judgment to govern only in case he elects to take a new trial; so that after the trial court, on reception of the mandate, has entered an order setting aside the judgment theretofore entered and granting a new trial, plaintiff may take a voluntary nonsuit.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Alexander Smith, for plaintiff in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. This is a suit brought under a statute of Tennessee to recover for the wrongful death of the intestate occasioned by the negligence of the railroad company. The case was before us on a previous occasion, and the facts and the decision of this court are reported in 92 Fed. 820, 35 C. C. A. 24. It was then held, reversing the judgment of the circuit court, that the amendment of the declaration by substituting the father in place of the mother, as the party for whose benefit the suit was brought, so changed the nature of the action as to be equivalent to the bringing of a new suit, and that the question whether the suit was barred by the statute of limitations must be tested by reference to the time when the amendment was made; and, further, that, it appearing that the time prescribed for bringing the suit had elapsed prior to the amendment, the plea of the statute should have prevailed. The mandate sent to the court below, after ordering a reversal, contained a direction "to grant a new trial, to sustain the plea of the statute

of limitations to the declaration as amended, and to enter judgment for the defendant." On the reception of the mandate, the circuit court, on the 2d day of May, 1899, entered an order setting aside the judgment theretofore entered, and granting a new trial, but at that time made no further order in execution of the mandate. On the 10th of October following the plaintiff entered a voluntary nonsuit; whereupon the court, against the objection of the defendant, ordered that the suit be dismissed without prejudice, and that the costs in the case be taxed against the plaintiff and his sureties. To this order the defendant excepted, and the case is brought here on another writ of error.

The contention for the plaintiff in error is that the circuit court should have ordered that the defendant's plea of the statute of limitations be sustained, and entered judgment for the defendant in strict conformity with the directions of the mandate. The ground of complaint is that, whereas the judgment directed by the court would have terminated litigation by settling the rights of the parties, the judgment actually entered leaves the plaintiff at liberty to prosecute a new action for the same cause.

But we think the course taken by the circuit court was entirely proper. The directions of the mandate, when rightly construed, intended to award the privilege to the plaintiff of having a new trial, if he should desire it, and did not make it compulsory. If the plaintiff should elect to take a new trial, then the further directions of the mandate would govern the court in its further proceedings thereon. Such provisional directions are not unusual in appellate courts, the object being to guide the court below in such further proceedings as may be taken, and not to subvert the normal course of procedure. Under the statute of Tennessee (Code, § 4246), "the plaintiff may, at any time before the jury retires, take a nonsuit or dismiss his action as to any one or more defendants; but if the defendant has pleaded a set-off or counterclaim, he may elect to proceed on such counterclaim in the capacity of a plaintiff." And, at the common law, the plaintiff may take a nonsuit before the trial begins, and in some jurisdictions at any time before verdict, and the right is the same, whether upon the first trial, or upon a new trial after judgment has been set aside and "held for naught," and such new trial ordered. 6 Enc. Pl. & Prac. 836, 838, 839, and cases cited.

In the case of Gardner v. Railroad Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107, the plaintiff had brought suit in the state court for a personal injury, and had recovered judgment. The defendant removed the case to the supreme court, and that court, upon consideration of the evidence, held that the plaintiff had not made out a cause of action, and for that reason the judgment of the lower court was reversed, and a new trial granted. After the case had been remanded, the court below entered an order setting aside its former judgment, and ordering a new trial. Thereupon the plaintiff voluntarily submitted to a nonsuit, and judgment was entered accordingly.

The plaintiff having commenced a new suit in the federal court, one of the questions was whether he was barred by the determination of the facts and the judgment of the state supreme court in the

former action. After judgment, the case went to the supreme court of the United States, where it was held that, by the reversal of the judgment of the lower court by the state supreme court, the matter was set at large, and that, although the lower court had actually ordered a new trial as directed by the supreme court, the plaintiff was at liberty to disclaim the right to pursue it and to become nonsuit, and thereupon to commence a new suit in any court having jurisdiction. In the present case this court did not assume the power of arbitrarily compelling the plaintiff to go on with his suit after his judgment had been reversed, but simply directed what judgment should be entered in case he elected to go on to a final determination in the court below. This is the reasonable construction of the mandate. The judgment of the circuit court is affirmed, with costs.

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## CLARK v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, S. D. New York. November 19, 1900.)

REFERENCE—STIPULATION FOR COSTS—MANDATE OF SUPREME COURT.

Provisions of a mandate from the supreme court, in relation to the costs of a case, do not affect the right of a party to tax costs made on a reference, in accordance with a stipulation entered into between the parties before the hearing.

On Objections to Taxation of Costs.

See 20 Sup. Ct. 924; 25 C. C. A. 120, 92 Fed. 968.

Kellogg, Ross & Smith, for plaintiff.

Peckham, Miller & King, for defendant.

LACOMBE, Circuit Judge. The mandate of the supreme court certainly has not eliminated the stipulation under which the parties began their hearings before the referee. Either party was at liberty to insist upon the case being retained on the calendar and tried without the expense necessary to a trial by referee. Assenting to such a disposition of it, both sides were free to make such arrangement as they saw fit as to how such expense should be provided for. They stipulated "that there shall be charged and taxed in favor of the prevailing party such reasonable referee's fees as the referee may decide to charge"; also that "the stenographer's fees shall be paid, half by each party, and that the successful party shall tax its half as costs." There can be no possible doubt that, had the referee found in favor of the plaintiff the same amount as the supreme court has, he would have been entitled, under this stipulation, to tax the referee's and the half stenographer's fees. As to the other items in the bill, possibly this court will be conforming to what the supreme court wants to have done, if the plaintiff be allowed to tax one-sixth only. It is so ordered.

## INTERNATIONAL CONTRACTING CO. v. McNICHOL.

(Circuit Court, E. D. Pennsylvania. January 3, 1901.)

No. 112.

1. PLEADING—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

Act Pa. July 15, 1897, entitles a plaintiff to judgment on any portion of a claim as to which the affidavit of defense may be insufficient. Plaintiff sued for breach of a contract under which defendant agreed to receive plaintiff's deliveries of gravel at the average rate of 1,000 cubic yards a day, in that he failed to take the full amount. *Held* that, where the affidavit of defense failed to negative any allegations of the complaint, but only contended for a different measure of damages from that claimed, plaintiff was entitled to judgment on the pleadings for the amount recoverable under the proper measure of damages.

2. BREACH OF CONTRACT—MEASURE OF DAMAGES.

In an action for breach of a contract under which defendant agreed to take plaintiff's deliveries of gravel at the average rate of 1,000 cubic yards a day, the measure of damages for defendant's failure to take the full amount is the costs and expense suffered by plaintiff by reason of such failure, with interest from the date when the contract terminated.

J. R. Paul, for plaintiff.

J. G. Johnson, for defendant.

DALLAS, Circuit Judge. This is a motion for judgment to the extent to which the plaintiff avers that the affidavit of defense is insufficient in law. Act Pa. July 15, 1897. In so far as it is necessary now to state it, the contract sued upon provided for the delivery by the plaintiff, and acceptance by the defendant, of a considerable quantity of gravel, at an average rate of about 1,000 cubic yards per day. The plaintiff's statement alleges that it was prepared and ready and willing to deliver at the rate agreed upon as above stated, and that the defendant refused to receive at that rate, "but, on the contrary, did and would receive much less than 1,000 cubic yards per day, and during 117 days, during which the plaintiffs were engaged in delivering material under the said agreement, did and would receive only 83,016 cubic yards of material, instead of 117,000 yards thereof, as required by said contract." The pertinent part of the affidavit of defense is:

"I am further advised by counsel, and therefore aver, that, even if the plaintiff is entitled to damages by reason of my failure to receive the gravel at the rate of 1,000 cubic yards a day, it is only entitled to recover the additional costs and expenses which it suffered by reason of my failure to take the full amount stipulated in the contract per day. and not to recover at the rate set out in its statement of claim."

I am of opinion that the plaintiff is now entitled to judgment for that part of its claim to which the foregoing extracts relate, but that the measure of damages which is contended for by its learned counsel cannot be applied by this court in this case. The claim that the earning capacity of the vessels engaged in the service of delivering the gravel should determine the amount of the judgment to which the plaintiff is entitled is therefore overruled, and the measure suggested in the affidavit of defense is adopted, namely, the costs and expense suffered by the plaintiff by reason of the defendant's failure to take

the full amount stipulated in the contract per day. Accordingly, judgment may now be entered for the plaintiff for $4,103.12, that sum being alleged in the statement, and not denied in the affidavit, to be the amount of the actual expenses incurred by the plaintiff in consequence of the particular breach to which the present motion is directed.

(February 7, 1901.)

When this case was before the court on a rule for judgment for want of a sufficient affidavit of defense, the question of interest was not discussed at bar, and was therefore left undecided. The respective counsel have, however, since submitted their views upon the subject, and the point upon which they differ must now be determined. For the plaintiff it is contended that interest from the date of the termination of the contract in question should be allowed as a legal incident of its right to damages. The defendant, on the other hand, insists that interest should be awarded only from the time when demand was made for the correct principal sum, which, as he suggests, was not until the amended statement of claim was filed. In my opinion, the position of the plaintiff is the only tenable one. The right to compensation for the breach of a contract accrues when it is broken, and, if not then made, the delay must be paid for in interest. This is the ordinary rule, and the adjudications which seem to indicate that interest runs only from the time of demand rest, I think, upon the assumption that, in the cases in which they were made, the demand and refusal of payment fixed the time of default. An assessment in accordance with this opinion may be prepared, and, if agreed to, may be filed; otherwise, it can be presented to the court for settlement.

## TULLIS v. LAKE ERIE & W. R. CO.

(Circuit Court of Appeals, Seventh Circuit. January 15, 1901.)

No. 455.

1. BILL OF EXCEPTIONS—TIME FOR SETTLING—PENDENCY OF MOTION FOR NEW TRIAL.

When, by reason of a motion for a new trial or rehearing, or to set aside the judgment, entered at the term when the judgment was rendered, the power of the court over the judgment is retained, a bill of exceptions may be settled, or time given for preparing it when the motion is overruled, whether at the same or a later term.

2. NEW TRIAL—PROCEDURE IN FEDERAL COURTS—STATE PRACTICE.

Rev. St. § 914, does not require conformity to the state practice by the federal courts in respect to motions for new trial or bills of exceptions, and, where a motion for new trial was filed and disposed of in accordance with a rule of court, it is immaterial that the requirements of the state practice were not observed.[1]

3. MASTER AND SERVANT — RULES OF RAILROAD COMPANY — EVIDENCE OF WAIVER.

A railroad company may waive any of its rules governing employés, and where, in an action by an employé for a personal injury, it invokes such a rule, and its nonobservance by the plaintiff, as a defense, evidence is

[1] Conformity to practice in state courts, see notes to O'Connell v. Reed, 5 C. C. A. 594, and Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.

competent to show that the rule was never observed by employés, nor insisted on by their superiors, and the question of waiver is one for the jury.

4. SAME—ACTION FOR INJURY OF SERVANT—EVIDENCE.

In an action by a brakeman against a railroad company to recover for a personal injury, where it is shown as a defense that at the time of the injury plaintiff was not in the place required by a rule of the company, testimony of the division superintendent that he would discharge any employé who persistently violated such rule to his knowledge is not a statement of fact, and is incompetent to disprove a waiver of the rule by the company.

5. SAME—VIOLATION OF RULES BY SERVANT.

Where the rules of a railroad company provided that brakemen should be under the direction of the conductor at all times when on duty, and should remain at their post of duty at all times unless excused by the conductor, and further provided that conductors on freight trains should require their brakemen to be on top of the cars when ascending or descending grades, it cannot be held as a matter of law that a brakeman violated his duty by being in the caboose, with the knowledge and acquiescence of the conductor, when the train was starting up a grade.

6. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff, who was rear brakeman on a freight train, was in the cupola of the caboose when an engine which was to assist in pushing the train up a grade was negligently run against the caboose with such violence as to derail it, by which plaintiff was thrown to the ground and injured. *Held* that, conceding that plaintiff's duty required him to be on top of the cars, his remaining in the caboose was not negligence which contributed to his injury in a legal sense, but was a mere condition of the injury, since the rule requiring him to be outside was not made for his protection, and, under any ordinary circumstances, he would be safer inside the caboose than on top of the train.

In Error to the Circuit Court of the United States for the District of Indiana.

The plaintiff in error, Hosea B. Tullis, employed as a rear brakeman upon a freight train of the Lake Erie & Western Railroad Company, going eastward on the night of February 10, 1895, was injured by the negligent management of a locomotive which was following the train for the purpose of pushing it over a steep grade up which it had started or was just about to start. The pusher ran against the caboose of the train with such violence as to throw it from the track. The plaintiff, who was at the time in the cupola on the caboose, observing that a collision was imminent, endeavored to escape through a side window, but was thrown by the violence of the shock upon the frozen ground, and seriously injured. The engineer whose negligence is alleged to have caused the injury being a fellow servant, it was only by virtue of the act of the Indiana legislature approved March 4, 1893 (Sess. Laws 1893, p. 294), that the action could be maintained. The constitutionality of that act was denied in this case, but, upon certification of the question by this court to the supreme court, has been established by the decision of that court. Tullis v. Railroad Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192. It now remains, therefore, to consider whether in the proceedings at the trial there intervened error for which the judgment should be reversed. The errors alleged and insisted upon relate to the exclusion and admission of evidence, and to the refusal of requests for instruction.

The following rules of the company, under the titles quoted, were read in evidence:

"Conductors Have Control of Their Men."

"(90) Conductors have full control of all men placed under their direction, and will be held strictly responsible, with the men, for any violation of the rules and regulations, or the want of judgment and action in emergencies. They must know that their men are at all times at their posts of duty. One man must invariably be kept on the rear car of every train while in motion,

and on freight trains one man must be kept on the forward end or on the engine in bad weather. They must have in their possession at all times the proper danger signals, ready for use in an emergency. Passenger brakemen must take their position near the door, never using a seat when in use or needed by passengers, and must refrain from any discussions or arguments with the passengers."

"Freight Men on Top of Trains."

"(93) Freight conductors are expected to ride on top of the train as much as possible, where they can apply the brake if necessary, and see that their brakemen do their duty. They must require all the brakemen to be on top of the train at least one-half mile before arriving at and while passing all stations and stopping places, descending or ascending grades, or at any point or time when extra precaution is necessary to ensure safety."

"For Brakemen—Brakemen Study Time Table."

"(128) Brakemen are under the direction of the conductor at all times when on duty with their trains. They are expected to study and become familiar with the time table and the rules and regulations of the service."

"(132) They must remain at all times at their post of duty, unless excused by the conductor, or another brakeman must perform his duties."

Addison C. Harris, for plaintiff in error.

W. H. H. Miller and John B. Cockrum, for defendant in error.

Before WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The specifications of error relied upon all depend upon the bill of exceptions, and, it is insisted, cannot be considered because the bill was not signed, nor time for the preparation and filing thereof extended, during the term at which the trial was had and judgment entered. It appears, however, that a motion for a new trial, and briefs in support of it, were filed a few days before the close of the term. According to the docket entry, this was done in open court before the judge who presided at the trial; but it is stated in the bill of exceptions that the motion and brief were filed in the clerk's office, and were not brought to the attention of the judge until an early day in the next term of the court. The briefs were filed in conformity to the rule of court adopted on September 27, 1892, to the effect that all motions, demurrers, or exceptions thereafter filed should be supported by briefs filed therewith in duplicate, of which the clerk should forthwith notify the adverse party, to whom fifteen days should be allowed for filing answering briefs, and that, if oral argument should be desired by either party, it should be asked at the time of filing briefs. Within the time allowed by the rule, but at the ensuing term of the court, the attorneys for the defendant in error filed in the clerk's office their answering brief on the motion for a new trial, and, neither party having asked an oral argument, the clerk carried the motion and briefs to the judge in chambers. A few days later the motion was overruled, exceptions allowed, and sixty days given the plaintiff in error in which to file a bill of exceptions, the judge stating at the time that, in his opinion, the exceptions and bill would be of no avail. The bill was prepared, signed, and filed within the time allowed, embracing amendments suggested by the attorneys for the defendant in error,

who, however, objected to the signing of the bill on the two grounds that the court was then without power to sign a bill, and that the time for taking a writ of error had passed. While it is well settled that a bill of exceptions can be signed only at the term of court at which the trial was had and judgment entered, or within an extension of time then granted (Brooder Co. v. Stahl, 42 C. C. A. 522, 102 Fed. 590), yet if by reason of a motion for a new trial or rehearing or to set aside the judgment, entered at the term, the power of the court over the judgment is retained, a bill of exceptions may be settled or time given for preparing it when the motion is overruled, whether at the same or a later term (Woods v. Linvall, 1 C. C. A. 34, 48 Fed. 73, 4 U. S. App. 45; Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251; Railroad Co. v. Murphy, 111 U. S. 488, 4 Sup. Ct. 497, 28 L. Ed. 492; Smelting Co. v. Billings, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986; Voorhees v. Manufacturing Co., 151 U. S. 135, 14 Sup. Ct. 295, 38 L. Ed. 101). "Until then the judgment or decree does not take final effect for the purpose of a writ of error" (Smelting Co. v. Billings); and until then there is no good reason for saying that the time for settling a bill of exceptions, the necessity for which could not be known sooner, had passed. This proposition is not affected by the fact that in the federal courts the ruling upon a motion for a new trial is discretionary, and not reviewable. It does result, however, from that fact that section 914 of the Revised Statutes of the United States does not require conformity to the state practice in respect to motions for new trial or bill of exceptions (In re Chateaugay Ore & Iron Co., 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508); and it is immaterial to inquire whether, under the practice in the state courts, the filing of the motion in the clerk's office without calling it to the attention of the court would have been of no effect. Whatever might otherwise have been the proper practice, the rule adopted by the lower court was intended to authorize the course pursued. The attorneys for the defendant in error filed their answering briefs without questioning that the motion had been regularly filed, and the court, without suggestion of a want of power, entertained the motion, and decided it on the merits.

Rule 93 having been read in evidence, the plaintiff in error offered to testify that during the two years of his employment as brakeman upon the road of the defendant it was not required of any brakeman by any superior officer at any time to be upon the top of cars at any time between stations when going up or down grade, and testimony to the same effect from two other witnesses was offered, but upon objection was ruled out, on the ground, stated at the time by the court, that, this plaintiff having admitted that he signed a contract in which he agreed that he would study and abide by the rules on the time card, that made "a contract between him and the defendant, and, although every other man on the railroad may have disregarded the rule, he was bound by his contract to observe it." This was erroneous. It was within the power of the company to waive any rule of its own adoption, whether the employés' duty to obey it arose from express contract, or by implication from the mere fact of employment and knowledge of the rule. The testimony offered tended to show such disregard of the rule by the brakemen and officers of the company as to

make the question of waiver one proper to be submitted to the jury. Railway Co. v. Baker, 63 U. S. App. 553, 33 C. C. A. 468, 91 Fed. 224.

The court, over objection, permitted the division superintendent of the defendant, in response to the question whether, if the practice of violating rule 93 were brought to his attention, he would permit it, to answer: "If a man persistently violated that rule, I would order his discharge, if I knew it." This was not a statement of fact pertinent to the issue, but rather a mere expression of opinion, which could be of no legitimate significance in the trial.

The important, and, indeed, the controlling, question in the case is that of contributory negligence. Error has not been assigned upon the charge given by the court to the jury, but three requests for special instructions, it is insisted, were improperly refused. We have not made such analysis of these requests as to be able to say that they should or should not have been given. The first and second conclude with a declaration that there had been no contributory negligence, when, perhaps, as in the third, the conclusion should have been left to the determination of the jury. Without passing definitely upon the point, we deem it proper, since the question must arise on another trial of the case, to say that we are unable to see just ground for attributing the injury suffered by the plaintiff in error to his own fault. If he was bound by the rules to be on top of the car, and outside of the cupola, which was above the roof of the car, it was not by any rule directly regulating his conduct, but by inference from the rules prescribing the duties of conductors. He was, by an explicit rule, "under the direction of the conductor at all times when on duty," upon a train. For brakemen this rule, for manifest reasons, had precedence of all others; and when, with the knowledge and acquiescence of the conductor, the plaintiff in error was in the cupola, just as his train approached or was starting up the grade, it is not to be said, as matter of law, that he was there in violation of duty. The conductor's authority to excuse him from remaining at the post of duty is expressly recognized in rule 132, and we cannot agree that nothing less than an express instruction or command of the conductor could justify his presence in the cupola. To say the most, it was a question for the jury. But even if he was wrongfully away from his post, how can it be said that he was thereby guilty of negligence contributing to the injury which he suffered? A collision, such as that which happened, was not likely to occur, and in respect to the dangers reasonably to be apprehended the cupola was a safer place than the top of the car. The requirement that brakemen should be on top of the cars was not for their own safety, but rather for the better discharge of their duties upon an emergency. If in Railroad Co. v. Mansberger, 12 C. C. A. 574, 65 Fed. 196, 24 U. S. App. 551, this court was right in saying that the position of the brakeman on a car, when by the rule then applicable he ought to have been on the ground, "was a mere condition of the injury," and "not the immediate cause of it, in a judicial sense," it is difficult to see how, in a more direct sense, the position of the plaintiff in error in this instance could have been the cause of the injury. For the errors pointed out the judgment is reversed, with direction to grant a new trial.

## O'SHEA v. NEW YORK, C. & ST. L. R. CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 653.

1. RELEASE—JOINT TORT FEASORS.
   The legal effect and operation of a release declaring that a person injured by the joint negligence of two railroad companies has received full settlement from one of them for all his injuries resulting from the accident in question is not affected by an expression therein excepting the other company.
2. EVIDENCE—CONTRADICTING WRITTEN INSTRUMENT—RELEASE.
   While one of two joint tort feasors can avail himself of a release of the other, and is therefore not a stranger to the release to that extent, he is a stranger to the instrument in the sense in which the term is used in the rule that in a suit between a party to a contract and a stranger thereto neither is concluded by the writing, but either may contradict it by parol evidence.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Action by John W. O'Shea against the New York, Chicago & St. Louis Railroad Company. A verdict was directed for defendant, and plaintiff brings error. Reversed.

The plaintiff in error, who was the plaintiff below, brought suit to recover for injuries received while in the service of the defendant, the New York, Chicago & St. Louis Railroad Company, owning and operating a railroad commonly known as the "Nickel Plate Railroad." At the time of the accident, December 29, 1894, the plaintiff was riding upon one of the engines of the Nickel Plate Company, which was being run over the tracks of the Chicago, Burlington & Quincy Railroad Company. The latter company had erected a tower post in close proximity to the track, and as the engine passed this post the plaintiff was struck thereby and injured. The immediate cause of the accident was the dangerous proximity of the post to the track, and the action proceeds upon the theory that, while the Chicago, Burlington & Quincy Railroad Company was primarily responsible, yet the defendant, the Nickel Plate Railroad Company, was also liable to him for the injury, in that it negligently allowed its engine to be operated upon tracks dangerous because of the proximity of the tower post. In addition to a plea of not guilty, the defendant filed a further plea that on the 23d of March, 1895, the plaintiff made claim against the Chicago, Burlington & Quincy Railroad Company for his injuries, sustained by the joint negligence of the defendant and the Chicago, Burlington & Quincy Railroad Company, that such claim was duly paid and satisfied by that company, and that the plaintiff executed and delivered to that company a release and satisfaction for the claim, which is set out in hæc verba in the plea and is herein set forth at large. At the trial the supposed satisfaction or release was offered in evidence. It was upon the ordinary blank used by that company, and the following is a facsimile of the original, the words erased being in print, and the words substituted and interlined being typewritten, the body of the document, stating the character of the claim and the amount received, being also typewritten:

"Form 1,646.

"The Chicago, Burlington & Quincy Railroad Company to J. W. O'Shea, Dr. 7429 Ellis Ave., Chicago, Ills.

"For amount agreed upon in full settlement of all claim, demands, or causes of action whatsoever which J. W. O'Shea may have or ever has had against the Chicago, Burlington & Quincy Railroad Company (but not the New York, Chicago & St. Louis Railroad Company) account of or growing out of an accident which occurred at or near Loomis St. crossing of said railroad company's tracks, Chicago, Ill., on or about December 29th, 1894, at which time,

while on duty as switchman on a N. Y., C. & St. L. train, said O'Shea was supposed to have been struck and injured by post of gate tower.

"In full settlement for any and all injuries resulting from said accident .................................................. $1,200 00

"Received of the Chicago, Burlington & Quincy Railroad Company twelve hundred and $^{00}/_{100}$ dollars, in full payment of the above account. In consideration of the payment of said sum of money, I, J. W. O'Shea, of Chicago, in the county of Cook and state of Illinois, hereby ~~remise, release, and forever discharge~~ covenant never to sue the said company ~~of and from all~~ for any manner of actions, causes of action, suits, debts, and sums of money, dues, claims, and demands whatsoever, in law or in equity, which I have, ever had, or now have, against said company, by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort.

"In witness whereof I have hereunto set my hand and seal this 23 day of March, 1895.

"[Signed] J. W. O'Shea. [L. S.]"

Under objection and exception, the court allowed parol evidence of the negotiations which led up to the written agreement and of the actual agreement said to have been made. The testimony of the plaintiff, of Mr. Connell, the attorney, and Mr. Delano, the superintendent of freight terminals, of the Chicago, Burlington & Quincy Railroad Company, is substantially concurrent to the following effect: That the plaintiff applied to Mr. Delano to know what damages the company would pay or what they were prepared to do for him. At first Mr. Delano sought to induce him to make a settlement with the company which employed him, but the plaintiff persisted in desiring to know what the Chicago, Burlington & Quincy Railroad Company would do for him, and he finally proposed that that company should pay him a sum of money, but that he would sign no release of any kind for it. After consultation with other officers of the company, Mr. Delano told him that the company would pay him $1,200. What followed is thus stated by Mr. Delano: "He said he wouldn't sign a receipt of any kind for that money which didn't leave him free to sue, I think was his expression, the Nickel Plate Company; and I told him that our counsel was willing to give him the money on that understanding, and the last conversation I had with him prior to the final making out of the papers was to make an appointment with him to meet him on a certain day, and go with him to our general counsel's office, and there the money would be paid to him; and that time I gave him a copy of the standard form on which receipts are taken for money paid in that way, so that he might understand the thing, and know what he would be expected to sign when he came to the final meeting. He brought the form which I had let him have, and had made changes on it. Those changes were accepted by our attorney." The plaintiff and Mr. Delano then repaired to the office of the general counsel of the company, where they met Mr. Dawes, the general counsel, and Mr. Connell, the attorney, where, the plaintiff objecting to a form of instrument presented, but which does not appear in evidence, the attorney of the company dictated the form in which the instrument now appears, and, upon its being written out and exhibited to the plaintiff, he said, "I am not going to sign that unless it is all right so that I have my right to recover in a suit against the Nickel Plate Company." This he repeated several times, and Mr. Delano, Mr. Dawes, and Mr. Connell all assured him that was understood, and that the paper would carry out his intentions, and his right to sue the Nickel Plate Company would be preserved, if he signed the document; that all the company wanted was an agreement not to sue the company, leaving the plaintiff whatever rights he might have against the Nickel Plate Company; that the $1,200 was to be paid for an agreement not to sue the Burlington Company; and thereupon the plaintiff read the whole of the paper, and signed and delivered it, and the money ($1,200) was paid. Upon the conclusion of the evidence the court directed a verdict for the defendant, which ruling, upon proper exception and assignment of errors, is here for review.

Frank Hamlin, for plaintiff in error.
William J. Calhoun, for defendant in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

It is well settled that one injured by the act of several joint tort feasors may sue one of them, or any number less than the whole of them, or all of them. It is also settled that as there is but one injury there can be but one satisfaction. If, therefore, the injured person receives satisfaction from one of the joint tort feasors, or executes a release, that satisfaction and release operate as a bar to an action against the others, because the cause of the action is satisfied, and no longer exists. With respect to a technical release under seal of one of several joint tort feasors, the law indulges the absolute presumption that the injured person has received full compensation, and is therefore barred of an action against the other wrongdoers. It must therefore be shown in such an action that the injured party has received such full compensation, or what he accepted as full compensation, or that he has released one of the wrongdoers by technical release under seal. The instrument here in question is one under seal, and it may not be denied that some of the language therein contained indicates a complete accord and satisfaction for the injuries received by the plaintiff in error, while, on the other hand, there are expressions contained in it which indicate to the contrary. The first part of the document is in the form of an account or bill against the Chicago, Burlington & Quincy Railroad Company for the sum of $1,200 "for amount agreed upon in full settlement of all claim, demand, or causes of action whatever which J. W. O'Shea may have or ever has had against the Chicago, Burlington & Quincy Railroad Company, * * * account of or growing out of an accident which occurred at or near Loomis St. crossing of said railroad company's tracks, Chicago, Ills., on or about December 29, 1894, at which time, while on duty as switchman on a N. Y., C. & St. L. train, said O'Shea was supposed to have been struck and injured by post of gate tower. In full settlement for any and all injuries resulting from said accident." The remainder of the document consists, first, of a receipt of the sum of money mentioned "in full payment of the above account." Then follows, "in consideration of the payment of said sum of money," a covenant never to sue the Chicago, Burlington & Quincy Railroad Company for any debt, claim, or demand whatever which O'Shea ever had or now has against that company, whether arising upon contract or upon tort. This document is an accord and satisfaction coupled with a covenant never to sue. There are upon the face of the paper certain indicia of an intention of O'Shea not to accept the sum stated in full satisfaction of his injuries. Thus, in the statement that it is for the amount agreed upon in full settlement of all claims and causes of action against the Burlington Company, there follows this expression, "but not the New York, Chicago & St. Louis

Railroad Company." The agreement is written upon one of the printed blanks of the Burlington & Quincy Company, which contains in print a general release, and the words, "remise, release, and forever discharge," are erased in red ink, and the words, "covenant never to sue," substituted, and the words, "of and from all," are likewise erased, and the words, "for any," substituted. The inquiry naturally arises, if this document was designed as a full satisfaction for the injury, why should the New York, Chicago & St. Louis Railroad Company be excepted, and why should a covenant not to sue be substituted for a technical release? It may not be denied, we think, that, if this agreement must stand as it was executed, the expression, "but not the New York, Chicago & St. Louis Railroad Company," must be held to be of no force, being repugnant to the legal effect and operation of the instrument (Gunther v. Lee, 45 Md. 60; Delong v. Curtis, 35 Hun, 94; Seither v. Traction Co., 125 Pa. St. 397, 17 Atl. 338, 4 L. R. A. 54), which declares that O'Shea has received full settlement for all injuries resulting from the accident in question. The oral testimony allowed at the trial, under objection of the defendant in error, clearly establishes that it was not intended by either party to the paper that the sum of $1,200 should be paid to O'Shea in full satisfaction of his injuries, and that it was not intended by either party that the document which O'Shea was to sign should be anything more than a covenant not to sue the Chicago, Burlington & Quincy Railroad Company, that company being willing to give the sum stated in the paper as a consideration for that covenant. In other words, the paper does not express the actual agreement of the parties. The question then arises whether such oral testimony was admissible. We think that it was. The rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument" was not adopted because the document is under seal. That mode of attesting a written instrument as the deed of a party was employed because, at the time of its adoption, most men, even of the higher classes of society, could not write. There is popularly supposed to be some special sanctity to a seal. It was a solemn and deliberate act of the parties, expressing their assent to the agreement declared in the paper sealed. The seal, now that men can write, has not the sanctity and authority formerly given to it. See Lowe v. Morris, 13 Ga. 150. The rule was adopted "because the contract itself is plainly and intelligibly stated in the language of the parties, and is the best possible evidence of the intent and meaning of those who are bound by the contract and of those who are to receive the benefit from it." Stackpole v. Arnold, 11 Mass. 31. And this rule of exclusion is applied to simple contracts in writing to the same extent and with the same exceptions as to specialties or contracts under seal. Id. But this rule, as stated by Mr. Greenleaf on Evidence (section 279), "is applied only in [suits] between the parties to the instrument, as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in

the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties, and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others." See, also, Whart. Ev. 923. In a suit between a party and a stranger, neither is concluded by the contract, but either may give evidence differing from it. Lee v. Adsit, 37 N. Y. 78; McMaster v. Insurance Co., 55 N. Y. 222; Lowell Mfg. Co. v. Safeguard Fire Ins. Co., 88 N. Y. 591; Hankinson v. Vantine, 152 N. Y. 20, 46 N. E. 292; Iron Co. v. Greene, 31 C. C. A. 477, 88 Fed. 207; Reynolds v. Magness, 24 N. C. 30; Dunn v. Price, 112 Cal. 46, 44 Pac. 354.

The question then arises whether the defendant in error here was a "stranger" to this agreement in the sense in which the term is employed in the rule. It is true that the subject-matter upon which the agreement operated was the joint wrong of the two railway companies, and the defendant in error could avail itself of an accord and satisfaction or release between O'Shea and the Chicago, Burlington & Quincy Railroad Company. To this extent it may be said not to be a stranger to the matter, but it was no party to the contract, and was not bound by it. If the writing had been simply a covenant not to sue the Chicago, Burlington & Quincy Railroad Company, would it not have been open to the defendant in error to prove that the paper did not express the truth; that what purported to be merely a covenant not to sue was, in fact, an accord and satisfaction for the injury? The estoppel must be mutual, and both must be bound or neither. If the right of a stranger to vary a written contract by parol is limited to rights which are independent of the instrument (Wodock v. Robinson, 148 Pa. St. 503, 24 Atl. 73), then it is clear that in the case supposed the defendant in error would be bound by the writing, although it did not express the agreement of the parties to it. It must be admitted that the authorities are not at one, and that the cases of Brown v. City of Cambridge, 3 Allen, 474, Goss v. Ellison, 136 Mass. 503, and Railroad Co. v. Sullivan (Colo. Sup.) 41 Pac. 501, hold to the contrary, overlooking, we think, that the rule of exclusion does not apply between a party to the contract and a stranger, and improperly assuming that a joint tort feasor is a party to the contract. We are of opinion that the plaintiff in error should have been permitted to show the real agreement, and that the question should have been submitted to the jury whether the written paper expressed the actual contract of the parties. The judgment is reversed, and the cause remanded, with directions to award a new trial.

## MALE v. LAFFERTY.

(Circuit Court, S. D. New York. December 1, 1900.)

1. CONTRACTS — PERSONS BOUND — CONTEMPORANEOUS CONTRACTS CONSTRUED TOGETHER.

Where an agreement between defendant and the receiver of an insolvent corporation, by which defendant undertook to purchase the property of the corporation, contemplated and required defendant to comply with a second agreement, executed contemporaneously between bondholders, by which they agreed to deposit their bonds with a trustee, to be delivered to defendant for his use in paying for the property, the two contracts are to be construed together, and defendant, by becoming a party to one, became bound by the other, and may be sued by the trustee for its breach in failing to pay for the bonds received thereunder in accordance with its terms.

2. SAME—ACTION FOR BREACH—DEFENSES.

In an action for breach of contract in failing to return or pay for certain bonds delivered by plaintiff to defendant to be used by him in paying for property of an insolvent corporation, an answer alleging the delivery by defendant to plaintiff of a certificate of deposit for the bonds does not state a defense, it not being alleged that the certificate was accepted in lieu of the bonds themselves.

At Law. On demurrer to answer.

John A. Garver, for plaintiff.

Robert L. Harrison, for defendant.

WHEELER, District Judge. This is an action founded upon written contracts, to which the defendant has set up separate defenses, which have been demurred to. The defendant's counsel in argument says that, if the defenses are not good of themselves, the complaint does not state a good cause of action, and that a bad defense is good enough for a bad complaint. In common-law pleadings a demurrer reaches back to the first defect. So, apparently, would a demurrer in code pleading, when such a pleading is allowed. According to the complaint the plaintiff had in his hands as trustee $24,000 of mortgage bonds and $6,000 of receiver's certificates of the Maritime Coal Company, which was being foreclosed. The defendant and Thompson, the receiver, entered into an agreement in writing, arranging for the purchase of the property by the defendant at the foreclosure sale, which provided:

"(3) An agreement between the holders of $24,000, par value, of the said Maritime Coal Company bonds, and of $6,000, par value, of the said receiver's certificates, shall forthwith be entered into, by which they shall agree to deliver the said bonds and certificates to William H. Male, of the city of New York, as trustee, for the purpose of delivering the same to said Lafferty, or his assigns, upon receiving $25,000, par value, of first mortgage 5% fifteen-year gold bonds of a new corporation to be organized by the said Lafferty for the purpose of acquiring the said property of the Maritime Coal Company. * * * The said Lafferty shall also, within the time hereinafter specified, pay to the said Thompson $5,000 in cash, and to the said Male, as trustee, $22,000 in cash, or shall deliver to the said Thompson $5,000, par value, of the first mortgage 5% fifteen-year sinking fund gold bonds, issued by the said proposed new company, as aforesaid, and to the said Male, as trustee, $25,000, par value, of such bonds, upon receiving the said $24,000 of the bonds of the Maritime Coal Company and $6,000, par value, of receiver's certificates held by the said Male, as trustee."

And an agreement in writing was at the same time entered into by which the holders of the bonds and certificates agreed with each other and the trustee:

"(1) The parties of the first part hereby deposit their bonds and receiver's certificates with the trustee, in trust to hold the same and deliver them to Herbert D. Lafferty, of Roanoke, Virginia, or his assigns, at any time within sixty days after the confirmation of the said sale, upon payment to the trustee of $22,000 in cash, or upon the delivery to the trustee of $25,000, par value, of 5% fifteen-year sinking fund gold bonds, forming part of a total authorized issue of $75,000, par value, issued by a corporation which shall acquire the property now owned by the said Maritime Coal Company, and secured by a first mortgage upon all the said property. * * * (2) In case the said property is purchased by the said Lafferty, or in his interest, the trustee shall deliver the said bonds and receiver's certificates to the said Lafferty, to be used by him in paying for the said property, upon his giving a receipt to the trustee agreeing to return them or to deliver the said new bonds to him within sixty days after the confirmation of the said sale."

And the plaintiff, as trustee, delivered the bonds and certificates to the defendant, who purchased the property at a sale, which was confirmed; and, although more than 60 days from confirmation of the sale have elapsed, the defendant has not delivered the $25,000 of new bonds, nor paid the $22,000 to the plaintiff.

The principal argument against the sufficiency of the complaint is founded upon the supposition that the defendant's agreement was with the receiver, and that there is a total want of any contract and breach between the plaintiff and defendant. While the contract signed by the defendant runs to, and is signed otherwise only by, the receiver, it stipulates for this delivery or payment to the plaintiff, and for another contract between the plaintiff and other bond and certificate holders, also providing for such delivery or payment. These contracts appear to have been simultaneous, and are to be construed together. The defendant, by becoming a party to the one which provided for the other, became holden to the terms of both, by which he was, if the old bonds and certificates were delivered to him, to deliver the new bonds, or make the payment to the plaintiff. Performance by the plaintiff and breach by the defendant appear to be well averred, and the complaint appears to be sufficient. In his first separate defense the defendant has brought forward the second clause of the agreement between the bond and certificate holders and the plaintiff as trustee, and set forth the receipt executed by him to the plaintiff, which states that the bonds and certificates were received from the plaintiff by the defendant pursuant to the provisions of the agreement, which is set out in full, with an averment of failure of the receiver to enable the defendant to obtain a clear title, wherefore he was compelled to pay cash, instead of the securities, to complete the sale; "and that thereupon this defendant returned to the plaintiff herein certificates of deposit of the Atlantic Trust Company for $24,000, par value, of the first mortgage bonds of the Maritime Coal Company, and $6,000 of the receiver's certificates of indebtedness." The obligation of the defendant was, if he should buy the property, as is made more clear by his receipt when brought forward, to pay the $22,000, or deliver the bonds and certificates, to the plaintiff. If this defense was intended to amount to performance of the contract by delivery of the bonds and

certificates back to the plaintiff, according to that alternative, it falls short in averring the return of a certificate of deposit only of them, without averring that this certificate was what the defendant received of the plaintiff for them, or that the certificate of deposit of the securities was accepted in place of the securities, or that the production and delivery of the securities, instead of the certificate of deposit of them, was waived. What is set up does not amount to full performance of either alternative of the defendant's agreement with the plaintiff. The residue of this and the whole of the other separate defense relate to the alleged misdoings and shortcomings of the receiver, who had, however, nothing to do with the delivery of the $25,000 of new bonds, or the payment of the $22,000, or the return of the old bonds and receiver's certificates to the plaintiff, if the sale was made to the defendant and confirmed according to the terms of the agreement, as set forth in the complaint. The separate defenses, in this view, appear to be insufficient. Demurrer sustained.

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## GROTIAN et al. v. GUARANTY TRUST CO.

(Circuit Court, S. D. New York. December 1, 1900.)

RECOVERY OF PAYMENTS—MUTUAL MISTAKE OF FACT—PAYMENT WITHOUT LIABILITY.

Where a draft was by its terms drawn against a shipment of flaxseed, and had attached a forged bill of lading and certificate of insurance on the flaxseed, and the acceptance by the drawees was also expressly against the bill of lading and certificate of insurance, both draft and acceptance were qualified by the conditions so expressed, and the acceptance created no liability which could be enforced against the acceptors; hence a payment of such draft by the acceptors to an indorsee in order to obtain possession of the bill of lading, before either had knowledge of the forgery, was one made under a mutual mistake of fact, and without liability, and the acceptors were entitled to recover back the money paid.

At Law. On demurrer to complaint.

Arthur J. Baldwin, for plaintiffs.
Julien T. Davies, for defendant.

WHEELER, District Judge. According to the complaint, John Glen, of New York, made a draft on the plaintiffs, of Hull, England, for £1,518. 8s. 7d. sterling, payable 60 days after sight, to his order, in London, to be charged "to the account of 8,417.50 bush. flaxseed," which was accompanied by a forged bill of lading of the flaxseed per steamship Buffalo from New York to Hull, and a certificate of insurance for $8,500. Glen indorsed the draft, and assigned the bill of lading, with the insurance, to the defendant, and upon presentation the plaintiffs accepted thus:

"Hull, 21st Nov., 1898.

"Accepted, payable at Lloyd's Bank, Ltd., London, against indorsed bills of lading for 8,417 bushels flaxseed per Buffalo, SS., at New York, and certificate of insurance, $8,500. Due 22nd Jan., 1899.

"Fred. B. Grotian & Co."

Before the arrival of the Buffalo, in order to get the bill of lading to obtain the flaxseed with, the plaintiffs paid the defendant $7,319.29, and took up the draft, which they demanded back from the defendant on learning, after the arrival of the Buffalo, that the bill of lading was a forgery, and that there was no flaxseed to be drawn against. This suit is brought to recover that sum as money paid by mistake, and had and received to the use of the plaintiffs.

The title to the property covered by the bill of lading accompanying a draft goes with the bill, but as security merely, while the bill is kept collateral to the draft, and not brought into its terms, nor into the terms of its acceptance. Tilden v. Minor, 45 Vt. 196; Goetz v. Bank, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515. Here the property covered by the bill of lading was mentioned in the draft and in the acceptance, and affected their meaning. The draft was to be charged to the account of the flaxseed. The acceptance was not absolute, but was against the flaxseed and insurance. As the acceptance was qualified by being against the bill of lading, the flaxseed, and the insurance, there would be no liability upon it without any of them. The forged bill of lading was as nothing. There was no flaxseed, and consequently no insurance of any. The acceptance raised a new contract, by the terms of which the defendant could not have recovered upon it of the plaintiffs. Under a mutual mistake of fact, according to the complaint, the plaintiffs paid the money to the defendant without liability. It did not, and does not, appear to belong to the defendant. Demurrer overruled.

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NESTER et al. v. DIAMOND MATCH CO. (two cases).

RIEDINGER v. SAME.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1900.)

Nos. 801–803.

1. LOGS AND LOGGING—OBSTRUCTION OF STREAM—RIGHT OF PRIVATE ACTION.

A private action cannot be maintained to recover damages for the unlawful obstruction of a river by log booms constructed near its mouth by defendant for its own use in connection with its mills, and which stopped the passage of all logs floated down the river, where plaintiffs never made or attempted to make any use of the stream with which such obstructions interfered.

2. SAME.

Plaintiffs during a number of years placed logs in a stream, and allowed them to float down, mingled with those of other owners, until they were stopped by booms constructed near the mouth of the river by defendant for its own private use. The defendant passed the plaintiffs' logs through, sorted them, and placed them in side booms, from which plaintiffs took them. Some structure was necessary to prevent all the logs from floating out into Lake Superior and becoming lost, and plaintiffs never made any arrangement to handle their own logs until after they had been passed through defendant's gates and reached the mouth of the river. *Held* that, by voluntarily making use of the booms of defendant, they waived any right to recover damages upon the ground that such booms constituted an unlawful obstruction of the stream; nor could such an action be maintained because plaintiffs' logs suffered injury by reason of the unreasonable delay of defendant in passing them through its gates, the action being in tort, and not upon contract, implied or express.

**In Error to the Circuit Court of the United States for the Western District of Michigan.**

This is an action in tort to recover damages alleged to have been sustained by reason of an alleged unlawful obstruction maintained in the Ontonagon river, a navigable stream, wholly within the state of Michigan, which flows into Lake Superior. The declaration contained several counts, and, in substance, alleges that in the years 1890 to 1897, both inclusive, the plaintiffs placed in said river large quantities of pine saw logs for the purpose of running through and upon the waters of said river, and rafting and towing them from the mouth of said river, upon the waters of Lake Superior, to their mills at Barega; that the defendant, a corporation of the state of Illinois, was likewise engaged in the business of lumbering upon said river, and had mills erected and in operation at and near the mouth of said river, and "that the defendant wrongfully and unlawfully caused to be put, placed, and maintained in said Ontonagon river divers obstructions to the navigation thereof, to wit, columns of piles, jam piers, booms, logs, stones, timbers, and other hindrances, for the purpose and with the design of hindering, delaying, and obstructing the free and natural navigation on said Ontonagon river, and of hindering, preventing, and obstructing the plaintiffs in the navigation thereof, and from running, driving, floating, and rafting the said pine logs of the said plaintiffs upon and through said Ontonagon river aforesaid, by means whereof the navigation of said river by the plaintiffs was impeded, hindered, and obstructed, * * * and delayed in the running, driving, rafting, and manufacture of their said saw logs for long spaces of time"; that said logs, by reason of such delay and obstruction, were held back in the river, and "became sap-rotten, worm-eaten, discolored, and otherwise greatly injured and damaged," whereby damage had been sustained to the extent of $150,000. The defendant pleaded the general issue of not guilty. To maintain the issue upon their part the plaintiffs gave evidence tending to show that prior to May, 1890, Thomas Nester, the husband of the plaintiff Margaret Nester, and the father of the other plaintiffs, was the owner of large bodies of pine lands and of logs and lumbering equipment, and was engaged in lumbering upon the Ontonagon river and its tributaries, and of driving saw logs cut from his lands down the Ontonagon to its mouth, where the lumber was made into rafts and towed to his saw mills; that upon the death of said Thomas Nester, May 12, 1890, the plaintiffs succeeded to his business, and between May 12, 1890, and the bringing of this suit in January, 1898, they had cut, hauled, and put in said river logs aggregating 160,000,000 feet; that in 1882 the defendant purchased from Rich Bros. their saw mills and lumbering outfit on the Ontonagon river, and from that time had conducted large lumbering operations on said river and its tributaries, and manufactured their logs into lumber at their said two mills at the mouth of said river. The evidence tended to show that during the ownership of said saw mill by the Rich Bros. several piers, consisting of cribs of logs, filled with stones, had been placed in the channel of the river above the saw mills operated by them, and nearly two miles above the mouth of the river. Since the acquisition of said mills these piers have been enlarged and others constructed by the defendant company. These obstructions are, in the evidence, called "jam piers." They are 11 in number, and placed in near neighborhood with each other in the channel of the river, and are so arranged as, with the help of boom gates extending across the river on the lower side of the row of piers furthest down stream, to arrest and hold back the logs coming down stream. By opening a boom gate the logs are gradually suffered to float past these jam piers, and are sorted and guided into side booms constructed and maintained below by the defendant. This structure thus arrests the mass of floating logs, and enables those in control to sort them out and collect them in booms appropriated to the several owners. The logs of the plaintiffs and of defendant, together with the logs of other owners, come down the stream in a confused mass, and when the general progress is arrested by these jam piers the mass is stopped; the jam at times filling the river back for several miles. There was evidence tending to show that these piers were located too near the mouth of the river, and as a consequence there was not sufficient room for side booms between them and the lake; that,

as another consequence of such location, the operation of floating the logs through the jam piers and sorting gaps was much hindered by lake tides and winds, which caused at times a current up stream. There was also evidence tending to show bad management and dilatoriness in the operation of letting down and sorting the logs, by which great delays occurred. In consequence of such improper location of the "jam piers," deficient storage room, and bad management, there were such delays in the delivery of saw logs to the plaintiffs as resulted in discoloration, sap-rotting, and other damage to their logs and business. The evidence tended to show that the Ontonagon river was navigable only in the sense that it is suitable for the floating of saw logs and lumber. Its width at the point where the jam piers are standing is from 200 to 300 feet. There was some evidence to show that the original jam piers were constructed by a corporation known as the Ontonagon Boom & River Improvement Company, and that Rich Bros. controlled that corporation. There was no substantial evidence showing any connection between the said boom company and the defendant. Upon the contrary, it was shown conclusively that the defendant company had enlarged and continued to maintain the said jam piers since 1882, and that it had since exercised complete control over said piers and entire management of all logs running within "boom limits,"—a distance described as extending some 10 miles above the jam piers. There was also evidence to show that the land on one side of the river below the jam piers belonged to the plaintiffs, and that their river bank had been used for a storage boom by the defendant under a contract made March 25, 1891, by which defendant undertook to sort and store the plaintiffs' logs for a period of five years in consideration of the use of said bank and land for that term. It was also shown that plaintiffs had provided no side booms either above or below the jam booms, and had no facilities whatever for holding or sorting their logs from the general mass, and that they had continuously cut and floated logs down the river in expectation that they would mingle with the logs of defendant and others, and become a part of the mass held back by the jam booms, and would be let through as reached and sorted and boomed by the defendant, and that defendant had thus handled plaintiffs' logs without charge since May 12, 1890. There was also evidence tending to show complaints of dilatoriness and as to the location of the jam piers, but there was no evidence showing that plaintiffs had ever undertaken to sort or care for their own logs after they became part of the jam above the piers, or that they were ever in a situation to manage their logs after they reached the jam above the piers, or to store them after they should pass the boom gates, except such as was provided by the defendant. Upon the conclusion of all the evidence the trial judge directed a verdict for the defendant.

T. E. Tarsney and F. O. Clark, for plaintiffs in error.

E. H. Walker, for defendant in error.

Before LURTON and DAY, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

It is most manifest that the Ontonagon river is navigable only in a limited sense. It is a highway, nevertheless, in which every man who has occasion to use it has equal rights, though its only practical use is that which it affords for floating logs to market. The plaintiffs and the defendant, as well as other persons, were entitled to put logs into the stream to be floated singly to their destination at the mouth of the river. Logs were thrown in indiscriminately, ownership being signified by a brand on each log. When put in the river, they became a part of a general mass, often filling the river for miles, and the progress is that of those in advance. To separate them according to ownership, for either manufacturing at the mills

at the mouth of the river, or for placing into rafts or otherwise continuing their transportation, it was essential to the best interests of all that the floating logs should be arrested before reaching the lake, and the logs separated according to ownership, and guided into booms where they could be stored for further transit or manufacture. John F. Nester, one of the plaintiffs, concedes this most frankly, by saying in his evidence, that:

"Piers located at some point were necessary to our interests as well as the interests of others, to drive logs down the river. The objection to these piers is their location. The real embarrassment was the want of storage room between the piers and the mouth of the river."

It is clear that to make the navigable quality of this stream, short and narrow as it was, serviceable to log owners, it was almost essential that the use of the stream should be regulated by a single hand. Still the plaintiffs had the same right with the defendant to construct jam booms and side booms by which their logs might be separated from the general mass, and stored for use or transportation. That a multiplication of such facilities would injure rather than aid the general interests is evident, for every such obstruction would necessarily retard for a time the general movement of the whole mass. But the plaintiffs did not exercise this right by providing any facilities whatever for the sorting or reception of their logs. That neither they, nor any other owner of logs, did so, is doubtless due to the recognition of the necessity for a single management in order to obtain the best results. That the management of sorting and booming facilities, as well as the management of the running of the logs down the river, should be in the hands of persons not themselves interested as log owners, is evident; and the law of Michigan has accordingly provided for booming corporations, whose single duty and business shall be the control of the navigation of logging streams, by the construction and maintenance of facilities for the sorting and storing of logs for all who choose to use them. The defendant was engaged in lumbering and manufacturing logs into lumber upon this stream. For its own purposes it improved the Ontonagon by dams and other devices, and constructed and maintained the jam booms in question, as well as extensive storage booms below. It had an undoubted right to do this, provided its jam booms did not unreasonably obstruct the use of the river by others who did not care to avail themselves of the facilities furnished by it. That it was necessary to arrest the whole mass of logs for the purpose of obtaining and securing its own is evident from the nature of the navigation. This right, if reasonably exercised, would not be unlawful, whether exercised by a booming corporation or by an individual. Watts v. Boom Co., 52 Mich. 203, 208, 17 N. W. 809. That the plaintiffs had an equal right to maintain such piers, and to arrest the progress of the promiscuous mass for the purpose of securing their own logs, must be conceded. That they had a right to construct booms for the reception of their own logs after reaching the mouth of the river must also be conceded. That the defendant, in blocking the entire channel with its jam booms, so that passage was impossible except as it should allow, thereby monopolized the stream and maintained an unlawful ob-

struction, may also be conceded. But the plaintiffs never did exercise their right to provide for the sorting and storing of their own logs. If their logs had been permitted to go by, they would inevitably have gone into the open waters of Lake Superior. In this situation, they put their logs into the river, suffering them to become a part of the mass of logs composing the great jam above the piers of the defendant. They made no effort to themselves assort their logs, and provided no side booms, either above or below the defendant's piers. They suffered the defendant to sort and store their logs in a boom provided by the defendant, and then accepted them and proceeded with their further transportation. This was the course of business from year to year for a period of seven years after the plaintiffs succeeded to the business of Thomas Nester, who for many years before had had his logs handled in the same way. There was evidence of complaint from time to time of delays and of objection to the location of the piers where they were; but there was no evidence that plaintiffs ever demanded a right to pass their own logs through the jam boom, or that they had any way for saving them after they should pass through. We can but conclude, under the uncontradicted facts of the case, that the plaintiffs dealt with the defendant in regard to the sorting and storing of their logs, and recognized its right to handle them. Excluding consideration of the evidence tending to show a written special contract between the plaintiffs and the defendant, the only reasonable conclusion which a jury might draw from all the other facts and circumstances in the case is that the plaintiffs intended to avail themselves of the piers and booms of the defendant for the arrest of their logs before they should reach the open waters of the great lake, and of the services of the defendant in letting them through the jam piers and boom gates, and in storing them, after being separated from the logs of others, in a boom provided by the defendant, until plaintiffs should be ready to raft them to their own mills. Upon this state of facts the plaintiffs and defendant came into implied contractual relations, by which the one party delivered its logs to the other for a special service, and by which the other undertook to handle and care for the logs with reasonable dispatch and care. If the defendant had been an incorporated booming company under the law of Michigan, the facts and circumstances are such as would have subjected the plaintiffs' logs to the charges allowed by law to such companies, and placed them under its control and management until redelivered. Hall v. Boom Co., 51 Mich. 377, 402, 403, 16 N. W. 770; Lindsay & Phelps Co. v. Mullen, 176 U. S. 126, 146, 20 Sup. Ct. 325, 44 L. Ed. 400. It cannot be said that the plaintiffs were in any true sense compelled to use the jam booms and storage booms of the defendant. They might have provided their own facilities and taken care of their own logs, so far as that was consistent with the equal right of all other log owners. This they did not do, and, because they chose not to provide their own means for sorting and storing their own logs, they were compelled to use the facilities and services of the defendant. In no other sense was the use of the defendant's jam and storage booms compulsory. The conduct of the plaintiffs under the circumstances

is a waiver of any right to attack the means adopted by the defendant for handling and protecting their logs, as constituting an unlawful obstruction of navigation. Having availed themselves of those means, they are estopped to maintain a private action based upon the unlawful character of the means which they themselves have engaged, sanctioned, and licensed so far as they were able to do so.

The obstruction of a highway by land or water is a public nuisance. Those who construct or maintain it are subject to indictment, and under some circumstances an action at law for its abatement will lie. But no right of action by a member of the community will lie which is not based upon a special injury, differing in kind from that sustained by the general public. A ditch across a public street is a public nuisance. But a party whose use of the street has not been hindered cannot maintain a private suit for damages. To sustain a private action the plaintiff must show that he individually has sustained some special injury as a consequence of such obstruction. Undoubtedly, if the plaintiffs have shown that they undertook to use the Ontonagon river for the purpose of driving their logs to market, and were prevented from passing down the river by obstructions blocking the whole channel unreasonably, an action for the damage due to such unlawful delay will lie. But there is no evidence that the plaintiffs ever were hindered in the exercise of their legal right by the defendant's obstruction. In this respect the case is broadly distinguishable from that of Watts v. Boom Co., 52 Mich. 203, 17 N. W. 809. The defendant in the case referred to was a booming company organized under the statute law of Michigan. It was authorized to construct and maintain all necessary booms to aid in the driving of logs and rafts down the Tittabawassee river, provided such booms should be so constructed and used to allow, "as far as practicable," "the free passage of boats, vessels, logs and other floatables, along such waters." The plaintiff's logs were in a raft under his own control and management, and nothing indicated any purpose to avail himself of the booms or other facilities provided by the boom company. There was evidence tending to show that the defendant had willfully and totally obstructed the entire channel of the river with its piers and booms, and that such obstruction continued for an unnecessary and unreasonable time, and that the "plaintiffs were prevented from opening the piers or booms and breaking the jams by defendant," and thus were obliged to pass only when and as the defendant permitted. This delay undoubtedly constituted special damage; for the plaintiff in that case was prepared to care for his own raft after passing the pier boom, and endeavored, in the management of his own affairs, to pass on down the stream with his logs. In the case now before us it is not pretended that the plaintiffs' logs were separated from the logs of others. They were a part of the general mass of logs held back by the jam booms of the defendant. In that condition they could not pass the jam boom until those in front had passed, and could only be separated from others as they gradually went through the boom gates. The plaintiffs made no effort to pass their own logs through these gates, and made no demand that the jam should be broken or the gates opened, that they

might exercise their right of free navigation. The reason is plain. Their logs were not held together in one raft, as in Watts v. Boom Co., cited above. They could only pass as they were reached in the general movement of the confused mass. More than this; the plaintiffs had no means for securing them after they should pass the jam and sorting gates. Without storage booms the logs would inevitably pass into the open waters of Lake Superior. Plaintiffs say, "Concede this to be so; it would not follow that they would thereby be lost." But, on this record, we must conclude that such a course would be most extraordinary, and the loss inevitable and practically total. That the loss of the plaintiffs' logs was prevented by the alleged unlawful structure of the defendant is the only conclusion which could reasonably be reached by the jury. How, then, have the plaintiffs shown any special injury to themselves? They have been benefited, not injured, and their action must fail. True, there was evidence of dilatoriness, and consequent injury to logs from being kept too long in the water. But this sort of damage was less than the total loss which would have ensued but for the alleged unlawful obstruction of the defendant, and damages due to simple negligence or breach of the implied contract to use reasonable care in the handling of the plaintiffs' logs cannot be recovered in a suit based wholly upon the theory that the defendant was maintaining a public nuisance. We do not wish to be understood as approving or sanctioning the method by which the defendant corporation has monopolized the navigation of the Ontonagon river. We entertain little doubt of the unlawful character of the obstruction it has so long maintained. Conceding this, what we hold is that the plaintiffs have so far sanctioned, employed, and benefited by the defendant's course as to make it highly unjust that they should in this form of action be suffered to recover damages which really arose from the dilatory conduct of the facilities which they had voluntarily availed themselves of. The judgment must be affirmed.

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## SIMON v. GOODYEAR METALLIC RUBBER SHOE CO.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1900.)

No. 842.

1. FRAUD—ACTION FOR DECEIT—REPRESENTATIONS INDUCING CONTRACT.

Defendant's agent secured a contract from plaintiff to supply to defendant in the future a large quantity of rubber waste by representing that a competing company was "entirely out of business," and that defendant would thereafter be practically without competition in the market, which would tend to reduce the price of the article. The competing company, which held leases on the works of five constituent companies, did in fact dissolve, but its constituent companies each thereafter operated its own works, and entered the market as a purchaser of waste; and the competition thereby created caused an advance in the price to such an extent that plaintiff was compelled to pay more than he received for the rubber to fill his contract. *Held*, that the question whether the representation made by defendant's agent was fraudulent depended on whether he meant plaintiff to understand that the five factories then operated by the competing company had gone out of business, which was a question of fact to be determined by the jury.

2. SAME—WAIVER—PERFORMANCE OF CONTRACT AFTER KNOWLEDGE OF FRAUD.

Where a party who has contracted to sell and deliver a commodity in the future at a fixed price learns while the contract is still to a large extent executory that representations of fact made by the other party, which induced him to enter into the contract, were false, he has his election to repudiate the contract at once, and sue for the loss he has already incurred, or to go on with it; and, if he continues performance and completes his deliveries thereunder, he waives the deceit and affirms the contract, and cannot thereafter maintain an action for the deceit, even to the extent of recovering damages to the amount of the loss incurred before his knowledge that the contract was not obligatory.

3. SAME.

It is not essential, to entitle a party to disaffirm a contract on the ground that it was induced by fraudulent representations, that the party making such representations knew them to be false, but they are equally fraudulent if made without knowledge of their truth, with the intention that they should be acted upon; and hence the party deceived is put to his election whether he will go on with the contract on discovering, while it is still executory, that the representations were in fact false.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This was an action for fraud and deceit in the procurement of a contract for the sale of 250 tons of rubber waste, and for the recovery of the damages sustained by the plaintiff, Aaron Simon, in the execution of the contract. Upon the conclusion of the plaintiff's evidence, the court directed a verdict for the defendant. This instruction, as we learn from the charge itself, was based upon two grounds: First, that the representations which induced the contract were either promissory in character or true in fact; second, that the contract was still largely executory when the plaintiff acquired full knowledge of the alleged false and deceitful representations made to induce the sale, and with such knowledge proceeded to execute it according to its terms, and thereby waived the fraud and deceit for which he now sues.

The evidence shows that the plaintiff had for many years been engaged in the business of buying old rubber boots and shoes, and selling same to manufacturers engaged in the business of reclaiming the rubber. For several years prior to 1895 the principal consumer of such rubber waste had been a company known as the Rubber Reclaiming Company of New York. This company had a New Jersey charter, under which five subordinate corporations were sheltered, the factories of each being leased to and operated by the dominating corporation. In 1894 the United States Rubber Company, another combination of rubber manufacturing corporations, engaged also in the business of reclaiming rubber waste, and became a large competitor for such waste in the market. Beside these two great customers, there were several small factories engaged in buying and reclaiming, but their competition was of little or no importance, as their capacity was small. In this condition of things, one William J. Rodenbach, the buyer for all of the factories controlled by the United States Rubber Company, approached the plaintiff and urged him to take a contract to sell for the use of the Goodyear Metallic Rubber Company, one of the allied corporations operating under the United States Rubber Company, several hundred tons of old rubber shoes and boots, deliverable in monthly installments. The plaintiff's evidence tended to show that Simon was reluctant to make so large a contract, inasmuch as he carried no stock, and would be obliged to send out agents and buy from collectors in order to comply with its terms. This reluctance was made known to Rodenbach. To overcome this and induce plaintiff to contract as desired, the plaintiff testified as follows: "He told me he wants to give us a chance to make a few dollars this time, and there would be a good chance to make a dollar this time, because rubbers are going to be cheaper. He says, 'The spring is coming pretty near, and the Rubber Reclaiming Company is entirely out of business.' It means our best customer is gone. And he wants me to enter into a large contract for four or five hundred tons for future delivery at a fixed price. He told me that the

Rubber Reclaiming Company was entirely out of business, and that the Goodyear Metallic Rubber Shoe Company, or the company Mr. Rodenbach represented at the time, would be the only consumers of rubber. He told me at the office that, if we would buy any more lots of rubbers, he has got to buy them at a less price than he paid us, and then, if he bought in the city, he would not pay as much as he paid us. I asked him about the competition in Cleveland and Buffalo, and he said he would avoid the competition of Cleveland and Buffalo. He said, 'I did not come to rob you of your money.' He said the market would be a good deal lower, because nobody would be in the market for rubbers; there would not be any competition at all any more; they would be the only consumers. Q. How many times, in the course of the hour or hour and a half he was there in your office, did he tell you that the Rubber Reclaiming Company was entirely out of business? A. He told me that three times, anyway, in different ways. He wanted to make a contract for either four or five hundred tons. Q. Did he say the Rubber Reclaiming Company was then out of the business? A. He said they were entirely out of the business. Those were the words he used. And we would be the only consumers of the article, he said, except there might be a few small orders, but we would be the main consumers. Q. What others did he say? A. He didn't mention anything. I asked him how many more there would be left after the Rubber Reclaiming Company had gone out of business, and he said they would practically be the only consumers of the article." Plaintiff also testified that he relied upon the truth of the statement made by Rodenbach, and contracted to sell and deliver 250 tons of rubber waste at 4⅜ cents per pound, deliverable "in about equal monthly installments" by September 1, 1895. This contract is dated April 18, 1895. There was no direct evidence as to what Rodenbach actually knew of the plans and purposes of the Rubber Reclaiming Company in respect of a continuance in business. But there was evidence tending to show that the Goodyear Metallic Rubber Company, the defendant in error, was one of the constituent companies comprising the dominating corporation called the United States Rubber Company, and that its affairs were entirely controlled and dictated by it through the ownership of its capital stock. There was also evidence tending to show that while an actual dissolution of the bonds uniting the corporate members of the Rubber Reclaiming Company did not occur until May 6, 1895, such dissolution had been determined upon in March, 1895, and that the officers of the United States Rubber Company were informed by the president of the Rubber Reclaiming Company that such dissolution would occur, and that several of its constituent corporations would thereafter continue in business each for itself. There was also evidence tending to show that within a few days after the contract with Simon the market for rubber waste became active and the price higher, and that the agents for the separate companies of the Rubber Reclaiming Company appeared in the market as competitive buyers in May following. The plaintiff conceded that he learned of this activity in the market before he made his first delivery, May 2, 1895, and that before he made any other delivery he knew that some of the corporate members of the Rubber Reclaiming Company were separately engaged in buying and reclaiming old rubber. Finding that this unexpected competition had advanced the price of such waste, and that as a consequence he could not buy to fill his contract except at a loss, he made vain efforts, by correspondence and personal intercession, to obtain some concession in quantity or some advance in price. Failing in this, he notified defendant that he would carry out his contract, and hold it responsible, in an action for fraud and deceit, for the loss he might sustain. He accordingly continued to buy and make deliveries, obtaining a concession in respect to deliveries until December 1, 1895, and received for each such monthly delivery payment at the contract price. The evidence tended to show that in buying to fill his contract he paid an average of 4¾ cents per pound, and received 4⅜ cents per pound, thereby sustaining a loss of the difference, aggregating about $4,000.

Alfred Lucking, for plaintiff in error.

F. W. Whiting, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and EVANS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The question as to what Rodenbach meant Simon to understand when he said "the Rubber Reclaiming Company is entirely out of business," was not so clear as to justify the court in taking it from the jury. That statement was not promissory in character. It was a definite statement of an existing fact. It was a true statement, substantially, for that particular corporation had resolved to surrender its charter and cancel its leases upon the factories of the five subordinate corporations. The dissolution of the Rubber Reclaiming Company meant the sundering of the bonds which prevented the independent conduct of the same business by the five corporations whose factories had theretofore been operated by it. Now, did Rodenbach mean that Simon should understand that these five factories theretofore operated by it would cease to be operated, and would be out of the market as customers for rubber waste? If he did, it was an untrue and deceptive representation. Those factories continued in the business of reclaiming old rubber, and, at the time Rodenbach made his representation, it was intended and expected that they should so continue in business, each for itself. When the officials of the Rubber Reclaiming Company advised the officials of the United States Rubber Company of the purpose of the Rubber Reclaiming Company to dissolve, they also informed them of the purpose of at least some of the corporations whose factories they had theretofore operated to continue in business each for itself, and the United States Rubber Company was sounded with a view to a new combination which should include these factories. The Goodyear Rubber Company was but one of the controlled instrumentalities through which the United States Rubber Company was engaged in the business of reclaiming old rubber waste, and Rodenbach was the purchasing agent of such material for the Goodyear Rubber Company. Within a very few days after knowledge of the purposes of the Rubber Reclaiming Company reached the United States Rubber Company, Rodenbach is found in Detroit, endeavoring to obtain a large contract for old rubber. Simon was reluctant to engage himself so deeply. The amount he could collect and the price he would have to pay would be affected by the competition for such material. Nathaniel C. Mitchell, the president of the Rubber Reclaiming Company, and of one of the corporations whose factory was operated by the Rubber Reclaiming Company, in his evidence, in speaking of the effect upon the price of rubber waste by the formation of such a combination of manufacturing companies, said:

"The actual effect on the rubber-waste market of the formation of the Rubber Reclaiming Company was a depression in the market price of old rubber boots and shoes, owing to the combination of five buyers. The effect of the dissolution and the entering into the market of separate buyers had precisely the opposite effect upon the price of old rubber boots and shoes."

In view of the manifest consequences upon the market if the several factories operated by the Rubber Reclaiming Company should become independent buyers of such material, what did Rodenbach mean Simon to understand when he told him that the Rubber Reclaiming Company was entirely out of business? In the same connection he said "the market would be a good deal lower, because nobody would be in the market for rubber; there would not be any competition at all any more; they would be the only consumers." Manifestly, it was a question for the jury as to whether he did not intend that Simon should understand that the factories operated theretofore by the Rubber Reclaiming Company had gone out of the business, and would no longer engage in the business of reclaiming such rubber waste, and that the combination of which his particular corporation was a member would, as a consequence, be practically the only customer for such rubber. If he meant Simon to understand that the several factories of the Rubber Reclaiming Company were entirely out of business he represented a fact which was not true, and which was calculated to induce the very contract which Simon was reluctant to make. The instruction upon this part of the case was, therefore, error.

But this was not the turning point of the case. If it be assumed that the representation made by Rodenbach was intended to be understood as a representation that the factories theretofore operated by the Rubber Reclaiming Company had stopped the business of reclaiming rubber waste, and were no longer customers for such material, either collectively or individually, Simon learned that this was an untrue representation in May, 1895, at which time he had made only one small delivery and no purchases for future delivery. The effect of the separate operation of the factories theretofore controlled by the Rubber Reclaiming Company upon the market had manifested itself by a sharp advance in the price which he had to pay to collectors. Plaintiff at once complained, by letter and otherwise, and sought to be relieved in whole or in part from his contract. His complaints did not at first rest upon any other ground than that of hardship. Later he complained that they had promised to prevent competition in the markets of Cleveland and Buffalo. Still later in the course of his correspondence he charged deceit in the representations touching the principal matter. The defendant steadily refused any concession and demanded the due execution of the contract, and during all of this time Simon continued to buy at a loss, and to make monthly shipments in accordance with the contract. In a letter of June 10, 1895, addressed to the defendant, plaintiff, among other things, said:

"You knew what was coming, and, in order to secure a big lot, you promised us to protect us,—you wanted us to make a little money on the deal. Our attorney advised us to have the affidavit made out at once, but we don't desire to have any lawsuit with you, but will ask you kindly to extend the time as you say, and help us out a little, and divide the loss with us."

To this, defendant, after a general denial of liability for an advancing market, caused by competition which it could not control, demanded performance of the contract as to price and quantity, but

granted an extension of the time of delivery until December 1, 1895.

In the next letter the plaintiff more specifically charged operative deceit, saying:

"Had Mr. Rodenbach purchased the stock without those conditions and promises, we never would have mentioned anything, and would saddle the loss cheerfully; but he told us the Rubber Reclaiming Company is entirely out, which leads us to believe that rubber will decline, and that you would be about the only prominent people for this article, and for these reasons, and for others stated in our former letter, we hold him, the big lot rubber; but you have known that the firms connected with the Rubber Reclaiming Company would start in separate, which would naturally boom the article at once, and, under the circumstances, you ought to let us out entirely. If you can't do any better for us, we will, of course, deliver the balance rubber to December 1st, but we will remember you for some time to come. We will ship out two cars rubber to-day, and will also offer you 2 cars more for this month for 5½ cent, del'd. Please wire acceptance and oblige."

This acceptance of an extension of time of delivery was followed by another request for relief from balance of contract, and a threat to hold defendant liable for damages upon completion of the contract. This was in a letter under date of July 1, 1895, in which plaintiff, among other things, said:

"Mr. Rodenbach dragged me into it against my judgment, and by misrepresenting all the facts to me, telling me that the Rubber Reclaiming Company is entirely out, etc. We therefore ask you kindly that you let us out on the balance, and we will saddle the loss which we have sustained to the present date, or we will not waive one cent, and will make ourselves hold for the entire difference soon as the contract is finished."

Many letters were subsequently written by plaintiff, begging some concession, or for an opportunity to recoup losses by further contracts at prices by which some profit might be made, to all of which the defendant turned a deaf ear. The last deliveries were made in January and February, 1896. Plaintiff's last letter, February 19, 1896, closed with the announcement of his purpose to sue, in these words:

"At any rate, we will not drop our loss, when you show us the cold shoulder right along, and no effort on your part to do right and in accordance with your promises. We will bring all those points to an issue, and test the matter for all it is worth. We will not, however, despair trading with you, but will try and sell you right along, and make this a friendly suit, and will not allow it to interfere in any way in our future dealing with you."

The case for the plaintiff, in its most favorable showing, may be thus stated:

"The defendant has deceived and beguiled me into a contract which I would not have made but for reliance upon the willfully false statements of its agent, made to induce its execution. I discovered its deceit after beginning its execution. I could have stopped then, for the engagement was not obligatory, and by far the greater part of my contract was still executory. If I had stopped purchases and deliveries when I acquired full knowledge of the falseness of its representations, my loss would have been limited to the difference between the price I had paid for the rubber waste I had theretofore delivered and the price I received under the contract, and this loss I might have recovered in an action for deceit. But when I discovered the deceit I sought to be relieved in whole or in part from its further execution, and appealed to the defendant to make concessions. The defendant denied the deceit and demanded full performance, granting me only an extension of time for performance. In this situation, with full knowledge of the deceit, I accepted

this concession in respect of time of performance, but notified it that I would hold it liable for the loss I should incur in buying to fill my contract when it should be fully performed, and went ahead and executed the contract according to its terms. Defendant has paid me the price it agreed to pay, but I now demand the damages I have incurred in carrying out the contract according to its terms."

There can be but one answer to the case thus stated. The contract was not obligatory by reason of the deceit by which it was procured. If it had been fully executed before full knowledge of the deceit which made it nonobligatory, the plaintiff's remedy would have been in an action for the deceit. In such an action the measure of damages would not be the value of the contract if the representations which induced it had been true, but the loss which was incurred by reason of its execution. What the plaintiff might have gained would not have been recoverable, but only the loss which he sustained by its actual execution. Smith v. Bolles, 132 U. S. 125, 129, 10 Sup. Ct. 39, 33 L. Ed. 279; Sigafus v. Porter (decided Oct. 29, 1900) 21 Sup. Ct. 34, 45 L. Ed. ——. In Smith v. Bolles, cited above, the chief justice said, touching the measure of damages for deceit, that:

"The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct, but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery."

This being the rule of damages in an action by one who has been fraudulently induced to make either a contract of sale or purchase, it must follow that if one, after full knowledge of the fraud and deceit by which he has been induced to make a sale of property, goes forward and executes it notwithstanding such fraud, the damage which he thereby sustains is voluntarily incurred. The maxim volenti non fit injuria has application to all loss resulting from the voluntary execution of a nonobligatory contract with full knowledge of the facts which render it voidable. Fraud without damage is not actionable. If the fraud be discovered while the contract is wholly executory, the party defrauded has the option of going on with it or not, as he chooses. If he executes it, the loss happens from such voluntary execution, and he cannot recover for a loss which he deliberately elected to incur. Kingman v. Stoddard, 29 C. C. A. 413, 85 Fed. 740; People v. Stephens, 71 N. Y. 527; Selway v. Fogg, 5

Mees. & W. 83; Fitzpatrick v. Flannagan, 106 U. S. 648, 660, 1 Sup. Ct. 369, 27 L. Ed. 211. In the case of Kingman v. Stoddard, cited above, a full discussion of this question and an elaborate review of the cases supposed to hold a different view will be found. The opinion is that of the circuit court of appeals for the Seventh circuit, and was delivered by Jenkins, Circuit Judge. It is so full, clear, and satisfactory that we need not add to its reasoning. The fact that the defendant insisted upon performance, and that the plaintiff intended to perform, and then sue to recover the loss growing out of performance, cannot alter the principle. The plaintiff was under no legal compulsion to go on. What he subsequently did was in execution of the contract. The deliberate execution of it was an adoption of it with knowledge of the deceit, and in contradiction of his purpose to sue for deceit practiced in its procurement. He cannot save his right to sue for the fraud by notice that he will do so if he perform, and exact performance with full knowledge of the facts which rendered performance nonobligatory. Neither can the action be saved, after such voluntary performance, to the extent of the damage sustained by partial performance before full knowledge of the deceit. His duty was "to stop short or go on with it," to use the expression of Judge Bronson in Railroad Co. v. Row, 24 Wend. 74. The execution of the contract, so far as it was executory after full knowledge of the fraud, is equivalent to an adoption of the contract with knowledge of all the facts. "A subsequent promise, with full knowledge of the facts, is certainly equivalent to an original promise made under similar circumstances; and no one, acting with full knowledge, can justly say that he has been deceived by false representations." Fitzpatrick v. Flannagan, 106 U. S. 660, 1 Sup. Ct. 369, 27 L. Ed. 211. In Selway v. Fogg, 5 Mees. & W. 83, 85, Baron Park said:

> "I also think, upon discovering the fraud, unless he meant to proceed according to the terms of the contract, the plaintiff should immediately have declared off, and sought compensation for the bygone time in an action for deceit. Not doing this, but continuing the work as he has done, he is bound by the express terms of the contract; and, if he fail to recover on that, he cannot recover at all."

But it is said that plaintiff did not have full knowledge of the deceit, in that he did not know before full performance that Rodenbach or his principal knew the falsity of his representations, and that this fact was not discovered until it came out in the evidence in this case. But plaintiff did discover as early as May, 1895, that the factories which had been operated before April 18, 1895, by the Rubber Reclaiming Company were in full operation, each for itself, and that each was in the market, actively competing for old rubber waste. The actionable misrepresentation, upon plaintiff's theory of the case, was that these factories were out of business, and therefore would not be competitors in the market for the material he undertook to collect and sell to plaintiff. It was not of the essence of his case that Rodenbach knew his representations to be false. If he made the representation, which it is claimed he did make, with the purpose of procuring the contract in question, and with the intent

that the plaintiff should act upon it, without knowledge as to whether it was true or not, it would be a false representation within the rule. Cooper v. Schlesinger, 111 U. S. 148, 155, 4 Sup. Ct. 360, 28 L. Ed. 382; Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215. Fraud is not waived unless there be conduct inconsistent with a purpose to disaffirm the contract after full knowledge of the facts which constitute the fraud, and raise an election whether the defrauded party will go on with the contract, or disaffirm what has been done. Mining Co. v. Watrous, 9 C. C. A. 415, 61 Fed. 163; Alger v. Keith (decided by this court Nov. 7, 1900) 105 Fed. 105; Moxon v. Payne, 8 Ch. App. 881. But full knowledge of a fraud does not mean that the party defrauded shall have knowledge of all of the evidence tending to prove the fraud. If he have knowledge of the material facts which go to make up the case of deceit as practiced upon him, it is sufficient to make him elect whether he will go on with the contract, or stop short and sue for the loss he has already suffered. Bach v. Tuch, 126 N. Y. 53, 26 N. E. 1019.

When the plaintiff learned, as he did in May, 1895, that the several factories which had been operated by the Rubber Reclaiming Company had not gone out of business of reclaiming old rubber, but were actively prosecuting that business, and in the market, each for itself, competing for waste rubber, he knew the material facts which went to make his case for deceit. By thereafter deliberately proceeding with the execution of the contract, he waived the deceit and affirmed the contract. Upon this ground the direction to the jury to find for the defendant was correct, and the judgment is accordingly affirmed.

## In re NUGENT.

### MUELLER v. NUGENT.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1901.)

No. 920.

1. BANKRUPTCY—SURRENDER OF ASSETS—CONTEMPT PROCEEDINGS.
Bankr. Act 1898 (30 Stat. 544) does not authorize the trustee to compel, by process for contempt, the surrender to the trustee of assets properly belonging to the estate, by one who obtained possession of them before the filing of the petition; such property being only obtainable by ordinary legal remedies applicable between any two claimants of property.

2. SAME—UNITED STATES DISTRICT COURT—JURISDICTION.
Bankr. Act 1898 (30 Stat. 552) § 23b, provides that suits by the trustee shall only be brought in those courts in which the bankrupt might have brought them but for the bankruptcy proceedings, except by consent of the defendant. *Held*, that one who obtained property as agent of a bankrupt before the filing of a petition against him, the trustee, the bankrupt, and the agent all being residents of the same state, was not subject, without his consent, to process from the United States district court to compel the surrender of the property to the trustee, since the bankrupt could not have sued in that court to recover the property if the bankruptcy proceedings had not been instituted.

On Petition for Review from the District Court of the United States for the District of Kentucky.

W. W. Smith, for petitioner.
W. W. Watts, for trustee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. On the 23d day of March, 1900, E. B. Nugent was adjudicated a bankrupt upon the petition of the Wayne Knitting Mills and others, his creditors, filed February 19, 1900, and the matter was referred to a referee. Shortly thereafter Arthur E. Mueller was appointed trustee of the bankrupt's estate. On the 7th of April following, the trustee obtained an order upon the bankrupt from the referee requiring him to show cause why he should not be required to pay over to the trustee two sums,—one of $4,133.45, which it was alleged the bankrupt had received upon a mortgage of his house and lot in Louisville, and another of $10,100, alleged to have been received by him upon the sale of a stock of goods with which he had been doing business in that city. In the bankrupt's response he stated that the moneys were in the hands of his son, W. T. Nugent, and that it was impossible for him (the bankrupt) to pay the money to the trustee. Upon the hearing this response was held by the referee to be insufficient, and the bankrupt was ordered to pay the funds mentioned into the hands of the trustee. Upon the bankrupt's failure to do this, he was adjudged guilty of contempt by the referee, and the matter was reported to the court, with a recommendation that the bankrupt be committed for his contempt. Upon a suggestion that the bankrupt was of unsound mind and approaching senile imbecility, the court declined to make the order and discharged him. On the 13th day of April, 1900, the trustee presented to the referee a petition for an order to show cause against William T. Nugent, the present petitioner for review. In that petition the trustee alleged that the bankrupt pretended that the proceeds of the mortgage and stock of goods were in the possession of William T. Nugent, who had been ordered to appear and testify; that the latter concealed himself, and could not be found by the marshal. It was further stated that it was "shown by the evidence herein" that the said William T. Nugent was authorized by the bankrupt to receive the said moneys, and that the bankrupt pretended that the money was intended to be used in the payment of creditors and starting another business elsewhere. The trustee further stated in his said petition that he did not know whether the money was in the hands or under the control of E. B. Nugent or William T. Nugent, but he was fearful it would be dissipated unless an injunction should be issued against William T. Nugent, restraining him from disposing of any part thereof, and an order made that he pay the said moneys into the hands of the trustee; that, as the trustee believed, the said moneys were part of the estate of the bankrupt, and that, if they came into the hands of said William T. Nugent at all, they did not come to him "as a common or simple debtor," "but that said sum is a fund belonging to this estate, and should be in the hands" of the trustee. Whereupon the trustee prayed that an order for an injunction, restraining William T. Nugent "from disposing of

said moneys, may be made, and further ordering him to pay all thereof, or such as he may have in his hands, to the trustee." Thereupon, without notice to the respondent, the referee forthwith made an order for the injunction as prayed, and further commanding him within five days after service of the order to show cause why he should not be required to pay said sum of money to the trustee. Neither the petition nor the order stated when the moneys came to the hands of the respondent, or under what circumstances. A copy of the order was served upon the respondent on October 8th, and on the 13th a hearing was had thereon before the referee. Shortly before that date an indictment had been found by the grand jury in the United States district court for the district of Kentucky against William T. Nugent, charging him with having unlawfully and fraudulently received $10,000 and other moneys of the bankrupt with the intent to defeat the provisions of the bankrupt act. On the above-mentioned hearing before the referee on October 13th the said William T. Nugent filed a response, in which he alleged that he had at no time since the filing of the petition in bankruptcy received the moneys with which he was charged, or any part thereof, and excused himself from further answering by reason of the above-mentioned pending indictment, and the tendency of his answer to criminate himself. He further, in his said response, denied the jurisdiction of the referee to make the order on which the referee was proceeding. The referee proceeded to take testimony upon the matter of the order, and, on a subsequent day to which the proceedings were adjourned, adjudged that the response to the order was insufficient, and that the said moneys were the proceeds of the mortgage of the house and lot, and of the sale of the stock of merchandise, the property of the bankrupt, and were received by the said William T. Nugent, as the agent of the bankrupt, on February 19th, before the hour of 2 o'clock p. m.; that the petition in bankruptcy was filed at 5 o'clock p. m. of the same day; and that, as it further appeared that he had not paid over said moneys to the trustee, the order should be made absolute. It was thereupon further ordered that the respondent pay the moneys to the trustee before 9:30 o'clock a. m. of the next day. The respondent having failed to comply with this order, the referee adjudged him in contempt, and reported the matter to the court, with a recommendation that he be committed to prison until he should pay the moneys to the trustee. The respondent prayed for a review by the district judge of the order requiring him to pay the moneys to the trustee, and the referee certified the proceedings to the district judge. The matter came on for hearing before the judge upon the report and certificate of the referee, and on November 1, 1900, the judge announced an opinion that the proceedings of the referee should be sustained, and his recommendation of imprisonment approved. The matter was postponed until the 3d of November, when counsel for the respondent tendered an amended response which was verified by the respondent, in which he stated, in substance, that he had failed to make response before the referee respecting moneys received by him before the petition in bankruptcy was filed, because, as he was advised, his answer would tend to incriminate him of the

charge contained in the above-mentioned indictment, but that he now asked to amend his response; and, in addition to what he averred in his former response, he said "that whatever moneys came to his hands on February 19, 1900, belonging to said E. B. Nugent, or any such money at any subsequent date thereto, was not received or held by this respondent as agent or bailee, or in any trust capacity whatever, but was held adversely to said E. B. Nugent." The judge declined to permit this amended response to be filed, being of opinion that it was too late. The following order was then entered:

"And, thereupon, pursuant to the opinion of the court filed herein on the 1st instant, it is the judgment of the court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson county, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.45, or otherwise satisfy the said trustee with respect thereto; and the court reserves the right and power to suspend or set aside the judgment and sentence upon the delivery, payment, or satisfaction aforesaid. To all of which the respondent William T. Nugent, excepts."

In pursuance of this order the respondent was committed to the county jail. Upon his petition the proceedings were certified to this court for review. The petition for review by the district judge prayed only for the review of the order of the referee ordering the respondent to pay the sums of money mentioned to the trustee, and it is the action of the district judge upon that petition which is the subject of our review; but as the validity of the referee's order requiring the payment of the money, and the order finding the respondent guilty of contempt, and the authority of the judge to order the imprisonment, depend upon the previous proceedings, the whole of the proceedings must necessarily be considered.

It must be admitted that the circumstances shown by the record would, unexplained, tend strongly to indicate that the petitioner was a party, and perhaps the principal party, to a fraud upon the creditors of the bankrupt. But if he was under no valid requirement to make defense, and show such explanatory facts, if they exist, as would relieve the present appearances, and he has failed to do so in consequence of his reliance upon his objection that the proceedings were without lawful authority, it would be premature to pass judgment on the merits of the case.

The question of the legality of the proceedings is twofold: First, whether it is competent for the court in bankruptcy to adopt this summary method of getting the assets of the bankrupt in, under circumstances such as these; and, second, if such authority existed, whether it was duly exercised in the present case. It is needless to say that if the facts are as found by the referee the fund in question was of the assets of the bankrupt, and that upon his qualification the trustee became vested with the title thereto as of the date of the adjudication of bankruptcy, and the right to its possession. But the question is, how may he recover such possession? If the circumstances are such that the bankrupt himself, but for his bankruptcy, could not recover the fund by a summary proceeding against one who withholds it from him, is there any provision in the bankrupt act which entitles the trustee to resort to it? The person in pos-

session of the fund before the petition in bankruptcy was filed could not be dispossessed by violence, or otherwise than by a plenary suit, where his right to retain it could be tried and determined. Is his privilege taken away by the succession of the trustee to the bankrupt's right? It seems to be settled that the trustee stands in the place of the bankrupt for all purposes except that of asserting certain rights of creditors, in respect of which the bankrupt's hands are tied for their protection. But that exception has reference to rights of property, and not to the remedies for their enforcement. We are not referred to any provision in the bankrupt act which accords the right to the trustee to resort to a summary proceeding against one who is not a party to the proceedings for the recovery of assets withheld from him by such other party, who has the possession of them. In Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, the supreme court indicated its opinion to be that congress intended "that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy." The district judge and the referee seem to have thought that if, in the judgment of the court, the possession was not adverse to the bankrupt, such proceedings might be adopted to dispossess the holder. But it is the exercise of jurisdiction to determine whether the circumstances are such that the possession is really in right of the bankrupt or adverse to him or to the trustee. It would be the pith of a controversy in a suit at law or in equity brought to enforce the rights of the trustee. The view which was entertained in the district court seems to have been taken from the language of decisions which have denied the right of the bankruptcy court to take jurisdiction of causes between the trustee and outside parties claiming adversely to him when there was no jurisdiction independently of the bankrupt act, referring particularly to the recent case of Bardes v. Hawarden Bank, above cited. But such language was meant, as we understand from its context, to include all holdings as adverse when the circumstances are such that the property cannot be recovered without resort to legal remedies; for the reasons given for the decision would apparently include all such cases. In the case of a general assignment for the benefit of creditors, the assignment being void, the assignee's possession is without right, and the title as well as the right to possession is in the assignor. But, if the latter cannot recover the property otherwise than by legal proceedings, he must resort to the ordinary legal remedies. We perceive no valid distinction between such a case and any other where there is an adverse holding in fact by one not a party to the proceedings, no matter what the character of such possession may be in point of law. Neither was the respondent subject to process from that court. The respondent, the bankrupt, and the trustee were all citizens of Kentucky. If the bankrupt could not have instituted legal proceedings in the district

court for the recovery of the money, it seems clear that the trustee could not. The jurisdiction is not changed by the transfer of the title from the bankrupt to the assignee. And it was declared in the Hawarden Bank Case, above referred to, that, under the second clause of section 23 of the bankrupt act, controversies not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property, as assets of the bankrupt, against strangers to those proceedings, do not come within the jurisdiction of the district courts of the United States, unless by consent of the proposed defendant.

But it is urged that the respondent was the agent of the bankrupt, and that his possession was that of the bankrupt, and that, as the bankrupt could be compelled to turn over the fund, so might his agent. This argument again confounds the actual with the theoretical conditions, and it is with the former that we are necessarily concerned. Let it be conceded that in the eye of the law the possession of the agent is that of the principal; yet if, as matter of fact, the agent withholds the property of his principal, the latter must have recourse to the ordinary legal remedies, and in a proper court. The fiduciary relation between them gives the principal no extraordinary remedy to compel the agent to deliver the property which he holds to his master. That relation may affect the determination of the court when its jurisdiction has been properly invoked, but that is another matter. The case with which we have to deal is one where the bankrupt transferred the assets before the petition in bankruptcy was filed, and the trustee has never had possession, and where his right is given by the retroactive operation of the law resulting from the adjudication in bankruptcy. How the matter would stand where the assignee has obtained possession of the assets, and a third person dispossesses him or otherwise meddles with the assets, is a different question, and is subject to different considerations, into which we have here no necessity to go.

Our conclusion that these proceedings are invalid for lack of sufficient authority from the law also makes it unnecessary to consider whether, if such authority existed, the petition to the referee for the order to show cause was sufficient to found the proceedings against the respondent, and whether the proceedings taken thereon were regular or otherwise. It results that the order of the district court for the commitment of the respondent should be reversed, and the order to show cause made by the referee, together with his order requiring the respondent to pay the trustee the money under his control, as well as the order adjudging the respondent to be in contempt, should be vacated and set aside.

# In re HANNA et al.

(District Court, E. D. Pennsylvania. December 22, 1900.)

No. 482.

1. EQUITABLE ASSIGNMENT—PART OF CLAIM.

An order, "Please pay to the order of * * * the sum of * * * out of any balance due us remaining in your hands," operates as an equitable assignment of part of the fund.

2. SAME—RIGHTS OF TRUSTEE IN BANKRUPTCY.

There having been an equitable assignment of part of a fund by a bankrupt, valid as between him and the assignee, the trustee in bankruptcy takes the fund subject to the assignment, even if for reasons of public policy it could not have been enforced against the city which held the fund.

In Bankruptcy.

The following is the certificate of the referee and report on exceptions:

To the Honorable the Judge of the District Court for the Eastern District of Pennsylvania:

The referee respectfully reports that the following question involving a claim upon the fund in the hands of the trustee in bankruptcy was presented to him for his decision by the trustee, and William S. Eaton, Jr., Esq., a creditor, the claimant:

The bankrupts were contractors for the erection of steam-heating apparatus in premises Nos. 1120 to 1142 Market street, Philadelphia, a property belonging to the Stephen Girard estate. There was due to the bankrupts from the trustees of said estate the amount of $2,854.02 for materials furnished and work performed by them on this building. This fund was paid to the trustee in bankruptcy by the trustees of the Stephen Girard estate, with the reservation on behalf of the trustees of the Girard estate of any right in said fund which might be vested in the claimant, the said Wm. S. Eaton, Jr., by reason of a certain letter of request drawn by the bankrupts, and presented to the trustees of the Girard estate, requesting them to pay to the Boston Blower Co. the sum of $281.88; the said sum being the amount of a judgment obtained by them against the bankrupts in the court of common pleas of Philadelphia county in November, 1898. All the interest of the blower company and all debts whatever due them were duly assigned to the said Wm. S. Eaton, Jr., by a duly-executed deed of assignment.

The letter of request is as follows:

"Philadelphia, February 1, 1899.

"To the Trustees of the Stephen Girard Estate, Philadelphia, Pa.—Dear Sirs: Please pay to the order of Frank P. Prichard, Esq., attorney for the Boston Blower Company, the sum of $281.88 out of any balance due us remaining in your hands.

"Yours, truly, Hanna & Kirk.
"J. V. Kirk."

The deed of assignment by which Wm. S. Eaton, Jr., became assignee of all moneys due to the Boston Blower Company was executed on the 25th day of March, 1899. The adjudication in bankruptcy was made on the 23d day of February, 1900, so that the claimant was fully vested with all the rights of the Boston Blower Company in their claim under the letter of request more than four months before the adjudication in bankruptcy.

It appears clear to the referee that the trustee in bankruptcy became vested only with the title held by the bankrupts, taking the property subject to all existing liens, charges, claims, and equitable rights (Coll. Bankr. p. 375), and that the claimant, Wm. S. Eaton, Jr., became vested by the deed of assignment from the Boston Blower Company with whatever interest in

the amount of $281.88 was transferred to the blower company by virtue of the letter cited.

It was contended on behalf of the claimant that the letter cited operated as an assignment of the amount expressed in the letter. On behalf of the trustee it was urged that the letter was not expressed in such terms as to come within the requirements of a partial assignment, and, even if it should be regarded as sufficiently specific to operate as a partial assignment of a fund in the hands of an ordinary holder, it was inoperative against the trustees of the Stephen Girard estate on the ground that the administration of the Girard estate was a branch of the city government, and that a partial assignment of a fund under the control of a municipal corporation is inoperative.

A partial assignment is not allowed at common law without the ratification of the debtor, because he might be submitted to multitudinous suits, and be subjected to embarrassments and responsibilities not contemplated in his original contract (2 Am. & Eng. Enc. Law [2d Ed.] p. 1068; 1 Beach, Mod. Eq. Jur. p. 378); but this rule of law has long been abandoned in courts of equity, for in proceedings in equity the interests of all parties can be determined in a single suit, and the debtor can bring the entire fund into court for distribution.

It only remains, then, to consider: First, whether the letter cited fulfills the conditions requisite to effect an equitable assignment; and, second, whether the holder of the fund, the trustees of the Stephen Girard estate, are exempt from the rule as to the validity of partial assignments, on the ground that they are a branch of the municipal government.

The conditions required to constitute an effective assignment are that the fund shall be designated, and the order to pay unconditional. The language of this letter is sufficiently specific on these points, under the decisions of the supreme court of the United States and the supreme court of this state. The letter addressed to the trustees of the Girard estate contains an unconditional order to pay the party named therein the sum of $281.88, and the expression in the letter that follows, "out of any balance due us remaining in your hands," defines the fund as being the money due the drawer of the order by the parties on whom it is drawn.

In the case of Caldwell v. Hartupee, 70 Pa. St. 75, the following order was held to operate as a partial assignment:

"Mr. W. A. Caldwell—Dear Sir: Please pay to Mr. John Cuthbert $1,500 out of the proceeds of the last note coming to us from the steamer Quickstep, with interest from date of such note. Hartupee & Company.

"Pittsburg, October 10th, 1868."

The facts in this case were as follows: Henry T. Dexter, the owner of the steamboat Quickstep, which was largely in debt, made a trust mortgage of the boat to defendant and George W. Coffman, as trustees, to secure $15,000 for the benefit of the creditors of the boat, named in a schedule annexed to the mortgage among whom were the plaintiffs.

The plaintiffs drew upon the defendant in favor of John Cuthbert. The defendant declined to accept or pay the order on the ground that Hartupee & Co. were indebted to the firm of which he was a member. Cuthbert indorsed the draft to Morrow, for whose use the suit was brought. This order was held to be an equitable assignment of so much of the money as Hartupee & Co. were entitled to receive from the trustee under the deed of trust out of the proceeds of the last note which they had full power to make.

This case has been followed in Ruple v. Bindley, 91 Pa. St. 296, and Knuchel's Adm'r v. Schneider, 158 Pa. St. 412, 27 Atl. 1088.

When the order in this case is compared with the case in hand, the force and effect of the language of the two papers are identical. In the language, "out of the proceeds of the last note coming to us from the steamer Quickstep," there is no more specific identification of the fund than the language of the letter in the case in hand, "out of any balance due us remaining in your hands."

There are a line of decisions that a check without other evidence to support it is not operative as an equitable assignment. The reason of this de-

cision appears to be that a check drawn generally is not considered to be drawn on a particular fund. If the order in the case in hand had been a simple order to pay, the decisions as to checks would not be in point; but the order specifying the fund as "any balance due us remaining in your hands" is not drawn in the form of a check, but defines the fund from which payment is to be made.

In the case of Bank v. Yardley, 165 U. S. 635, 17 Sup. Ct. 439, 41 L. Ed. 855, it is held that a check drawn in the ordinary form does not constitute an equitable assignment; but, it being established by evidence that the intention of the parties to the transaction was that the check drawn generally was to be paid out of a particular fund, such a check, as between the parties, is to be treated as an order for the payment out of the specific designated fund. This case was a bill filed in the circuit court of the United States to subject moneys in the hands of the receiver of the Keystone National Bank to the satisfaction of an alleged equitable charge or lien thereon, arising from a check for $25,000 given by the Keystone National Bank to the Fourth Street National Bank, under the following circumstances:

The Keystone National Bank, desiring a loan of this amount from the Fourth Street National Bank, exhibited to the officials of the latter bank a memorandum showing a balance to their credit in the Tradesmen's National Bank of New York for $27,000, and asked the Fourth Street National Bank to accept a draft of the Keystone National Bank against the Tradesmen's National Bank. Relying upon these representations, the check was accepted, and the loan made by the Fourth Street National Bank. The Tradesmen's Bank made settlement with the receiver of the Keystone Bank, paying to him all the balance due the Keystone National Bank.

In finding upon this claim, White, J., says: "Whilst an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if, in the transaction connected with the delivery of the check, it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specific fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers and parties charged with notice."

Numerous additional authorities to this effect could be cited, but sufficient has been said to maintain the position that an order for the present and unconditional payment of money, specifying the fund from which it is to be paid, will operate as an equitable partial assignment.

It has been strongly contended, however, that, even if the language of the letter was operative as a partial assignment against an ordinary holder of the fund, in the case in hand it was not effective, as the trustees of the Girard estate were a branch of the city government, and it has been decided that a municipal corporation is not bound to recognize a partial assignment of a claim against it. This was decided in Geist's Appeal, 104 Pa. St. 351, where it is held that an assignment of a portion of a claim against the city of Pittsburg could not be enforced.

It would be difficult to determine whether the trustees of the Girard estate could avail themselves of the privileges and immunities of a city department that administers the city money collected from the taxpayers for municipal purposes, and where the officials would be very much embarrassed by the enforcement of partial assignments. The municipal corporation is trustee of the will of Stephen Girard for the purposes of carrying out the trusts declared in his will, and it is difficult to see any reason why they should be exempt from the duties of other trustees.

The reason for the exception made in favor of municipal corporations is that they would be embarrassed and harassed by partial assignments dividing funds into small payments. It is not evident that this reason would apply to the trustees of the Girard estate, but it is not necessary to decide this question, because they are not the holders of the fund; they are not defending the action; and, even if they were at one time privileged holders of the fund, the reasoning that applies to the decisions exempting municipal corporations is not applicable, the fund having passed into the hands of the trustee in bankruptcy.

Report of Referee upon Exceptions.

To the Honorable the Judge of the District Court for the Eastern District of Pennsylvania:

The referee has fully considered the arguments of counsel on the exceptions, and cannot find any reason to change the views already expressed. The latter deposited with the trustees of the Girard estate appears to him, under the authorities, to fully comply with all the requirements of a valid, partial, equitable assignment, in that it is an unconditional order to pay, and also contains a designation of the fund sufficiently specific to comply with the authorities already cited.

As to the question raised that the letter of request was not binding upon the trustees of the Girard estate, a branch of the municipal government, and that, therefore, the letter could not operate as an assignment of the fund within four months of the bankruptcy, the referee is of the opinion that, if an equitable assignment is in proper form, it is, as against a privileged holder of the fund, only voidable; not void. If such holder should see fit to comply with the assignment, he would be safe in doing so. The law still prevails. The privilege only extends to the enforcement of the law, and, the fund having been transferred by the trustees of the Girard estate to the trustee in bankruptcy, with the reservation of the rights of the Boston Blower Company by the letter mentioned, no question can be raised as to the enforcement of the law, and the letter of request operates as an assignment, as it was executed in good faith more than one year before the adjudication in bankruptcy. Therefore the exceptions are dismissed.

C. Wilfred Conrad, for trustee.

Thomas S. Gates and Frank P. Prichard, for William S. Eaton, Jr.

J. B. McPHERSON, District Judge. I agree with the referee in holding that the order in question operated as an equitable assignment of part of the fund, and that the trustee in bankruptcy of the assignor took the fund subject to the assignment. The transaction was valid between the bankrupt and the blower company, even if for reasons of public policy it could not be enforced against the city of Philadelphia.

The decision of the referee is affirmed.

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STRAUSE et al. v. HOOPER et al.

District Court, E. D. North Carolina. January 1, 1901.)

1. BANKRUPTCY—PARTNERSHIP—PROVABLE DEBTS.
   It is the policy of Bankr. Act 1898 to treat partnerships as distinct legal entities, and notes signed by both members of a partnership, which do not purport to be obligations of the firm, although given by the partners for money borrowed and put into the firm as capital, are not provable against the estate of the partnership in bankruptcy.

2. SAME—DISCHARGE—GROUNDS FOR REFUSAL.
   It is only on one of the grounds specified in Bankr. Act 1898, § 14b, that a court can refuse a discharge to a bankrupt.

In Bankruptcy. Petition to review decision of referee allowing the claims of E. O. Hooper and A. F. Gray to be proved against the estate of the firm of J. A. Hooper & Co., bankrupts.

J. Haywood Sawyer and P. H. Williams, for petitioners.

E. F. Aydlett, for E. O. Hooper and C. H. Gray.

PURNELL, District Judge. On June 6, 1900, the firm of J. A. Hooper & Co. were duly adjudged bankrupts on a petition filed by creditors of the firm. At the meeting of the creditors to prove claims and elect a trustee, E. O. Hooper, father of J. A. Hooper, filed a bond in the following words:

"$1,000. Elizabeth City, N. C., May 15th, 1897.

"On demand we promise to pay to E. O. Hooper or order, without offset, one thousand dollars, with interest at six per cent. per annum. Negotiable and payable at ——. Value received. The drawer and indorser of this note hereby waive the benefit of homestead exemption as to this debt.

"J. A. Hooper. [Seal.]
"C. H. Gray. [Seal.]"

C. H. Gray is the other member of the firm of J. A. Hooper & Co. A. T. Gray, father of C. H. Gray, filed a bond for $1,500, bearing the same date, in the same words, except the amount, signed as above,—similar in every respect except the amount. Creditors of the firm or partnership of J. A. Hooper & Co. objected to these claims being allowed as claims against the partnership, and insisted they were individual liabilities of J. A. Hooper and C. H. Gray. After taking depositions, the referee held:

"That the bond of E. O. Hooper for one thousand dollars, dated the 15th day of May, 1897, is a liability of the firm of J. A. Hooper and C. H. Gray, trading as J. A. Hooper & Co.; that the said firm received the benefit from the said one thousand dollars, which went into the firm and was a part of their capital; that the bond of A. T. Gray, for fifteen hundred dollars, dated May 15, 1897, is a liability of the firm of J. A. Hooper & Co., and was cash advanced to said Hooper & Gray for their partnership business, and was a liability of said firm, being a part of the capital of said partnership."

To this the creditors excepted, and the record is certified for review under the statute.

The following facts appear in the depositions and are found by the court: In August, 1896, J. A. Hooper entered into partnership with one Gold under the firm name of Gold & Hooper. E. O. Hooper furnished or loaned his son $1,000 to purchase a half interest in the business of, and the amount was paid to, Gold. No note or bond was given for this sum during the existence of the firm of Gold & Hooper. The firm of Gold & Hooper was dissolved in May, 1897; Gold retiring, and Hooper taking the stock of merchandise, accounts, fixtures, etc., and assuming the debts of the firm. In May, 1897, J. A. Hooper and C. H. Gray formed the partnership of J. A. Hooper & Co. No written agreement appears in the record. J. A. Hooper contributed the goods, etc., he had received from Gold & Hooper, estimated to be worth about $1,200. Gray was to contribute $1,500, and his note to his father represents his contribution. This is about all of the agreement that can be gathered from the depositions. About the time the partnership was formed the notes were executed. J. A. Hooper testifies that at the time the partnership of J. A. Hooper & Co. was formed "I owed my father the one thousand dollars, and he [referring to Gray, his partner] owed his father the fifteen hundred dollars. Then we each became responsible to our fathers, A. T. Gray and E. O. Hooper, for the amounts we owed them." E. O. Hooper testifies repeatedly that he looked to his son alone to repay the money

($1,000) paid to Gold, and evidenced by the bond, which remained the same in 1897, a year after the advancement was made, though no interest had been paid. The money represented by both bonds was used by the partnership. J. A. Hooper has some individual estate, real and personal property, which he estimates to be worth about $1,250, but it does not appear whether C. H. Gray has any individual estate or not. He was not examined, though present.

Counsel propounded to witnesses questions of law, as to whether the firm assumed the debts. The court is not bound by answers to such questions, but will find the facts and apply the law to such facts. Were these firm or individual liabilities? This is the question to be determined,—a question of law arising on the facts. It is clearly the policy of the bankrupt act of 1898 to treat partnerships as legal entities which may be adjudged bankrupts in voluntary or involuntary proceedings, irrespective of any adjudication of the bankruptcy of individuals who compose such partnerships or firms. The adjudication of the bankruptcy of a partnership does not necessarily draw into the proceeding the estate of every individual member. In re Wilcox (D. C.) 2 Am. Bankr. R. 117, 94 Fed. 84; In re Gay (D. C.) 3 Am. Bankr. R. 529, 98 Fed. 870; In re Meyer, 3 Am. Bankr. R. 559, 39 C. C. A. 368, 98 Fed. 976; In re Duguid (D. C.) 3 Am. Bankr. R. 794, 100 Fed. 275. In these opinions the provisions of the statute are fully discussed,—especially in Re Meyer, by the circuit judge, who delivered the opinion of the court. In this cause the proceeding was against the firm of J. A. Hooper & Co., the legal entity, and not against the individual members composing the firm. In the case cited (In re Meyer) the petition asked for an adjudication as to the firm and each individual member of the firm, but the court held that, while the adjudication was proper as to the firm and those members thereof who participated in the acts of bankruptcy, there could be no adjudication as to a member of the firm who was not present and did not participate. The petition furnishes an illustration for the solution of the question involved. There is a widespread practice in commercial circles of adopting firm names which do not in any way indicate who compose the firm. Old firm names are retained long after the original members have passed away, for reasons sufficient to succeeding partners, sometimes for one consideration and sometimes another; but all contracts or obligations, to bind the firm, must be so expressed. Take, for instance, one of the petitioners herein, I. I. Strause and M. M. Strause, partners trading and doing business under the firm name of Southern Clothing Manufacturing Company, of Richmond, Va. A note or bond signed by I. I. Strause and M. M. Strause without any mention of or reference to the firm name, Southern Clothing Manufacturing Company, would not be provable against such partnership, nor could a suit against the firm be maintained on such note or bond. The fact that the proceeds of a loan went into the assets of the firm would not change the legal aspect of the obligation. The question would at last resolve itself into the query as to who executed the bond or contract, and to whom was the credit given. The written contract is the best evidence of this, and if parties are careless in executing notes, bills, bonds, and contracts, they must

abide the consequences. In the case at bar the fathers of the two young men evidently intended to set them up in business, and for this purpose each made to his son an advancement, for which he signed a note with his partner as surety. This appears on the bonds themselves. What expectation they had aliunde is not shown, except by the testimony quoted, which shows Hooper, the father, regarded the note as a personal obligation on the part of his son, and he looked to him alone for repayment. In fact, there is nothing in the record which shows the two bonds offered to be proved as claims against the firm of J. A. Hooper & Co. were anything more than personal and individual obligations of J. A. Hooper and C. H. Gray, which would be provable in bankruptcy against their individual estates had there been an adjudication as to them severally as individuals, but not provable against the partnership of J. A. Hooper & Co. except as to any surplus which may remain after the partnership debts shall have been paid; but this question does not and may not arise. The two bonds set out in the record are not partnership liabilities, and are not provable claims against the partnership of J. A. Hooper & Co. in this proceeding. The referee's ruling is therefore reversed. The claimants are not entitled to share with other creditors of J. A. Hooper & Co. in the distribution of the partnership assets.

There is also a petition sent up asking for a final discharge of J. A. Hooper & Co. and J. A. Hooper and C. H. Gray, to which creditors object. There has been no adjudication as to J. A. Hooper and C. H. Gray individually; hence creditors' objection to discharge is sustained. Reasons for this are so palpable they need not be stated. The objections to the discharge of the partnership of J. A. Hooper & Co. are not such as are contemplated in the act as grounds upon which a discharge may be refused. It is the duty of the court to discharge the applicant unless he has committed an offense punishable by imprisonment as provided in the act, or, with fraudulent intent, to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained. Bankr. Act, § 14b; Id. § 2, cl. 12. The court will not seek for grounds upon which to refuse or even delay a discharge, but hear and consider them when properly presented. The court must, however, in every case see that the law and rules have been complied with. In the case at bar there is no evidence or certificate showing the rules have been observed. There is no certificate of conformity, as required by district rule 8; no proof of publication. The order for discharge is therefore postponed until the court is satisfied the law and rules have been complied with, and the bankrupts entitled to the discharge. This petition is held for further order.

## In re HOWELL.

(District Court, N. D. Illinois, N. D. May 18, 1900.)

No. 2,784.

BANKRUPTCY—APPLICATION FOR DISCHARGE—OBJECTIONS—FALSE SCHEDULES.

Where the specification of objections to the discharge of a bankrupt alleged that nine years before he made his wife a gift of $20,000 in fraud of creditors, and that his failure to schedule such amount as his property was making a false schedule, such objections will be overruled as insufficient in law, since on their face the objections showed property in the fund to be in the wife, and not in the bankrupt.

In Bankruptcy. On objections to discharge.

Swift, Campbell & Jones, for bankrupt.

Leonards & Austin, for objecting creditor.

KOHLSAAT, District Judge. This matter comes on to be heard upon the specifications of objection to the discharge of the bankrupt filed by John A. Ames, a creditor. The specifications were prepared in the nature of a petition, and the bankrupt filed an answer to the same, asking that the answer be treated as a demurrer. Treating the said petition as the technical specifications of objection to discharge, and said answer as a demurrer thereto, I am of the opinion that said specifications do not state a ground for withholding the discharge of the bankrupt. The allegation is that the bankrupt nine years ago made a gift to his wife of $20,000 in fraud of creditors. Petitioner several years ago filed a creditors' bill against said bankrupt and his wife, seeking to establish said contention, and to obtain the money so given to the wife, which suit is still pending. The sole legal ground of objection to discharge on this state of facts is that the bankrupt failed to schedule the property in question as his own. Under the allegations of the petition or specification, the property in question was that of the wife, as against the bankrupt. Therefore he made no false schedule by omitting this property. Possibly the trustee of the bankrupt may be able to recover this property for the benefit of creditors, and if the creditors desire to have a trustee appointed for this purpose, and desire to advance the costs necessary to continue said litigation, leave will be granted for such trustee to cause himself to be substituted in said suit. Creditors may, if they desire, take the proper steps before the referee to have a trustee appointed, but the specifications herein of the objections to the discharge of the bankrupt will be overruled on the ground that they are insufficient in law. The bankrupt is discharged.

## In re EIDEMILLER.

(District Court, N. D. Illinois, N. D. July 14, 1900.)

No. 3,614.

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—INFANCY OF DEBTOR.

Creditors of an infant, in Illinois, whose debts the infant is entitled to repudiate at majority, cannot have him adjudged an involuntary bankrupt, since they are not creditors in the sense of the bankruptcy act of 1898.

Wheeler & Silber, for petitioning creditors.

Wm. R. Burleigh and E. C. Crawford, for bankrupt.

KOHLSAAT, District Judge. This matter comes on to be heard upon demurrer of petitioners to the plea of infancy of the alleged bankrupt. The authorities cited in support of said demurrer do not apply to the law of infancy existing in Illinois. I am of the opinion that in Illinois an infant cannot be adjudged a bankrupt. In this case the infant can, upon reaching majority, repudiate the debts which petitioners claim he owes them. For this reason the petitioners are not creditors, in the sense contemplated by the bankruptcy act, and therefore cannot maintain their petition as such. The demurrer is overruled, with leave to petitioners to reply to the plea within five days, if they choose to controvert the alleged fact of infancy.

## ATKINS v. WILCOX.

(Circuit Court of Appeals, Fifth Circuit. December 18, 1900.)

No. 977.

1. BANKRUPTCY—TRUSTEE—RIGHT TO CONTEST CLAIMS

   Under Bankr. Act 1898, a trustee of a bankrupt is authorized, as representative of all the creditors, to contest the allowance of any claim filed against the estate.

2. SAME—EFFECT ON LEASE—RENT TO ACCRUE.

   Under a provision of a lease that "should the lessee at any time fail to pay the rent punctually at maturity, as stipulated, the rent for the whole unexpired term of this lease shall * * * at once become due and exigible," the filing of a petition in bankruptcy by the lessee at a time when he was not in default in the payment of rent does not mature notes given for rent to accrue in the future, or the lessor's right to enforce a statutory lien therefor.

3. SAME—PROVABLE DEBTS—RENT TO ACCRUE.

   On the bankruptcy of a lessee, notes given by him for installments of rent to accrue in the future under a lease for a building occupied by him for business purposes do not constitute debts provable under Bankr. Act 1898, § 63, subd. 1, where the lease contains provisions for its termination in case the building should become untenantable, authorizing re-entry by the lessor for condition broken, and prohibiting its transfer by the lessee, or the use of the premises for any other purpose than that specified, without the written consent of the lessor.

Appeal from District Court of the United States for the Eastern District of Louisiana.

Robert J. Maloney, for appellant.

E. T. Florence and Chas. Rosen, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. On the 4th day of May, 1899, Leopold Keiffer, by a written lease, rented from the appellant, Mrs. Sarah E. Atkins, certain premises described in the lease for the term of one year, commencing on the 1st day of October, 1899, and ending on the 30th day of September, 1900, for a monthly rental of $333.33⅓, for which Keiffer executed and delivered to the appellant 12 rent notes, bearing even date with the lease, and payable to the lessor, one on the 1st day of November, 1899, and one on the 1st day of each and every succeeding month (except the last one, payable on the 30th of September), fixing the interest at the rate of 8 per cent. per annum from maturity until paid. The lease recited that should the property be destroyed by fire, or should the lessee be deprived of the use of the premises by some other unforeseen event, not due to any fault or neglect on his part, then he should be entitled to a credit for the unexpired term of the lease, and the corresponding proportion of rent notes should be annulled and returned to him. At the time of the making of this lease Keiffer was in possession of the premises under a lease of similar import bearing date 8th of June, 1898, which provided for a term of one year, commencing on the 1st day of October, 1898, and ending on the 30th day of September, 1899. On October 3, 1899, Keiffer presented his petition to the court of bankruptcy to be adjudged a bankrupt, which petition, in the judge's absence, was referred to a referee, who on the same day declared and adjudged the petitioner to be a bankrupt. By a stipulation of the parties, only certain portions of the record in the bankrupt proceeding were brought up on this appeal, from which it appears that the appellant made proof of a secured debt against the estate of the bankrupt on October 31, 1899, claiming the aggregate amount of the 12 rent notes given and held under the lease of date May 4, 1899, and to become payable as above recited. The claim and proof thereof embraced other items, which do not require further notice here. On November 21, 1899, this proof of debt was filed by the referee. The record we have does not show any further action in the bankrupt estate until March 7, 1900, when an account of C. O. Wilcox, trustee of the estate of Leopold Keiffer, bankrupt, was presented to and filed by the referee, who thereon made an order of that date, as follows: "Let a meeting of creditors be held on March 20, 1900, at 3 p. m. Let them be notified according to law, and that they do show cause on the above date why said account should not be approved and homologated." The account showed the receipt of all of the funds that had come into the hands of the trustee, aggregating $3,651.44. It also showed 20 items of disbursement that had been made by the trustee, and bore an item, "Reserved for future costs, $150.00," which, added to the disbursements, aggregated $2,253.77. Among the disbursements is the following: "Mrs. Sarah E. Atkins, landlord. Rent for September, October, and November, 1899, three months, at $333.33⅓, $1,000.00." On March 20, 1900, the

appellant appeared before the referee and filed her written opposition to the account submitted by the trustee, on the ground that she had proved her claim for rent for the whole of the 12 months specified in the lease of May 4, 1899 (and other grounds not necessary here to notice), and that by the laws of Louisiana she has a lien of the first rank on all the property in the leased premises, and that the total assets in the hands of the trustee and on deposit to the credit of the estate were realized from the sale of the property contained in the leased premises, and subject to her lien, wherefore she opposes each and every item on said account, and prays that she be declared entitled to a lien first in rank on all the property contained in the leased premises, or on the proceeds, and that the account of the trustee be amended, and he be ordered to pay to her the full amount of her claim in preference to all other claims. The referee rejected her claim for the months of December, 1899, to September, 1900, inclusive, for reasons elaborately given in his judgment thereon, from which judgment Mrs. Atkins appealed to the judge sitting in the court of bankruptcy, by whom the judgment of the referee was affirmed, and she prosecutes this appeal.

It appears that the trustee occupied the premises during the months of October and November, 1899, and that he allowed and paid on Mrs. Atkins' claim for rent the rent which accrued for the months of October and November, under the current lease, at the rate and amount of the notes which had been given therefor. The appellant insists that the trustee was without right or interest to contest the lien of the opponent, as it was claimed in her proof of debt. We are clear that this position is not well taken. By the express terms of the statute the trustee is selected by the creditors. By the clearest implication he represents all the creditors, and as such representative has an interest in the just administration of the estate which belongs to the creditors. Moreover, this right is expressly recognized in the sixth paragraph of general order in bankruptcy 21 (32 C. C. A. xxii., 89 Fed. ix.), which has itself the force of a statute, even if not clearly founded on the text of the statute, which we think it is. It appears to give the trustee precedence even of the creditors, for the language is that, "when the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may," etc. The appellant by her proof of debt appears to found her claim, in part at least, on the following provision in the lease:

"Should the lessee at any time fail to pay the rent punctually at maturity as stipulated, the rent for the whole unexpired time of this lease shall, without putting said lessee in default, at once become due and exigible."

In her affidavit in support of her claim she contends:

"According to the terms of said lease, the note maturing November 1–4, 1899, not having been paid, then the whole unexpired amount of said lease represented by said notes becomes due and exigible."

At the date of the adjudication in bankruptcy, and at the date when the debt was proved, there had been no default in the payment of rent under the then current lease, or any violation of its conditions which would render the notes, or any of them, given for the

rent that was to accrue due and exigible, and authorize the lessor to enforce her lien on the property then in the leased premises for the payment of all or any one of the rent notes given and held under that lease. The lease does not provide in express terms that the bankruptcy of the lessee would have the effect to mature the notes and render them exigible. The present bankruptcy act has no direct provision on this subject. The bankruptcy act of 1867 contained this provision:

"Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods." Section 19.

No such provision, or its equivalent, appears in the present act. Its language applicable to the case we are considering is that debts of the bankrupt may be proved and allowed against his estate which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and do not bear interest. Section 63. This provision has not yet been construed by the supreme court, nor, as far as we are advised, by any one of the circuit courts of appeals. The National Bankruptcy News reports show that it has been frequently ruled on by referees in bankruptcy, and by four of the judges for districts in other circuits. In the opinions of the referees and of the judges of the courts of bankruptcy, just referred to, there is a marked unanimity to the extent that rent to accrue in the future, if it can be called a debt, is a contingent one, both as to its amount and as to its very existence, and that there is no provision in the act of 1898 which allows proof of such debts. In the very nature of the case, there is great diversity of view as to the ground on which this ruling is placed. The opinions and judgments necessarily have relation to the terms of the contract of lease out of which the claim for future rent grew, and are largely controlled by the particular provisions of the respective instruments. Some of the opinions, however, take ground broad enough to cover the subject, without reference to the terms of leases in general use. The judge for the district of Kentucky in his opinion uses this language:

"The court sees no way to avoid the conclusion that the relation of landlord and tenant in all such cases ceases, and must of necessity cease, when the adjudication is made. If the relation does cease, the landlord afterwards has no tenant, and the tenant has no landlord. At the time of the adjudication the bankrupt is clearly absolved from all contractual relations with, and from all personal obligations to, the landlord growing out of the lease, subject to the remote possibility that his discharge may be refused,—a chance not worth considering. After the adjudication there is no obligation on the part of the tenant growing out of the lease. He not only owes no subsequent duty, but any attempt on his part to exercise any of the rights of a tenant would make him a trespasser. His relations to the premises and to the contract are thenceforth the same as those of any other stranger. He cannot use nor occupy the premises. No obligation on his part to pay rent can arise when he can neither use nor occupy the property. The one follows the other, and it seems clear that no provable debt, and, indeed, no debt of

any sort, against the bankrupt, can arise for future rent. No rent can accrue after the adjudication in such a way as to make it the debt of the bankrupt, and future rent has not, in any just sense, accrued before the adjudication." In re Jefferson (D. C.) 93 Fed. 951.

The judge of the court for the Eastern district of North Carolina seems to concur in the views just stated. In his opinion we find this language:

"As to the rent of the bank: The contractual relations being terminated, a landlord is not entitled to prove a claim for rent against a bankrupt after such bankrupt ceases to use the building. The relations of landlord and tenant are severed by operation of the bankruptcy law. The trustee of his estate may, after adjudication, occupy and use the rented or leased premises for the estate; but under such circumstances it would be chargeable to the estate, not as rent under bankrupt's contract, but as cost and expenses of administering the same." Bray v. Cobb, 2 Nat. Bankr. N. 588, 100 Fed. 270.

Touching the language above quoted from the opinion of Judge Evans (In re Jefferson, supra), Judge Lowell, of the Massachusetts district, says:

"With all respect for the learned judge, I must think the above remarks made somewhat hastily, unless they are to be taken as limited to the particular lease in question, or made to depend upon some peculiar provision of the Statutes of Kentucky. Let us consider an actual example. A lease recently examined was made for a term of several hundred years, upon a payment of sixteen thousand dollars at the beginning of the term, and subject to a future rent of one dollar a year if demanded by the lessor. Clearly this would be an asset of a bankrupt's estate which the trustee would almost certainly elect to assume, and I can find nothing in the bankruptcy act which would terminate the lease and entitle the landlord to possession. Many existing ground leases, also, would certainly be assumed by a trustee in bankruptcy of the lessee, and it would be unjust to hold them terminated by the adjudication. It follows, then, that the lease here in question was not determined by the bankruptcy of the lessee, but only by the re-entry of the lessor."

The actual example proposed for consideration by Judge Lowell is a leasehold in form, certainly, but it appears to be substantially, in fact, a purchase of the freehold for a present consideration paid in cash at the beginning of the term, and to have value as an asset equal to the current market price of the freehold in the premises let. It is an estate with such an inconsiderable burden as may well be disregarded, and, as the learned judge says, clearly this would be an asset of a bankrupt's estate which the trustee not only would almost certainly elect to assume, but which the creditors, or the court on their motion or on its own motion, would compel him to assume. The doctrine of election to which he refers sprung out of the state of the law in bankruptcy as it was at an early time in England construed by the common-law courts. The rule as then announced has been greatly modified in England by statutes passed from time to time, and the decision of the English courts on these various statutes, and the decisions of the state courts in this country on the various insolvency acts, are more interesting than helpful in our effort to construe the provision of our bankruptcy law now in force. Moreover, the question as to the effect that the adjudication in bankruptcy has on the relations subsisting between the landlord and tenant, while it is kindred to the question with which we are dealing, its connection there-

with is by no means vital. The language of our statute affecting the claim here involved requires that the debt shall be a fixed liability absolutely owing at the time of filing the petition. Under the insolvent law of the state of Massachusetts prior to the statute of 1879, only such debts (with certain exceptions) were provable as were "absolutely due" at the time of the first publication of the notice of issuing the warrant of insolvency. The case of Bowditch v. Raymond, 146 Mass. 109, 15 N. E. 285, shows that the language "absolutely due" was treated as exactly equivalent to the language "absolutely owing," as it must be, for the statute provided for proving debts payable at a future date. After referring to numerous cases in which it had been held that under that statute future rent to accrue under a lease in which the insolvent debtor is lessee cannot be proved, it is said:

"The principle of these cases is that such rent is not a debt absolutely due at the time of the first publication. The lease may be terminated by the eviction of the lessee or otherwise, and no rent may ever accrue or become due. The lessor's claim is a contingent one. It is not contingent merely as to amount, but the very existence of the claim depends upon a contingency,"—referring to Bordman v. Osborn, 23 Pick. 295.

Further on in the opinion it is said:

"The existence of any debt in the future depends upon contingencies, and therefore the appellants' claim cannot be proved under our insolvent law prior to the statute of 1879."

In the lease before us the lessee binds himself—

"To make no sublease, nor transfer said lease in whole or in part, nor use the premises for any other purpose than that herein contemplated, without the written consent of the lessor."

And again it declares:

"And, should the lessee in any manner violate any of the conditions of this lease, the lessor hereby expressly reserves to himself the right of canceling said lease without putting the lessee in default; the lessee hereby assenting thereto, and expressly waiving the legal notice to vacate the premises."

It is not so clear that this leasehold is an asset of the bankrupt's estate which the trustee would almost certainly elect to assume, or that the court should on its own motion, or on the motion of creditors, require him to assume. Nor is it quite clear what he could do with it if he did assume it. It is not necessary for us to hold that the adjudication in bankruptcy terminated this lease and absolved the relations between the landlord and the tenant thereby created, nor is it necessary or prudent to announce in advance what the holding should be in any given case which may possibly arise. We therefore content ourselves with announcing that, in our opinion, there was no error in the judgment of the district court rejecting the appellant's claim. That judgment is therefore affirmed.

## WOODRUFF v. CHEEVES et al.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1901.)

No. 874.

1. BANKRUPTCY—JURISDICTION OF COURTS OF BANKRUPTCY—EQUITABLE POWERS.

After the trustee of a bankrupt had set apart to him without objection the property exempted by the laws of the state, and the court had fixed the time for hearing the bankrupt's application for discharge, properly made, certain creditors filed a petition setting up that they held notes of the bankrupt in which he had waived his right of exemption, as permitted by the state statute, but that under the laws of the state they could only subject the exempt property to the payment of their claims by obtaining judgment thereon, and levying on such property. They prayed the court to withhold the bankrupt's discharge, and to take possession of the property through the trustee, and administer the same for the benefit of the petitioners. *Held*, that the court, as a court of bankruptcy, had no power under Bankr. Act 1898 to grant the prayer of such petition, either by refusing or withholding the bankrupt's discharge, no statutory ground therefor being alleged; or by taking possession of and administering the exempt property, which, under sections 6 and 70a, constituted no part of the estate in bankruptcy.

2. SAME—JURISDICTION OF PLENARY SUITS.

A district court is vested with no jurisdiction by Bankr. Act 1898 to entertain a plenary suit in equity by creditors of a bankrupt to reach and subject to their claims his exempt property on the ground that they hold notes in which he expressly waived his right of exemption.

Appeal from the District Court of the United States for the Southern District of Georgia.

Z. T. Woodruff, a citizen of Dooly county, Ga., was adjudged a bankrupt in the district court for the Southern district of Georgia, on his own petition, on January 6, 1899. On the 28th day of that month O. C. Cheeves was appointed trustee. On February 23d the trustee made his report to the court of the articles set off to the bankrupt by him, as provided in section 47, cl. 11, of the bankrupt act, and required by rule 17 of general orders in bankruptcy (32 C. C. A. xix., 89 Fed. viii.). No exception to this action on the part of the trustee was taken by any creditor within 20 days after the filing of the report. On March 23d the bankrupt filed his application for a discharge. This application was set to be heard before the judge of the court of bankruptcy on June 5th, and due notice thereof was given. On May 2d a petition was presented to the district court for that district, as follows:

"In the Matter of Z. T. Woodruff, Bankrupt. In Bankruptcy.

"The petition of J. D. Lester, H. & D. Keen, the Farmers' Supply Company, Gabe Lippman, and Max Cohen respectfully shows:

"(1) That they are creditors of said bankrupt, and severally hold and own promissory notes given by the said bankrupt, containing a waiver by him of the right and benefit to the homestead and exemption allowed and prescribed by the laws of the state of Georgia.

"(2) The notes held by petitioners respectively against said bankrupt are for the principal sums following, namely: J. D. Lester, two notes, dated July 31, 1897, for $275, due October 1, 1898, with interest from October 1, 1897, at the rate of 8 per cent. and 4 per cent., respectively. On the first-mentioned note the said bankrupt has been credited with the sum of $61.70. Said bankrupt is still indebted to said Lester for the full amount of principal and interest due on said notes, after deducting said credit. Eli Woodruff is also a joint maker of said notes. Said bankrupt is indebted to H. & D. Keen on a note given by him jointly with Eli Woodruff for $100, besides interest from maturity at the rate of 8 per cent. per annum, dated January 20, 1897, and

due November 1, 1897. Said bankrupt is indebted to the Farmers' Supply Company in the sum of $16.41, besides interest at 8 per cent. per annum from maturity, on a note dated January 16, 1898, and due October 1, 1898. Said bankrupt is indebted to Gabe Lippman in the sum of $21.60 principal, besides interest from maturity at 8 per cent. per annum, on a promissory note dated January 18, 1898, and due September 15, 1898. Said bankrupt is indebted to petitioner Max Cohen in the principal sum of $324, besides interest from maturity at 8 per cent. per annum, on a promissory note given by him, dated February 11, 1898, and due 12 months after date. In each and all of said notes said bankrupt has, in writing, expressly waived and renounced his right to the benefit of the exemption provided in and by the constitution and laws of the state of Georgia; said waiver being stated in said notes constituting the contract of indebtedness, and being made in accordance with the provisions of the constitution and laws of said state authorizing and empowering the debtor to waive or renounce in writing his right to the benefit of the exemption provided for by the constitution and laws of said state.

"(3) O. C. Cheeves, the duly-appointed trustee of the estate of said bankrupt, has set apart the said bankrupt's exemption, and reported the items and the estimated value thereof to the court, to which report reference is hereby made.

"(4) The said bankrupt has applied to the court to have a full discharge from all the debts provable against his estate under said bankrupt act, except such debts as are excepted by law from such discharge.

"(5) Petitioner Max Cohen holds a deed to the land set apart to and constituting a portion of the exemption of said bankrupt, the said deed having been made and delivered by said Z. T. Woodruff on the 11th day of February, 1898, in accordance with section 2771 et seq. of the Revised Code of the state of Georgia (being sections 1969, 1970, and 1971 of the Code of 1882), in order to secure the debt hereinbefore mentioned. Said deed will be to the court shown.

"(6) The other petitioners above named hold no security for their aforesaid debts, save and except so far as a waiver of homestead and exemption may be construed as a security. Said notes containing said waivers will be to the court shown.

"(7) Petitioners show that, if the discharge applied for by the said bankrupt is granted by the court at this time, and without making provision for the protection of petitioners, and the enforcement of their aforesaid waivers of homestead, your petitioners will be without remedy.

"(8) Under the laws of the state of Georgia a debtor's exemption cannot be subjected to the payment of a debt containing a waiver of homestead, except by first putting said debt in judgment, and afterwards causing the execution issued thereon to be levied on the exempt property in accordance with the provisions of sections 2850 et seq. of the Revised Code of this state. If a discharge be granted by this court without reserving to petitioning creditors the right to sue on said debts and put the same in judgment, and without giving them a judgment for their said debts, or providing means whereby they may obtain judgment thereon, your petitioners would be left without means of enforcing their rights created and arising out of the aforesaid waivers of exemption by said bankrupt debtor, and will be without remedy.

"(9) The entire property of said bankrupt, so far as turned over by him to the trustee, and not consumed in expenses, has been set apart to him as an exemption. The said Eli Woodruff, joint maker of some of the aforesaid notes, as hereinbefore stated, is likewise a bankrupt, and his property is in the hands of the same trustee, and has likewise been set apart by said trustee to him as an exemption, and the said Eli Woodruff has likewise waived in the aforesaid notes signed by him all right and benefit of exemption under the constitution and laws of the state of Georgia.

"(10) Wherefore your petitioners, being without remedy at common law, pray that this honorable court may grant petitioners such relief as can be afforded and administered in a court of equity, and, if need be, to frame such remedy and appropriate form of proceeding as may protect their rights and interests in the premises. And petitioners pray that said bankrupt's application for discharge be stayed, and that the discharge applied for be not

granted until petitioners are given an opportunity to enforce their said waivers of homestead, either by proceedings in the state court or in this court, as this court may determine; that, in the event a discharge be granted, the same be so molded, conditioned, and qualified as to save and reserve to petitioners their rights to reach the exemption set apart to said bankrupt, as under and by virtue of the aforesaid waivers they are severally entitled to do; that the court grant such remedies and forms of relief and authorize and direct such proceedings as may enable petitioners to render their aforesaid waivers effective, and reach the property set apart to said bankrupt as his exemption; that the court protect and preserve said exempted property, and provide for its due administration and distribution, and to this end to appoint a receiver to hold the same, and sell and administer the proceeds, or otherwise provide for the protection and due distribution of said property, under such forms, procedure, and remedies as are usual and appropriate to a court of equity; that the court grant such other and further relief as may be meet and proper. Petitioners will undertake to prove the facts stated in this petition without answer under oath from the bankrupt, or any other person who may be deemed a proper defendant to the prayers of this petition; discovery and answer under oath being expressly waived."

On the presentation of this petition the judge of the district court made thereon the following order:

"The foregoing petition read and considered, and ordered filed, and the same will be heard and passed upon in the district court of the United States for the Western division of the Southern district of Georgia, at Macon, on Monday, 5th day of June, 1899. Let the defendant bankrupt, above named, show cause in said court at said time why the prayers of said petition should not be granted.

"In open court, May 2, 1899."

To this petition the bankrupt, by his counsel, submitted: "(1) A general demurrer. (2) And for special cause of demurrer the bankrupt says that there is no authority of law for instituting the proceedings in this case. (3) That the bankrupt court has no jurisdiction over exempted property, and has no jurisdiction to administer it. (4) That the waiver of homestead relied on is no legal reason for denying bankrupt his exemption under the constitution and laws of Georgia. (5) That the exception to bankrupt's discharge, and not injunction, is the proper remedy for the petitioners. (6) For further cause of demurrer bankrupt says that there is no authority of law in the bankrupt act for this proceeding, nor for the relief sought. This is an effort to change the bankrupt law, and carve out exceptions to a discharge which are not contemplated by the act, and to provide remedies not authorized by law. The right to a discharge in bankruptcy is a statutory right. How it can be obtained, what debts it affects, and what objections may be urged, are to be determined alone by the bankrupt act; and it does not authorize this proceeding, nor the relief which it seeks."

On August 5th the district court gave judgment as follows:

"In the Matter of Z. T. Woodruff, Bankrupt. In Bankruptcy.

"Petition of John D. Lester and other creditors objecting to the discharge prayed for, and relief, etc. This came on on be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that the demurrer interposed by the bankrupt to the petition be overruled, and that the trustee, O. C. Cheeves, carve out of the property heretofore set apart by said trustee as a homestead exemption to the bankrupt free from the claims of general creditors the sum of $300 in household and kitchen furniture and provisions, including in the charging against said amount such provisions as the bankrupt may have heretofore pending the settlement of this issue reduced to cash, and not turned over to his trustee, and that the $300 so set apart to said bankrupt be held by said bankrupt free from the claims of all creditors of said bankrupt, including such creditors as hold general waivers of homestead. It is further ordered, adjudged, and decreed that all the other portion of the property of said bankrupt heretofore set apart to him in the $1,600 exemption shall be dealt with

by the trustee precisely as if it did not constitute a part of the homestead exemption, except that a separate account shall be kept of the proceeds of said portion, and that the same shall constitute a special fund for distribution to creditors holding general waivers of homestead from the bankrupt, and that the said creditors holding general waivers of homestead must first resort to the fund thus arising out of the homestead exemption for the payment of their claims before sharing in the general fund of said bankrupt should such general fund arise over and above the fund arising from homestead exemption: provided, however, that should the bankrupt, or any one for him, pay off the claims of such creditors as hold general waivers of homestead within thirty days from this date, the entire $1,600 homestead heretofore set apart to said bankrupt shall stand and be approved as the exemption of said bankrupt. It is further ordered, adjudged, and decreed that the trustee hold possession of the entire homestead until the expiration of thirty days from this date, and at the expiration of said period of thirty days shall convert the same into money as soon as it may be done without detriment to the best interest of the estate. It is further ordered, adjudged, and decreed that the bankrupt shall yield possession to the trustee of the homestead heretofore set apart to him over and above the aforesaid $300 on demand by said trustee. It is further ordered, adjudged, and decreed that the bankrupt's application for discharge be stayed until the rights of the creditors holding homestead waivers can be definitely settled and enforced under the provisions of this decree, and that a lien be established in favor of the creditors holding waivers of homestead against the homestead set apart by the trustee and the funds arising therefrom, save and except the $300 hereinbefore mentioned."

Allen Fort, for the petition.

J. I. Hall and O. T. Wimberly, opposed.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case, delivered the opinion of the court.

It appears from the record brought up by the petition for review in this case that the bankruptcy proceedings were ripe for the application by the bankrupt to obtain his discharge. More than 30 days and less than 12 months before the presentation of his application for a discharge he had been adjudicated a bankrupt, and a trustee had been appointed. There is no suggestion that any of the proper schedules have not been made up and filed. It affirmatively appears that the trustee had reported, agreeably to the statute and the general orders, the property set off to the bankrupt exempt from seizure in satisfaction of his debts under the law of the state of his domicile, and that no objection to that report had been made within 20 days, or ever, by any of the creditors or other person interested in the estate. The application thus being timely, and in proper form, it was the duty of the judge to hear the same, and investigate the merits thereof, and discharge the applicant, unless such proofs and pleas made in opposition thereto by parties in interest who had been given sufficient time and a reasonable opportunity to be heard made known to the court that he had (1) committed an offense punishable by imprisonment, as provided in the act of July 1, 1898; or (2) had, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained. Section 14b. Nothing of this kind was at-

tempted to be shown, and what was shown assumes that these statutory objections did not exist. A very candid and able statement of the relations of the appearing creditors to the bankrupt and his estate was submitted to the court, which the court received, considered, and treated as the institution of a plenary proceeding in equity. In re Woodruff (D. C.) 96 Fed. 317. It showed substantially that, with reference to the term "secured creditors," as used in the bankrupt act, the complainants are unsecured creditors, who, as such, had proved their claims, which, while they were evidenced by instruments in writing waiving the homestead and exemption rights, constituted no lien on the property of the debtor, and could be availed of only by putting the same in judgment, and seizing the property under final process issuing thereon; that, such judgments not having been obtained and process issued and levied before the adjudication of bankruptcy, if the bankrupt should now be discharged in the terms of the statute the complainants would be remediless,—if, in fact, they were not already remediless,—unless the district court, in the exercise of the equity jurisdiction conferred by the bankruptcy act, was able to grant them relief, and cause the exempt property held by the debtor to be taken by the trustee and administered for the benefit of the complainants and others, if any, holding like claims. The bill of complaint does not aver, or by implication suggest, that the bankrupt is not a person of that class in whose favor the organic and statutory law of the state of his domicile exempts from seizure for the satisfaction of his debts property, real or personal, or both, to the amount in value of $1,600; nor does it aver, or by implication suggest, that the property set apart to him by the trustee, and duly reported to the court, was of greater value than the amount thus limited by law. On the contrary, it assumes, by necessary implication, at least, that the applicant for discharge does belong to the class for whose benefit the laws allow the exemption, and that the property set apart by the trustee does not exceed in value the limit of the allowance. It is not shown that there are not other creditors whose debts are evidenced by writing, making the same waiver as is made in the complainants' contracts, or that there are not also other creditors whose claims are not of the class of those held by the complainants. The purpose and prayer of the bill is that the property so set apart, and now held by the bankrupt as his by reason of the exemption laws of his state, shall be recovered from his possession, and taken into the possession of the trustee, to be administered by the district court as a court of bankruptcy or as a court of equity, for the benefit of not all the creditors of the bankrupt, but of such only as hold claims against him with written evidence of his waiver of his homestead and exemption rights, as far as he is permitted to waive them, under the constitution and statutes of his state. The distinguished and able counsel who appeared for the complainants, both in the preparation of his pleading in the lower court and in the oral argument and printed briefs which he submitted to this court, was evidently in doubt as to the capacity in which his application was to be received by the district court. The opening words of the very learned opinion

of the judge of the district court in Re Woodruff, supra, are: "These are plenary proceedings in equity." Towards the close of his opinion we find this language: "Fortunately, the court of bankruptcy is given jurisdiction to do everything necessary to the administration and distribution of the bankrupt estates;" citing Bankr. Act 1898, cl. 2, § 2. If the bill is addressed to the court of bankruptcy to invoke its powers of administering the estates of bankrupts, it encounters the provision that:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition." Section 6.

And this other provision:

"The trustee of the estate of a bankrupt * * * and his successor or successors * * * shall, in their turn, be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt," etc. Section 70a.

It seems clear to us that this language of the statute leaves no room for argument to show that the exempt property constitutes no part of the estate in bankruptcy subject to administration by the trustee or by the court of bankruptcy. If the bill of complaint is addressed to the district court to invoke the exercise by that court of jurisdiction to entertain a plenary proceeding in equity between the parties, some observations which we find in the opinion of the supreme court in the case of Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175 (announced since these proceedings were had in the district court) seem to us to be pertinent to and instructive in the inquiry which now engages us. The warp and woof of the opinion, its reasoning and review of precedents, are so closely woven and finished that its force cannot be fully shown by such detached excerpts as we can make, and we earnestly commend it to the careful scrutiny of all who, in practice, are called upon to construe the provisions of the bankrupt law now in force:

"Under the act of 1867 * * * the distinction between proceedings in bankruptcy, properly so called, and independent suits at law or in equity between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the district courts and circuit courts of the United States by the express provision to that effect in section 2 of that act, and was not derived from the other provisions of sections 1 and 2, conferring jurisdiction of proceedings in bankruptcy. * * * The decisions of this court under the earlier bankrupt act of August 19, 1841 (chapter 9), are very few in number, and afford little aid in the decision of the present case. The one most often cited in favor of maintaining such a suit as this under the existing law is Ex parte Christy (1845) 3 How. 292, 11 L. Ed. 603. But section 8 of the act of 1841 contained the provision (afterwards embodied in section 2 of the act of 1867, and above quoted) conferring on the circuit courts concurrent jurisdiction with the district courts of suits at law or in equity between assignees in bankruptcy and adverse claimants of property of the bankrupt. * * * The general provisions at the beginning and end of this section [section 2, Act July 1, 1898] mention 'courts of bankruptcy' and 'bankruptcy proceedings.' * * * Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words 'at law,' in the opening sentence, conferring on the courts of bankruptcy 'such jurisdiction at law and in equity

as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause 4, authorizing the trial and punishment of offenses the jurisdiction over which must necessarily be at law, and not in equity. The section nowhere mentions civil cases at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers in clause 6 to bring in and substitute additional parties 'in proceedings in bankruptcy,' and, in clause 15, to make orders, issue process, and enter judgments 'necessary for the enforcement of the provisions of this act.' The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money, and distribution of the bankrupt's estate, is no broader than the corresponding provisions of section 1 of the act of 1867; and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to 'determine controversies in relation thereto,' it is controlled and limited by the concluding words of the clause, 'except as herein otherwise provided.' These words, 'herein otherwise provided,' evidently refer to section 23 of the act, the general scope and object of which, as indicated by its title, are to define the 'jurisdiction of United States and state courts' in the premises. * * * The bankrupt acts of 1867 and 1841, as has been seen, each contained a provision conferring in the clearest terms on the circuit and district courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt. We find it impossible to infer that when congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restrictive provisions of section 23, it indicated that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts. On the contrary, congress, by the second clause of section 23 of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies not strictly or properly a part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy, to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, 'unless by consent of the proposed defendant,' of which there is no pretense in this case."

The parties to the suit we are considering are not strangers to the bankruptcy proceeding, and the case, that far, at least, differs from the case of Bardes v. Bank,—a difference which we do not overlook in announcing that, in our view, the authority and opinion of the supreme court in that case makes it clear to demonstration that the district court should have sustained the demurrers to the complainants' bill, and have granted the bankrupt his discharge. It follows that the judgment of the district court must be reversed, and this cause remanded to that court, with direction to dismiss the complainants' bill, at their cost, and to enter an order nunc pro tunc as of the date of August 5, 1899, discharging the bankrupt agreeably to law.

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## In re RUSCH et al.

(District Court, E. D. Wisconsin. December 18, 1900.)

BANKRUPTCY—TRUSTEE—EMPLOYMENT OF COUNSEL.

Where there are matters in controversy between different classes of the creditors of a bankrupt, the trustee will not be authorized to employ as his counsel one who is also counsel for any of the creditors.

In Bankruptcy. On application of trustee for authority to employ as counsel one of the attorneys representing certain creditors.

Bloodgood, Kemper & Bloodgood, for creditors.

SEAMAN, District Judge. The creditors presenting claims in this matter united in interests, and may be roughly classified as (1) mercantile creditors, whose claims are both unsecured and undisputed; (2) so-called "family creditors," whose claims are disputed and unsecured; and (3) one claimant of a large amount for alleged purchases of lumber and other claims, secured and unsecured. From the outset of the proceedings a triangular contest has been carried on in reference to receivership, selection of trustee, and other phases, and, if counsel for either of these contestants were adopted as counsel for the trustee, I am satisfied that the way to a speedy and equitable adjustment of the entire estate would be more difficult than it would be in the hands of independent counsel. If litigation is unavoidable, an early hearing of the issues is important; but it does not appear that the questions of law or fact are so complicated as to cause delay through the employment of other counsel, and the circumstances do not warrant departure from the general rule against the selection on behalf of the trustee of counsel representing interests in the litigation which are either adverse to the general estate, or in conflict with other interests therein represented by the trustee, or to which he owes some duty. The trustee is authorized to engage counsel subject to approval, but not from either of those representing the parties litigant.

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## CROSSMAN et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 13, 1900.)

No. 3,132.

UNITED STATES—STATUS OF ANNEXED TERRITORY—CUSTOMS DUTIES.

The provision of the joint resolution for the annexation of the Hawaiian Islands of July 7, 1898, which retained in force the same customs duties between such islands and ports of the United States as formerly, is constitutional.

Appeal by Importers from a Decision of the United States General Appraisers.

W. Wickham Smith, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge. On April 26, 1900, the appellants imported from Honolulu into the port of New York certain whisky, brandy, and jam, on which duty was assessed under appropriate paragraphs of the tariff act of July 24, 1897. There is no question as to classification or rate of duty assessed, provided said goods were subject to any duty. The contentions of the importers are as follows: First. That the constitution of the United States—certainly so far as it imposes limitations and restrictions upon the power of congress—is in full force and effect in all territory of the United States, without express legislation by congress extending it to the territory. Second. That among the restrictions and limitations to which congress is subjected in dealing with territories is the requirement that all duties, imposts, and excises shall be uniform

throughout the United States. Third. That one of the limitations under which congress legislates is that no tax or duty shall be laid on articles exported from any state. Fourth. That a statute which, in its enacting clause, provides that certain rates of duty therein specified in tariff schedules and paragraphs shall be paid upon all articles imported from foreign countries, does not apply to goods brought into one of the ports of the United States from a place which has theretofore been by joint resolution of congress annexed as a part of the territory of the United States.

The joint resolution for annexation of the Hawaiian Islands to the United States became a law on July 7, 1898. The preamble thereof having recited that the government of the republic of Hawaii had "signified its consent * * * to cede absolutely and without reserve to the United States of America all rights of sovereignty," provided, inter alia, as follows:

"Resolved, by the senate and house of representatives of the United States of America in congress assembled, that said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

"The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the congress of the United States shall enact special laws for their management and disposition. * * *

"Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged."

Another section of said resolution provides for the government of such islands in such manner as shall be directed by the president of the United States until congress shall make provisions for such government. Various aspects of these constitutional questions have been discussed in Ex parte Ortiz (C. C.) 100 Fed. 955, and in Goetze v. U. S. (C. C.) 103 Fed. 72. These and other cases involving the status of our dependencies and the relation of the United States thereto are now before the supreme court of the United States. The distinctions claimed between the case at bar and the Goetze Case are as follows: (1) This is not a case of territory acquired through treaty with any foreign power. (2) It does not involve any question of military occupation. (3) The Hawaiian Islands are not foreign country, because they have been annexed as a part of the territory of the United States, and subject to its sovereign dominion. This case has been exhaustively argued by counsel on both sides, and said argument and the distinctions suggested have been duly considered. It is true, as contended for by counsel for the importers, that this joint resolution was substituted for a proposed treaty, which was withdrawn, and that the preamble showed that the government of Hawaii ceded "absolutely and without reserve to the United States of America all rights of sovereignty," etc. It is also true that the foregoing distinctions present a case differing in some of its aspects from the Goetze Case. But, in view of the present conflict of authority, and the probability that all these questions will

be finally answered in the decisions of the supreme court upon similar cases now pending therein, it is clearly the duty of this court to construe the statute as constitutional, and to affirm the decision of the board of general appraisers. "In passing upon the constitutionality of an act of congress, all the presumptions are in favor of the law, and courts will not pronounce it unconstitutional unless its incompatibility is clear, decided, and inevitable." Sarony v. Lithographic Co. (C. C.) 17 Fed. 591; Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162. The decision of the board is therefore affirmed.

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FLESHMAN v. McCLAIN, Collector.

(Circuit Court, E. D. Pennsylvania. June 13, 1900.)

No. 6.

1. Internal Revenue—Stamp Taxes—Mode of Collection.
A stamp duty imposed by an internal revenue law is collected by the government through the sale of the required stamps, and, in the absence of an express provision therefor, a collector is not authorized to collect such duty in any other manner.

2. Same.
Where a person fails to make and deliver bills or memoranda of agreements made by him to sell stocks, and affix stamps thereto, as required by section 25 of the war revenue act of 1898, a collector has no authority to demand and collect from him the value of the stamps which would have been required had he complied with the law, the only remedy provided for a violation of the law being by prosecution, and fine or imprisonment; and a payment so enforced by a collector, under threat of suit, is illegally exacted, and may be recovered back.

F. B. Bracken, for plaintiff.
James M. Beck, for defendant.

J. B. McPHERSON, District Judge. This is a suit to recover from the collector of internal revenue a certain sum of money exacted by him from the plaintiff under the circumstances disclosed by the following extracts from the plaintiff's statement:

"The plaintiff, during the period from November 1, 1900, and December 25, 1899, was engaged in business in the city of Philadelphia as a stock, grain, and provision broker, under the trade name of J. B. Fleshman & Co., and in connection with said business negotiated for others sales of stocks listed on the New York Stock Exchange, and also bought and sold stocks on his own account; the larger part of the transactions in stock carried on by plaintiff being commonly known as 'marginal transactions.'

"During the said period plaintiff, in addition to other transactions in stock carried on by him, entered into certain agreements to buy from or sell shares of stocks to customers, in connection with which agreements the other parties thereto deposited with plaintiff in each case a certain amount of money, proportioned to the amount of stock purchased or sold by way of margin. In no instance were any share or shares of stock delivered either by or to the plaintiff in connection with said agreements, and it was generally understood between the plaintiff and the other parties to said agreements that no actual delivery of the stock would take place.

"At the time when said agreements were entered into memoranda thereof were issued on forms as follows, marked, respectively, 'A' and 'B'; Form A being used in all cases wherein the plaintiff agreed to sell stock to customers, and Form B being used in all cases wherein the plaintiff agreed to buy stocks from customers.

"'Form A.

"'J. B. Fleshman & Co., Brokers and Dealers in Stocks, Cotton, Grain, and Provisions, 1406 South Penn Square.

"'Mr. ————. Philadelphia, ————, 1900.

"'Stocks deliverable and receivable on three days' notice in New York; grain and provisions, in Chicago, Ill.

"'It is agreed that whenever the deposit is exhausted all stocks and bonds bought of or by us for you, or held as collateral security, may be sold without further notice, and without incurring any liability for difference in value after such sale.

"'Not transferable.

"'Bought of J. B. Fleshman & Co.

"'Amount. Article. Price. Received on Account.'

"'Form B.

"'J. B. Fleshman & Co., Brokers and Dealers in Stocks, Cotton, Grain, and Provisions, 1406 South Penn Square.

"'Mr. ————. Philadelphia, ————, 1900.

"'Stocks deliverable and receivable on three days' notice in New York; grain and provisions, in Chicago, Ill.

"'It is agreed that whenever the deposit is exhausted all stocks and bonds sold to or by us for you, or held as collateral security, may be bought without further notice, and without incurring any liability for difference in value after such sale.

"'Not transferable.

"'Sold to J. B. Fleshman & Co.

"'Amount. Article. Price. Received on Account.'

"At the time said memoranda were issued documentary stamps were attached thereto in payment of tax, to which plaintiff regarded said agreements to sell stock as being subject, under the provisions of Schedule A of the said war revenue act, namely, at the rate of two cents on each one hundred dollars of par value of the stock referred to in said agreements.

"The aggregate of the shares of stock included in said agreements, in connection with which memoranda were issued on Form A, above described, was 151,497 shares, and the tax paid thereon by stamps as aforesaid amounted to $3,029.94, and the aggregate of the shares of stock included in said agreements, in connection with which memoranda were issued on Form B, above described, was 75,748 shares, and the tax paid thereon by stamps as aforesaid was $1,514.96.

"As hereinabove stated, no delivery of stock was actually made either by or to the plaintiff in connection with said agreements, and the only memoranda issued at any time in connection with said agreements were the memoranda hereinabove referred to as having been issued with documentary stamps attached thereto as aforesaid.

"In the case of each of said agreements, a settlement was made by plaintiff with the other party thereto upon demand of the latter by paying to him in cash a sum equal to the difference between the market value of the stock embraced in said agreement at the date thereof and the market value of said stock at the time of said settlement. Upon receiving payment from the plaintiff upon this basis, the other party to each of said agreements surrendered to plaintiff the memorandum of the character hereinabove described, held by him as evidence thereof, and the transaction was thus regarded as finally closed.

"The stock embraced in each of said agreements was never actually in possession of either of the parties thereto, and settlement under each of said agreements by payment of differences, as above described, was made and accepted by the parties as terminating all liability thereunder, and as relieving the one party (the vendor) from the obligation to specifically deliver the stock, and the other (the vendee) from the obligation to pay in full the agreed price therefor.

"But, notwithstanding that settlement under said agreements was made in the manner as described, the defendant, as collector of internal revenue aforesaid, pursuant to a treasury decision known as 'Treasury Decision No. 20,274,' a copy of which is hereto attached, nevertheless held that in contemplation of law, under the aforesaid state of facts, there was necessarily incident to each of said settlements under aforesaid agreements an agreement to resell the stock included therein, which agreement to resell was subject to tax, under Schedule A of said war revenue act, at the rate of two cents on each one hundred dollars of par value of stock.

"Proceeding upon this theory, and without further warrant, the said collector of internal revenue collected from the plaintiff the aforesaid sum of four thousand five hundred and forty-four and $^{90}/_{100}$ dollars as a tax arising from the settlements under said agreements to sell stock, made in the manner hereinabove described, namely, by the payment of differences."

The collection was made as follows:

"On the 2d day of March, 1900, the defendant, acting under and by virtue of the authority conferred upon him as collector of internal revenue aforesaid by the laws of the United States, made demand upon the plaintiff for the payment by the plaintiff to him as said collector of the sum of four thousand five hundred and forty-four and $^{90}/_{100}$ dollars as a tax alleged by defendant to be due from plaintiff to the United States, under the provisions of an act of congress approved June 13, 1898, and known as the 'War Revenue Act of 1898.'"

"And, further, defendant informed plaintiff that, if his demand for the payment of said sum was not complied with, proceedings for the collection of the same would be instituted against plaintiff under the internal revenue laws of the United States.

"In consequence of aforesaid demand and in order to avoid the proceedings with which he was threatened by defendant, the plaintiff did on the said 2d day of March, 1900, pay into the hands of defendant, as collector aforesaid, the sum of four thousand five hundred and forty-four and $^{90}/_{100}$ dollars, protesting to defendant at the time of said payment that the collection of the said sum of money from him as a tax due under the laws of the United States was wholly illegal and unwarranted, the plaintiff not being liable to the United States for taxes in any sum whatsoever."

On the same day the plaintiff applied to the commissioner of internal revenue, under section 3226 of the Revised Statutes, praying to have the money refunded, and brought this suit after the commissioner had rejected the application.

In support of the demurrer, the government has chiefly relied upon the character of the plaintiff's transactions,—the dealings appearing to have been of the "bucket-shop" variety,—arguing that a contract to resell is necessarily implied therein, and that each settlement between the plaintiff and his customers should be treated as if such a contract had actually been put into writing and delivered. In my opinion, however, the case must be decided against the government upon another, and a controlling, point, namely, the collector's lack of authority to demand a money payment from the plaintiff. I think there was no lawful warrant for the demand, and therefore that the plaintiff is entitled to recover the money illegally collected by the defendant.

Assuming the government's position to be correct,—that each of the plaintiff's transactions, to be complete, should have embraced a written contract to resell, duly executed, stamped, and delivered,—and assuming, further, that the war revenue act was violated because such contracts were not executed and stamped, the question still remains, did such violation authorize the collector to demand

from the plaintiff a sum of money in cash? As it seems to me, this question must be answered in the negative. The taxes under consideration are stamp taxes upon certain agreements, and taxes of this kind are not sums of money assessed annually, or for any other period, against either the citizen or his property. The remedies ordinarily used for the collection of such sums are not available to enforce the use of stamps under the war revenue act, because these remedies are not given by the statute, and are not implied from the nature of the citizen's obligation. Stamp taxes upon agreements are charges by way of excise, and the government collects the charge by selling the necessary stamps, and requiring them to be affixed to the material evidence of the contract. If this requirement is disobeyed, the statutory punishment is fine or imprisonment, coupled with the suspension of the evidential value of the written instrument; but nowhere in the act is there to be found any provision empowering a collector to distrain, or sue for, or collect in any other manner the money that ought to have been paid to the government for the stamps that were not used. Not being provided for by the statute, the course pursued by the defendant—demanding and collecting cash under threat of suit—was without authority, and the exaction was therefore unlawful. Congress possessed the sole power to authorize this tax, and the sole power to prescribe the means by which it should be collected. Meriwether v. Garrett, 102 U. S. 515, 26 L. Ed. 197. No remedy by suit is given or implied by the act in question, nor is there to be discovered any authority to demand and accept money in lieu of the stamps that are required by law to be affixed.

The attorney general has recently shown clearly, in an opinion published in 3 Treas. Dec. 24, that the stamp taxes imposed by Schedule A contemplate an instrument or paper to which the stamp can be affixed; and has pointed out, further, that the act requires the making of certain instruments that are liable to be taxed, while it leaves to the option of the parties the making of other instruments that (if made) are also taxable. A penalty for failure to obey this statutory requirement is provided, but I find no other remedy in the act.

Moreover, even if written agreements to resell ought to have been made by the plaintiff or his customers, the obligation rested upon the plaintiff only as to some of the agreements in question. In many instances he was not the seller, but the buyer, while Schedule A requires a bill or memorandum of sale to be made and delivered "by the seller" to the buyer. Upon any theory of the obligation imposed by the act, therefore, the plaintiff seems to have a good claim for at least $3,029.94.

But, for the reason already given, I think the whole claim is good. In the unreported case of White v. Treat (decided by Judge Lacombe in March of this year; C. C.) 100 Fed. 290, it appears that Treat, the collector, required White, who had sold numerous "calls," or written options to buy stock at a certain price, to purchase stamps and affix them to the respective calls. This method of procedure does not seem to have been objected to, and it may perhaps have

been justified. If the calls ought to have been stamped, White was not likely to object to the collector's demand that the stamps be put on, since he was already liable to indictment, and might be obliged, under section 7 of the act, to pay a maximum fine of $100 for each offense; but, if he had refused to affix the stamps, I am unable to discover any other remedy than the proceeding by indictment. In like manner, Fleshman would have been liable to indictment if, and so far as, he (and not his customers) was bound to affix a second stamp to the agreements between his customers and himself upon the completion of the game in which they were engaged, and if he failed so to do. If, and so far as, he was bound to execute and deliver an agreement to resell, and failed to do so, Schedule A itself provides a penalty of fine or imprisonment for such omission. He could not have been sued at law to recover the face value of the stamps alleged to have been necessary, and the exaction of payment under a threat of suit was therefore unlawful.

The demurrer is overruled.

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## CARTER v. McCLAUGHRY.

(Circuit Court, D. Kansas. December 10, 1900.)

1. JUDGMENTS—RES JUDICATA—HABEAS CORPUS PROCEEDINGS.
The denial of a writ of habeas corpus by the federal courts of one circuit does not render the questions determined res judicata, so as to preclude their re-examination by the courts of another circuit in subsequent habeas corpus proceedings instituted therein by the same petitioner.

2. HABEAS CORPUS—REVIEW OF JUDGMENT OF COURT-MARTIAL.
The judgment of a court-martial cannot be reviewed by a civil court on a writ of habeas corpus except as to questions of jurisdiction.

3. COURTS-MARTIAL — CHARGES AND SPECIFICATIONS — EMBEZZLEMENT BY DISBURSING OFFICER.
In proceedings by a court-martial against an officer of the army, a charge of embezzlement as defined by Rev. St. § 5488, which provides that every disbursing officer who, for any purpose not prescribed by law, transfers or applies any portion of the public money intrusted to him, is deemed guilty of the embezzlement of such money, is supported by a specification which sets forth that the accused was a disbursing officer of the United States, and as such was intrusted with certain public money, which he willfully and knowingly caused to be paid on false accounts, the amounts paid not being due or owing by the United States to the parties to whom the payments were made, as he well knew.

4. SAME—JURISDICTION.
On the trial of an officer of the army by a court-martial, whether the facts proved constitute a violation of the articles of war as charged is a question the determination of which is within the jurisdiction of the court-martial, and its decision cannot be reviewed by habeas corpus.

5. ARMY—OFFENSES—EMBEZZLEMENT BY DISBURSING OFFICER.
The offense of embezzlement by a disbursing officer of the United States as defined in Rev. St. § 5488, is broader than that defined in either the first, fourth, or ninth paragraph of the sixtieth article of war, and such offense, at least if not within the narrower definition of the sixtieth article, is punishable under the sixty-second article, which covers all offenses to the prejudice of good order and military discipline, "though not mentioned in the foregoing articles."

6. COURTS-MARTIAL—LEGALITY OF SENTENCE.

Under the sixtieth article of war, which defines a number of distinct offenses by persons in the military service, and provides in the concluding clause, which is to be read distributively, for their punishment on conviction by fine or imprisonment, one convicted of two of such offenses on separate charges may be fined on one charge and sentenced to imprisonment on the other; and where a single sentence is pronounced on such conviction, imposing both fine and imprisonment, it will be presumed that the punishment was so distributed between the charges.

7. SAME.

The mere fact that the same acts are specified in support of separate charges against an army officer before a court-martial does not destroy the distinctive character of the offenses charged, or constitute the splitting of a single offense into a number of distinct offenses, if different elements enter into each offense which must be proved to warrant a conviction.

8. SAME—EFFECT OF PARTIAL DISAPPROVAL OF FINDINGS.

The punishment prescribed by the articles of war to be imposed by a court-martial on a conviction for their violation is attached to the charges, and not to the specifications made thereunder, and the fact that findings of guilty upon certain specifications supporting a charge are set aside by the president, where others are approved, does not affect the validity of the sentence imposed by the court on such charge, or require its diminution.

9. SAME.

Where a sentence in gross is imposed by a court-martial upon a conviction on a number of charges, its validity is not affected by the setting aside of the conviction as to some of the charges, provided it is not greater than might have been imposed on the charges supporting which the findings are approved.

Proceedings in habeas corpus for the discharge of Oberlin M. Carter, a military prisoner of the United States, on petition of I. Stanton Carter.

Frank P. Blair and C. H. Grosvenor, for petitioner.

John W. Claus, Deputy Judge Advocate General, for respondent.

Before THAYER, Circuit Judge, and HOOK, District Judge.

HOOK, District Judge. This is a proceeding in habeas corpus. The writ having been allowed, the cause arises on petitioner's demurrer to the return thereto. Oberlin M. Carter, who was a captain in the corps of engineers of the United States army, was tried before a general court-martial which convened at Savannah, Ga., upon 4 charges of violation of the articles of war and 37 specifications thereunder. He was found guilty of the offenses set forth in 16 of the specifications and of the 4 charges which the specifications supported. In accordance with the practice in such tribunals, the court-martial imposed a lumping sentence, and adjudged the accused "to be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor at such place as the proper authority may direct for five years, and the crime, punishment, name, and place of abode of the accused to be published in the newspapers in and about the station and in the state from which the accused came or where he usually resides." As required by law, the record of the proceedings before the court-martial was submitted to the president for his action thereon. The president disapproved of the findings of the court-martial as to 12 of the 16 specifications, and approved of the

remainder, and also of the sentence. The action of the president left in force the findings of guilty under the 4 charges and 1 specification supporting each charge; and, although the determination of the court-martial as to 12 of the specifications was set aside, no diminution was made in the punishment that had been imposed. The secretary of war thereupon designated the United States penitentiary at Ft. Leavenworth, Kan., as the place of confinement of the prisoner, and he is now in the custody of the warden of that institution, who is the respondent herein. The entire sentence, excepting the service of the term of imprisonment, has been executed. The relator has been dismissed from the service of the United States, he has paid the fine imposed, and the specified publication has been made.

Prior to Carter's removal to the penitentiary at Ft. Leavenworth, a writ of habeas corpus was obtained in his behalf from the circuit court of the United States for the Southern district of New York. Upon hearing, the writ was dismissed, and he was remanded to the custody of the military authorities. In re Carter, 97 Fed. 496. An appeal from the order dismissing the writ was taken to the circuit court of appeals for the Second circuit, and that court affirmed the judgment of the circuit court. Rose v. Roberts, 40 C. C. A. 199, 99 Fed. 948. A petition for a writ of certiorari to the circuit court of appeals was presented to the supreme court, and was by that court denied. Carter v. Roberts, 176 U. S. 684, 20 Sup. Ct. 1026, 44 L. Ed. 638. At the same time an appeal directly to the supreme court, and also a writ of error, were allowed by a judge of the circuit court, which, upon hearing, were dismissed. Id., 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861. The supreme court, in dismissing the appeal and proceeding in error, did not pass upon the questions affecting the validity of the conviction and sentence of Carter, but held that, since an appeal had been prosecuted from the circuit court to the circuit court of appeals, and that court had acted on the whole case, including the constitutional questions connected therewith, the supreme court would not entertain a direct appeal from the circuit court in the same cause; in other words, it was held that a defeated party did not have the right to have his case finally determined in the supreme court and in the circuit court of appeals on independent appeals. Being restrained of his liberty by the respondent pursuant to the sentence of the court-martial as approved by the president and the action of the secretary of war thereon, it is contended in behalf of Carter that his imprisonment is in violation of the constitution of the United States, and is otherwise illegal, and without warrant of law.

At the threshold of the case counsel for respondent interposes the objection that by reason of the aforementioned proceedings in the courts, and the orders and judgments rendered by them respectively, the matters sought to be presented by petitioner are res adjudicata, and that this court is precluded from re-examining them. It is true, the merits of Carter's case as presented were considered by the circuit court for the Southern district of New York and by the circuit court of appeals for the Second circuit, but, while the judgments of those courts are recognized as of highly persuasive authority, they do not amount to res adjudicata, nor prevent a re-examination of the

same questions in a subsequent habeas corpus proceeding. The action of the supreme court was confined to a denial of the application for a writ of certiorari, which is not allowed as a matter of right, and to a dismissal of the appellate proceedings without a consideration of the merits of the case. It is, therefore, the duty of this court to give due consideration to the case presented.

The limited scope of inquiry in a case of this character is well defined by many decisions. A writ of habeas corpus cannot be converted into a proceeding in error. A court to which an application is made for the discharge of one restrained of his liberty pursuant to the judgment and sentence of another court cannot inquire whether the evidence was sufficient to warrant a conviction, nor consider whether, in the progress of the trial, errors were committed by the trial court as to matters within its jurisdiction. In such a case the writ of habeas corpus is, in effect, a collateral attack; and, if the court pronouncing the sentence had jurisdiction of the accused and of the offense for which he was tried, and did not exceed its jurisdiction in the imposition of the sentence, the case is not open to further inquiry. Courts-martial are independent tribunals created by the same authority to which this court owes its existence, and they have as complete power and jurisdiction to judicially determine any cause before them involving offenses under the articles of war as this court has over controversies committed by law to its cognizance. The limitations on the power of this court to inquire into matters connected with the judgments of other civil courts by means of the writ of habeas corpus apply with equal force to the judgments of courts-martial. This consideration is sufficient to eliminate a number of petitioner's objections without further discussion.

The charges preferred against Carter before the court-martial, and of which he was found guilty, were: (1) Conspiracy to defraud the United States, in violation of the sixtieth article of war; (2) causing false and fraudulent claims to be made against the United States, in violation of the sixtieth article of war; (3) conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war; (4) embezzlement, as defined in section 5488, Rev. St. U. S., in violation of the sixty-second article of war. It is not denied that the court-martial by which Carter was tried had jurisdiction of his person, but it is contended that the finding of guilty under the fourth charge is illegal and void, in that the acts described in the specification supporting the charge are insufficient to constitute the offense, and that they show that the offense, if any was committed, was cognizable under the sixtieth article of war, for the violation of which a less punishment is prescribed than that inflicted; also that the first two charges constitute offenses against the sixtieth article of war, under which the punishment prescribed is fine or imprisonment, in the alternative, but not cumulatively; also that the charges and specifications show that a single act, viz. the drawing of two checks, has been carved up into several distinct and separate crimes, and a punishment assessed on each, and that, therefore, he has been tried more than once for the same offense; also that, when the president disapproved of certain of the findings of the court-martial, there should

have been by some competent authority an appropriate diminution of the sentence as pronounced by that court. No serious contention is made as to the finding of guilty of the third charge if the proceedings as to any of the other charges are upheld.

First, as to the objections connected with the fourth charge,—which is that of embezzlement as defined in section 5488, Rev. St. U. S., in violation of the sixty-second article of war. Section 5488, so far as concerns the contention in question, is as follows:

"Every disbursing officer of the United States who * * * for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, is, in every such act, deemed guilty of an embezzlement of the money so * * * transferred or applied."

The sixty-second article of war provides that:

"All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a * * * court-martial, * * * and punished at the discretion of such court." Section 1342, Rev. St.

Were the facts set forth in the specification supporting the fourth charge sufficient to constitute the offense charged, and was the conduct described "to the prejudice of good order and military discipline," as required by the sixty-second article of war? The specification set forth that Carter was a disbursing officer of the United States, and that as such officer he was intrusted with certain public money, which he willfully and knowingly caused to be paid on false accounts; the amounts paid not being due or owing from the United States to the parties to whom the payments were made, of which Carter well knew. In my opinion, this charges the application of public money to "a purpose not prescribed by law," and, with the details which the specification supplies, constitutes a sufficient indictment under section 5488 of the Revised Statutes. And it may also reasonably be contended that in a larger sense the misappropriation by a captain in the engineer corps of the army of public money intrusted to him to be used in the construction of works of which he has official charge is conduct prejudicial to good order and military discipline. But, even if petitioner's contention in these respects were well made, it does not show the sentence to be void, but simply that it is erroneous. It was clearly within the province of the court-martial to decide those particular questions,—that is to say, whether the money mentioned was or was not applied to a purpose prescribed by law, and whether such misappropriation, under the particular circumstances of the case, was or was not prejudicial to good order and military discipline,—and its determination thereof, even if erroneous, cannot be reviewed by habeas corpus. In Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787, the court said:

"But the question whether it was or was not a crime within the statute was one which the district court was competent to decide. It was before the court, and within its jurisdiction. * * * Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a question which has to be met at almost every stage of criminal proceedings,—on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court

may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court; and no such writ lies in this case."

Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. 542, 28 L. Ed. 1005; Swaim v. U. S., 165 U. S. 561, 17 Sup. Ct. 448, 41 L. Ed. 823; In re Boyd, 1 C. C. A. 156, 49 Fed. 48.

It is also contended that under the sixty-second article of war no charge can be preferred that is embraced in any other article, and that, as the charge is that of embezzlement, it is covered by either the first, fourth, or ninth paragraph of the sixtieth article of war. Assuming, but not deciding, that no charge can be laid under the sixty-second article of war if it is mentioned in any preceding article, still it is apparent that the embezzlement defined in section 5488, Rev. St., is not the offense denounced in either the first or fourth paragraph referred to; and I am also of the opinion that it is a species of embezzlement different from that defined in the ninth paragraph of the sixtieth article of war, since the money which is the subject of embezzlement under the latter article is "money furnished for military service," whereas, under section 5488, the term "money" comprehends any public money, whether appropriated for the military service or for other purposes. The offense denounced in section 5488 is much broader and more comprehensive than the other; the former being the application by a disbursing officer of money to any unauthorized purpose, while under the ninth paragraph mentioned the money which is the subject of the embezzlement is money appropriated specifically for the military service; and it is quite probable from the context of the entire paragraph that the term "embezzlement," as there employed, means such an offense as is generally understood where one having the money of another in his custody appropriates it to his own use with felonious intent, intending to deprive the true owner thereof. The result of these conclusions is that the sentence imposed may be upheld by the conviction under the fourth charge alone, since the punishment authorized by the sixty-second article of war is left to the discretion of the court, subject to the review of the president.

But the decision need not be based upon the regularity of the conviction under the fourth charge alone. There was also a conviction under the first charge for a conspiracy to defraud the United States, and a conviction under the second charge for causing false and fraudulent claims to be made; such charges being the subjects of the first and third paragraphs of the sixtieth article of war. I am in entire accord with Judge Wallace, who delivered the opinion of the circuit court of appeals for the Second circuit, that under the sixtieth article it was competent to impose a fine for one charge of which the accused was found guilty and imprisonment for the other. Therefore the entire sentence as ultimately pronounced and confirmed can be sustained under the sixtieth article of war without reference to the sixty-second, and for that reason no relief is possible by the writ of habeas corpus. Every presumption must be indulged in in favor of the judgment of the court-martial, and, even if the conviction under the fourth charge were void, it should be presumed that the fine re-

lates to the conviction under one of the first two charges and the imprisonment under the other. Under the procedure of courts-martial it was not required to be stated that the fine was imposed for conspiracy and the imprisonment for the causing of false and fraudulent claims to be made or vice versa. If the court might have imposed sentence in that manner, it must be presumed that it did so impose it.

Nor is the contention well made that Carter committed but one offense, which has been split up into several charges, and punishment inflicted therefor. A "conspiracy to defraud," as alleged in the first charge, and "causing false and fraudulent claims to be made," as alleged in the second charge, and "the statutory embezzlement under section 5488," as alleged in the fourth charge, are separate and distinct offenses, dependent upon different facts, and requiring different proof; and therefore it cannot be said that for the same act the accused has been tried and punished three times. The mere fact that certain acts of the accused are set out in all of the specifications supporting the three charges does not destroy the distinctive character of the offenses charged.

It is also contended that, since Carter was found guilty under 16 specifications, and upon review thereof by the president 12 were set aside, but no change was made in the sentence imposed by the court-martial, the sentence is void. The punishment prescribed by the articles of war is attached to the charges, and not to the specifications made thereunder, the latter being merely by way of exemplification and detailed statement of the principal charges to which they respectively relate; but, even if this were not so, the rule is well established that, where a sentence in gross is pronounced upon a conviction under an indictment containing several counts, and upon appeal or review some of them are held bad and the others are sustained, the sentence will not be disturbed provided it is such as could lawfully have been imposed under the counts which are upheld. Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 939, 38 L. Ed. 830; Claassen v. U. S., 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Haynes v. U. S., 42 C. C. A. 34, 101 Fed. 817; Jewett v. U. S., 41 C. C. A. 88, 100 Fed. 832; Peters v. U. S., 36 C. C. A. 105, 94 Fed. 127. In this case what was confirmed by the president is sufficient, under the law, to justify the punishment inflicted. This disposes of all of the objections that merit consideration. The writ of habeas corpus will therefore be dismissed, and the petitioner, Oberlin M. Carter, is remanded to the custody of the respondent.

**THAYER**, Circuit Judge. I concur in the foregoing opinion.

## CRAVENETTE CO. v. BENJAMIN et al.

(Circuit Court, S. D. New York. November 28, 1900.)

TRADE-MARKS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

In a suit for infringement of a trade-mark, complainant is entitled to the continuance of a temporary restraining order, where it appears that in numerous instances defendants have used boxes marked with such trade-mark for goods not made by complainant, although such use may have been through error, and not intentional.

In Equity. Suit for infringement of trade-mark. On motion to continue restraining order.

Albert Stickney and Samuel Ordway, for the motion.
William A. Jenner, opposed.

LACOMBE, Circuit Judge. Irrespective of all other questions in the case, the number of instances in which coats not made of complainant's goods have been packed in boxes marked with complainant's trade-mark is so great that I should not be warranted in refusing to continue the restraining order already in force. Against even the careless oversight of some subordinate the complainant is entitled to be protected more abundantly than by defendants' instructions to their employés, which, according to defendants' own admissions, have not proved sufficient in the past; especially so in view of the errors which by the later documents and affidavits are shown to have crept into the bills, and of the cards containing samples of both kinds of goods which were sent out, although those in charge of that department apparently contemplated the use of separate sample cards for imported and domestic goods. The suit being for infringement of trade-mark, and not for unfair competition merely, the intent is not of so much importance. The restraining order is continued until final hearing.

## WELLS v. CEYLON PERFUME CO.

(Circuit Court, S. D. New York. December 1, 1900.)

TRADE-MARKS—SUIT FOR INFRINGEMENT—BASIS OF LIABILITY.

Plaintiff was the proprietor of "Rough on Rats," a powder sold in boxes, and used for the killing of vermin, and had registered as a trade-mark the words "Rough on" as applied to vermin exterminators and medicinal preparations. *Held*, that the sale by defendant of a liquid in bottles under the name of "Rough on Skeeters" did not render it liable as an infringer, the article being wholly unlike any preparation sold by plaintiff, and one which could not be mistaken therefor, so as to create unfair competition.

In Equity. Suit for infringement of trade-mark.

Herbert Knight, for plaintiff.
Henry S. Wardner, for defendant.

WHEELER, District Judge. The plaintiff is the proprietor of "Rough on Rats," a yellowish brown poisonous powder, long sold

in boxes, for killing vermin, with directions for use in four languages, "for rats and mice; for roaches, water bugs, ants, etc.; for flies, mosquitoes, etc." The defendant has put up and sold "Rough on Skeeters," a transparent orange-colored liquid, in colorless glass bottles, which has an odor obnoxious to mosquitoes, and is useful in driving them away. The plaintiff has a trade-mark for the words "Rough on," as applied to vermin exterminators, and medicinal preparations, but has never applied "Rough on Mosquitoes" or "Rough on Skeeters" to any of his wares. The suit is brought upon the plaintiff's right to the exclusive use of the words "Rough on" in this business, and has been heard upon agreed statements of fact, from which these prominent ones have been deduced. The foundation of liability in such cases is palming off somehow the wares of one person as those of another, or doing what is likely to accomplish this. Without such accomplishment or likelihood, the liability is not made out. Manufacturing Co. v. Read (C. C.) 47 Fed. 712. Here the plaintiff was not putting up anything when the defendant began that the "Rough on Skeeters" could be mistaken for. The most that the use of these words could do in that direction would be to indicate that plaintiff had brought out something new for mosquitoes, which he had not. Nobody would think it was "Rough on Rats," which was the only thing he had alluding to mosquitoes before. "Rough on Skeeters" had to stand on its own merits as a repellent of mosquitoes. It would not go as "Rough on Rats," for it was not, and was not in any way made to appear to be, like that preparation; and it would not go as anything else that the plaintiff had, for he had nothing else that it could be taken for. Bill dismissed.

## KAMPFE et al. v. REICHARD.

(Circuit Court, S. D. New York. January 2, 1901.)

1. PATENTS—INVENTION—DESIGN FOR RAZOR CASING.
   The Kampfe design patent, No. 27,032, for a safety razor casing, is void for lack of invention.
2. SAME—SAFETY RAZORS.
   The Kampfe patent, No. 344,115, claim 9, for an improved tooth for a safety razor, having a longitudinal groove extending along its face, covers a useful invention, and is valid; also, *held* infringed.
3. SAME.
   The Fuchs patent, No. 561,707, for improvements in safety razors, claim 1, if sustainable, must be limited to the precise structure described and shown. As so limited, *held* not infringed.

In Equity. Suit for infringement of patents. On final hearing.

Edwin H. Brown, for complainants.

W. C. Hauff, for defendant.

COXE, District Judge. This is an infringement suit based upon letters patent relating to safety razors. One of these, a design patent, No. 23,699, for a razor handle, was withdrawn at the hearing. Design patent, No. 27,032, for a safety razor casing, is so manifestly invalid that but a word is necessary. In former structures the handle was

screwed into a concavity in the casing. The design in question consists in substituting a projection for the former depression. It is simply an appertured knob or boss, the use of which would occur to any mechanic who knew enough to make a symmetrical joint between the handle and the casing. There are, then, but two patents to be considered.

Letters patent, No. 344,115, were granted June 22, 1886, to the complainant, Richard Kampfe, for improvements in safety razors. The ninth claim only is involved. It is as follows: "(9) An improved tooth for a safety razor, having a longitudinal groove extending along its face." The claim sufficiently explains the character of the invention. The advantage asserted for the fluted or grooved teeth is that "many of the hairs which would otherwise be bent down by the bearing of the teeth upon them stand up in the grooves, and are more easily cut by the blade." This statement is corroborated by the testimony. It appears without contradiction that a safety razor thus constructed does better work, shaves closer, cleaner and more expeditiously than the razors which preceded it. It is a little thing, but it was never done before and it marks a distinct improvement in the art. Infringement, if not admitted, is not seriously disputed. In any event it is proved beyond a doubt. The conduct of the defendant has been so disingenuous in persistently pirating upon the complainants' business that the court is not inclined to adopt an unnecessarily strict construction in order to relieve him.

The other letters patent involved are No. 561,707, granted June 9, 1896, to Eugene J. Fuchs, for improvements in safety razors. The first claim only is involved. It is as follows:

"(1) In a safety razor, the combination with a casing, having a guard at its front, of a blade support, pivoted at its front edge to the front part of the casing to swing upward and outward, over the guard, so as to entirely open up the top of the casing and to give free access to the guard for cleaning the same, substantially as herein shown and described."

The advantages pointed out for the combination of the claim are that the razor is simple in construction and can be easily cleaned. In the specification the patentee says:

"On my improved razor the guard is rigid and always retains its position in relation to the casing."

It is obvious that this patent covers, at best, an exceedingly restricted invention, and, in view of the prior art, the limitations of the specification and the representations addressed to the commissioner of patents it must be limited, if sustained at all, to the precise structure described and shown. So construed the defendant does not infringe. In a letter addressed to the commissioner of patents, dated March 20, 1896, the patentee says:

"I am well aware that I am not the first to construct a safety razor in such a manner that the top of the case can be raised in such a manner as to give access to the interior of the casing. * * * In my razor the guard at all times remains fixed and the hinged top swings towards the front end and over the guard. * * * I must again call your attention to the very important fact that in my improved razor the guard is at all times a permanent and fixed feature, and is never shifted or moved."

In the defendant's razor the guard is not a permanent and fixed feature, but swings with the hinged top.

It follows that the complainants are entitled to a decree upon the ninth claim of patent, No. 344,115, but without costs.

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KAMPFE et al. v. REICHARD et al.

(Circuit Court, S. D. New York. January 2, 1901.)

PATENTS—INFRINGEMENTS—SAFETY RAZORS.

The Kampfe patent, No. 387,359, for improvements in safety razors, claims 1 and 2, which cover a razor in which the blade is adjusted by screws in relation to the guard, are valid and entitled to a liberal construction as to equivalents; the invention being one of more than ordinary value, and a distinct advance in the art. As so construed, *held* infringed.

In Equity. Suit for infringement of patents. On final hearing.

Edwin H. Brown, for complainants.

W. C. Hauff, for defendants.

COXE, District Judge. This is an equity suit based upon three letters patent owned by the complainants. One of these, No. 27,032, is for a design and was considered in the previous case. The patent was there held to be invalid. Another, No. 561,707, was also considered in the previous case and it was there decided that the defendant did not infringe. The same question of infringement is presented in the present case. Letters patent, No. 387,359, alone remain to be considered. They were granted to the complainants August 7, 1888, for improvements in safety razors. Claims 1 and 2 are the only ones involved. They are as follows:

"(1) A safety razor having angular blade retaining clips on the top of the holder at the ends of said top, and screws in said clips, substantially as herein shown and described, and for the purpose of adjusting the blade in relation to the guard, as set forth. (2) In a safety razor, the combination, with a blade holder, of movable angle clips, on said holder at the ends of the top of the holder, screws in said clips, and a spring pressing on the blade towards the guard, substantially as herein shown and described, and for the purpose of adjusting the blade in relation to the guard, as set forth."

The object of the invention was to provide a razor in which the blade can be adjusted readily in relation to the guard. The cutting blade is placed upon the top of the holder, the ends being passed in between the holder and the clips. A spring is then raised which presses the blade forward against the lower ends of the screws which are shown as located in the clips. By turning the screws so that their ends move downward and press upon the beveled top of the blade the tendency is to force the blade against the spring and away from the guard. If the screws be turned in an opposite direction the pressure of the spring forces the blade toward the front of the guard. A perfect adjustment can thus be made so that the cutting edge will be on the proper gauge line with reference to the guard. Another form of applying the invention is shown in Fig. 5 of the patent, where the clips are secured to spring angle pieces and are provided with top and bottom flanges, the screws being held in the bottom flanges. Still

another form is shown in Fig. 6, where screws are provided both in the top and bottom flanges of the clips. The adjustment can be made by any person of ordinary intelligence. In the prior structures where the clips were made without screws the setting of the blade was a difficult operation requiring time and skill. Pliers were used to bend the metal into the proper shape which resulted in impairing and often in breaking the clips. If a thicker or a thinner blade were substituted for the one removed it was necessary to repeat the same difficult process of adjustment which could seldom be accomplished by the user of the razor and necessitated the employment of skilled labor. The essential element of the invention is the adoption of adjusting screws to place and hold the blade in proper position. Evidently the inventors did not regard the form, size or location of the screws, or the angle at which they were set, as essential features of their combination. There was nothing in the prior art requiring them to limit the invention to such unsubstantial and inconsequential details. The use of adjusting screws in this art for the purposes indicated was new with the complainants and it was an improvement of more than ordinary value. It saved time, money and labor. It has increased sales and largely augmented the popularity of safety razors. The owner can now adjust the blade without returning it to the manufacturer or vendor; no expert skill is necessary. The razor does not break down or get out of order. Before the invention large numbers of razors were returned by those whose patience was exhausted by their propensity to become unmanageable; now such an event is rare. Lack of invention is hardly asserted. Indeed, the defendants have a patent granted to Reichard for a razor operating upon the same principle. The main defense is noninfringement, and this is based upon the fact that in the defendants' structure the screws are not actually in the clips as shown in the drawings of the patent. There is no doubt that the defendants have appropriated all that is valuable in the complainants' device. They have taken the essence of the invention and have changed it in form only. The conduct of the defendant Reichard has been such that the court is not inclined to strain the rules of construction in order to relieve him. For eight years he was in the employ of the complainants. Since leaving them he has been engaged in making safety razors on his own account. His competition has not been fair. He has copied complainants' methods at every point. It is plain that he has attempted to avoid the patent by locating the screws at a different point from any shown in the drawings. The construction is an awkward one, no one would locate the screws at the corners of the holder from choice, and the inference is plain that the object was to secure all the advantages of the invention and escape infringement by the plea that the screws are not in the clips. The effort shows some ingenuity, but the difference is not in function or in result but in nomenclature merely. The object in view was to secure an end adjustment by forcing the clips—as shown in Fig. 5—down upon the blade. To do this the complainants place the screw-threaded hole in the bottom flange of the clip with the end of the screw bearing against the holder. The defendants place the screw-threaded hole in the holder with the end of the screw bearing against the elongated bottom

flange of the clip. So far as the action of the screws is concerned the one is the exact equivalent of the other. Suppose the defendants had placed the screw in the spring between the clip and the casing of Fig. 5, or had extended the spring a short distance beyond the clip and placed the screw there, or had placed the threaded hole in the extended spring piece of their own razor and had thus pulled down the clip upon the blade, could they have avoided the claims? It is thought not, though in none of these supposed constructions would the screws pass through the clips. The defendants argue that they should escape because the threaded holes through which the screws pass are not in the clips of their razor. But the claims do not say that the screws must pass through holes in the clips. The screws are to be in the clips; that is, within and not outside of the clips; within the limits of, but not necessarily extending through, the clips. Even if a construction were necessary limiting the claims to "screws in said clips" the words quoted are susceptible of an interpretation which will include so palpable a subterfuge as that attempted by the defendants. Surely, the court is not called upon to adopt an illiberal construction at the instance of so unscrupulous an infringer as the principal defendant. The complainants are entitled to a decree upon claims 1 and 2 of letters patent No. 387,359, but without costs.

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BRILL et al. v. PECKHAM MOTOR TRUCK CO.

(Circuit Court, S. D. New York. December 3, 1900.)

PATENTS—SUITS FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where infringement appears, under the construction placed on the claims of complainant's patent in a prior suit in the same court, and no new questions affecting the validity of the patent are raised, complainant is entitled to a preliminary injunction.

In Equity. Suit for infringement of a patent. On motion for preliminary injunction.

Francis Rawle, Joseph L. Levy, and Frederick P. Fish, for the motion.

Henry P. Wells, opposed.

LACOMBE, Circuit Judge. The only question presented is whether defendant's structure infringes. That involves the construction of the claims declared on, and, for the purposes of this motion, the construction already adopted by this court on final hearing in the Third Ave. Case (103 Fed. 289) should be followed; for there is no prior patent, no prior use, proved here, which was not before Judge Shipman. It is true that in that case the defendant's device was a much closer copy than the one now under consideration, containing, as it did, the feature that the spiral springs came first into play, and the further feature of depending caps, in which the leaves of the elliptical springs play vertically. But the court most carefully indicates that the leading feature of the invention lies outside of these details; that the "gist of the invention consists in combining with the frames of the truck and the spiral springs other springs, viz. elliptical springs, between the car body and the extensions of the independent

frame,"—the object being to break the rhythm of the springs, and thus do away with the galloping or rocking motion. The defendant here insists that there is no rhythm broken,—indeed, that there is no rhythm to break,—and that the combination of the quotation does not do away with the galloping motion. On those points, however, this court should follow the earlier decision. There are additional rods, and also spirals, below the frame, which apparently in defendant's structure do their share in eliminating galloping; but the combination which Judge Shipman described as the gist of the invention is undoubtedly in defendant's structure, and, under well-settled rules of practice, complainant is entitled to a restraining order until final hearing.

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## J. ELWOOD LEE CO. v. B. F. GOODRICH CO.

(Circuit Court, S. D. New York. November 19, 1900.)

PATENTS—PATENTABLE NOVELTY—CATHETER.

The Lee patent, No. 390,177, for an improved catheter, *held* valid on demurrer.

In Equity. Suit for infringement of patent. On demurrer to bill.

Herbert Howson, for plaintiff.
Seward Davis, for defendant.

WHEELER, District Judge. The suit is brought upon patent No. 390,177, dated September 25, 1888, and granted to J. Elwood Lee, for an improved catheter. The bill is demurred to for want of patentable novelty in the claimed invention. But the improvement is in a surgical instrument. On its face it appears so far new and useful that professional or expert information, beyond common knowledge, is necessary to show that it is not. Demurrer overruled. Defendant to answer over by January rule day.

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## FEDER v. DE YONGH.

(Circuit Court, S. D. New York. November 21, 1900.)

1. PATENTS—ANTICIPATION—PRIOR KNOWLEDGE.

   To defeat a patent on the ground that the device was known in this country prior to the date of the alleged invention by the patentee, the evidence of such knowledge must be clear.

2. SAME—SKIRT PPOTECTORS.

   The Feder patent, No. 553,707, for a skirt protector, was not anticipated, and is valid.

In Equity. Suit for infringement of patent. On final hearing.

Edwin H. Brown, for plaintiff.
Norbert Heinsheimer, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 553,707, dated January 28, 1896, and granted to the plaintiff,

for a skirt protector. The invention is well described in the claim, which is for:

"A skirt protector, consisting of a fabric composed of a plurality of series of folded bunches of threads, forming the weft of the fabric, and having the bights of the folds of one series further from the edge of the fabric than the bights of the folds of another series from that same edge, and warp threads interwoven with the said folded bunches, leaving the free ends of the bunches extended beyond the edge of the fabric to form a brush, substantially as set forth."

The plaintiff's evidence takes the date of his invention back to the late summer of 1894. At that time there were dress trimmings of similar weave, the nearest of which to this invention, according to the cross-examination of the defendant's expert, are those shown on Hensel sample card, Exhibit 8, and none of which could be used as they were for a skirt protector. None of them appear to be any anticipation of this invention of a new skirt protector. Some samples of a skirt protector made according to the Vorwerk British patent, applied for August 2, 1894, appear to have arrived in this country and to have reached the defendant in the early fall of 1894. If they reached the defendant so as to become known in this country before the plaintiff's invention, they appear to be enough like it to have that knowledge of them here anticipate it. That patent was not published or accepted till long into the next year, so that, of itself, would not affect the plaintiff's patent. The turning question seems to be whether in fact those samples became known here before this invention was made. The extremes of the testimony of the witnesses on opposite sides of this question somewhat interlock as to time, and do not seem to be wholly reconcilable. But clear precedence, in time, of knowledge of the samples in this country, over the invention, is necessary to overcome the presumptions of the patent so as to defeat it. That clear precedence does not appear to be made out. Decree for plaintiff.

## FEDER v. STEWART, HOWE & MAY CO.

(Circuit Court, S. D. New York. November 26, 1900.)

PATENTS—DESIGNS—NOVELTY.

The Feder design patent, No. 29,350, for a design for skirt binding, is void for lack of patentable novelty in the design shown.

In Equity. Suit for infringement of patent. On final hearing.

Alan D. Kenyon, for plaintiff.
Lawrence E. Saxton, for defendant.

WHEELER, District Judge. This suit is brought upon design patent No. 29,350, dated September 13, 1898, and granted to the plaintiff, for a design for skirt binding. The specification says:

"The essential feature of my design consists in a skirt binding presenting in side elevation a head portion having the appearance of a woven fabric, an edge portion having the appearance of a brush or fringe, a portion of the

head being embellished by a change in the weave, producing a distinctive band or stripe, presenting the appearance of lines of dashes arranged in staggered order."

Vorwerk's British patent, No. 14,837, applied for August 2, 1894, and accepted August 2, 1895, for improvements in dress guards, set up by the defendant, states:

"The new dress guard may be made in different ways,—by weaving in a loom, by means of the braiding machine, or also by means of the so-called crocheting machine; and, whether made according to one or the other method, it may vary in details. The attaching strip may be carried out in plain work, or in more ornamental or fancy work. It may consist of a single strip, or two strips of different character may be worked together. But in all cases the main feature and characteristical point is that on one edge of the attaching strip or band the cross threads stand out like the threads of plush or velvet, and form, so to say, a little, soft brush."

The difference between these specifications seems to be in the appearance of lines of dashes arranged in staggered order. Such an appearance is very common in similar things. The plaintiff makes dress guards, and those of the defendant are quite similar; but the question is not whether the defendant imitates the plaintiff's goods, but whether it has taken any validly patented design belonging to him. The idea of staggering dashes on the bands of such a well-known article does not seem to be of sufficient importance, although new, to afford foundation for a patent. Smith v. Saddle Co., 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606. Bill dismissed.

## A. B. DICK CO. v. WICHELMAN.

(Circuit Court, S. D. New York. November 26, 1900.)

PATENTS—ANTICIPATION—STENCIL SHEETS.

The Dick patent, No. 562,590, for a duplicating stencil, the essential feature of which is the mixing of lard or lard oil with paraffin to form a coating for the paper of which the stencil sheet is made, was anticipated by the Brodrick patent, No. 377,706, which is sufficiently broad to cover the coating of the sheet with any gummy or waxy substance; the best material for the purpose being a matter to be determined by mechanical experiment.

In Equity. Suit for infringement of patent. On final hearing.

Dyer, Edmonds & Dyer, for plaintiff.
Frederick A. Wichelman, pro se.

WHEELER, District Judge. This suit is brought upon patent No. 562,590, applied for December 27, 1887, granted to Albert B. Dick, assignor to the plaintiff, and dated June 23, 1896, for a duplicating stencil. The specifications of that patent state:

"For preparing the stencil sheet from which the stencil is made I prefer to employ a thin, tough paper, which at the same time is very open. * * * This paper may be coated with paraffin in the ordinary way of coating paper with paraffin for other purposes, but I have found that when this alone is done the coating is tenacious, and does not readily break when struck by the type; but by adding to the paraffin a material which makes the coating fri-

able, this objection is overcome. For this purpose I have found that lard, or lard oil, is an efficient material. When I employ paraffin as the main ingredient of the coating, I mix the paraffin and lard or lard oil preferably in the proportion of seven parts of paraffin to one part of lard or lard oil, whereby the paraffin is shortened. The paper is coated with this mixture after the manner of the usual paraffin process."

The claims in question are for:

"(1) A stencil sheet or duplicating stencil of open material provided with a coating having a shortening material as an ingredient, substantially as set forth. (2) A stencil sheet or duplicating stencil of open material provided with a coating of wax mixed with a shortening material, substantially as set forth. (3) A stencil sheet or duplicating stencil consisting of open material coated with a mixture of paraffin and lard oil, substantially as set forth."

John Brodrick applied for a patent for a prepared sheet for stencils May 20, 1886, which was No. 377,706, dated February 7, 1888, and is now owned, and claimed to be valid, by the plaintiff. The specifications of that patent state:

"I prepare my improved sheet by preference from a sheet of thin, highly-porous paper by immersing the same in a bath of melted gummy or waxy substance—such as paraffin—of about 120 degrees Fahrenheit fusion point, or by any other suitable method of waxing paper now known to the arts."

It had three claims. The first two were for sheets coated with a substance impervious to ink, such as paraffin; and the third was for a sheet coated with a substance impervious to ink. It was in litigation between these parties, and upheld. Wichelman v. A. B. Dick Co., 31 C. C. A. 530, 88 Fed. 264. In speaking of it, Judge Wallace, for the circuit court of appeals, said:

"The patent, however, is not limited to the use of these constituents in preparing the sheet. The specification points out that any sheet of the requisite porosity, thinness, and toughness may be used, and may be coated with any gummy or waxy substance of a consistency that will yield upon pressure, so as to expose the interstices of the basic material at the lines of impression without abrasion."

Although these applications were before the patent office at the same time, the dates show a clear precedence of the Brodrick invention over that of Dick involved here, and therefore the question arises whether the shortening of paraffin with lard or lard oil—which is what Dick appears to have really accomplished—is a patentable improvement upon what Brodrick had done. Coating the sheets with a gummy substance of the right consistency, which might include paraffin and lard, or lard oil, or any other ingredient, was the invention of Brodrick. How much, and of what, was to be determined by mechanical experiment. Many of the experiments of Dick by which he reached the substances and proportions of the patent were made for him by the defendant as a skillful operator in the art of waxing paper. After Brodrick, there does not seem to have been any room left for anything to be gone in this direction but the making of mechanical experiments within the scope of what he had described. The testimony of Dick and of the defendant as to what was done in arriving at the proper proportions appears to show only

such experiments. Neither struck out anything new, but only carried forward what Brodrick had discovered, and was, therefore, well known. Bill dismissed.

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## CAMPBELL v. MAYOR, ETC., OF CITY OF NEW YORK.

(Circuit Court, S. D. New York. November 12, 1900.)

PATENTS—DAMAGES FOR INFRINGEMENT—INTEREST.

Under the general rule that profits recovered as damages for infringement of a patent do not bear interest until their amount has been judicially ascertained, the entering of an order for a decree for the amount of profits found by the court constitutes such ascertainment, and the amount bears interest from the date of such order, notwithstanding any delay in entering the decree.

In Equity. Suit for infringement of patent. See 81 Fed. 182.

Benner & Benner, for complainant.
John R. Bennett, for defendant.

WHEELER, District Judge. The master reported profits from savings in repairs made by infringement of the patent in suit to the amount of $28,363, and reported testimony, evidence, and findings from which the court ascertained savings in hose to the amount of $183,394.32, and in number of men to the amount of $606,344 (in all, $898,074.32), and on May 14, 1897, entered an order for a decree for the payment of this sum. Question is now made, upon the settlement of the final decree, as to the time from which interest should be cast. In Tilghman v. Proctor, 125 U. S. 142, 8 Sup. Ct. 894, 31 L. Ed. 664, it is laid down, at page 160, 125 U. S., page 907, 8 Sup. Ct., and page 672, 31 L. Ed., as a general rule that profits, as a measure of damages for infringement of a patent, "do not bear interest until after their amount has been judicially ascertained." The filing of a report by a master for the sum that is decreed is such an ascertainment. Railroad Co. v. Turrill, 110 U. S. 301, 4 Sup. Ct. 5, 28 L. Ed. 154. In this case the judicial ascertainment was made when the decretal order was filed. That ascertainment has stood ever since, and now goes into the decree. Delay in entering the decree, from whatever cause, does not affect that date. Decree for interest from May 14, 1897.

## SOCIÉTÉ FABRIQUES DE PRODUITS CHIMIQUES DE THANN ET DE MULHOUSE v. LUEDERS et al.

(Circuit Court, S. D. New York. November 8, 1900.)

PATENTS—SUIT IN EQUITY FOR INFRINGEMENT—DUPLICITY OF PLEA.

A plea to a bill for infringement of a patent, which sets out a prior process patent to the same patentee, and avers that the product of the process shown is the same product claimed in the second patent, and that the two patents are, therefore, for an indivisible invention, and the second is void, and also pleads that the first patent was an abandonment to the public of the product of the second, presents two separate defenses, and is bad for duplicity.

In Equity. Suit for infringement of patent. On motion to strike out amended plea.

Elisha K. Camp, for the motion.
Arthur v. Briesen, opposed.

SHIPMAN, Circuit Judge. The complainant's bill in equity seeks to restrain the alleged infringement of letters patent No. 451,847, dated May 5, 1891, and issued to Albert Baur for a new product called "artificial musk." The bill is in the ordinary form, and makes profert of the patent. The defendants filed a plea which alleged that Baur applied for and received, on December 10, 1889, letters patent No. 416,710, for a new process for making artificial musk, made profert of the patent, and alleged that the invention of the patent in suit was fully disclosed and abandoned to the public in and by letters patent No. 416,710, and that thereby the patent in suit was void, and of no effect. The plea was set down for argument, and upon the hearing I said that I could not tell, merely upon profert of the two patents, which are very chemical in their character, that the invention of the product was shown in the process patent, and that either more facts must be averred or testimony must be given, and gave leave and time for an amendment of the pleadings. An amended plea was thereupon filed, which avers that the necessary product of the process is the product claimed in the patent in suit, "and that, therefore, said last-mentioned letters patent, No. 451,847, are void, and of no effect in law." The plea further declares, "All of which things the defendants do aver to be true, and they plead the abandonment of the alleged invention specified and claimed in said letters patent No. 451,847." The complainant now moves to strike out the amended plea. The amended plea presents two separate defenses,—one that the two patents are for one and the same or "indivisible" invention, and that the second patent is, therefore, void, upon the principles stated in Mosler Safe & Lock Co. v. Mosler, Bahmann & Co., 127 U. S. 354, 8 Sup. Ct. 1148, 32 L. Ed. 182; Plummer v. Sargent, 120 U. S. 442, 7 Sup. Ct. 640, 30 L. Ed. 737; Giant Powder Co. v. California Powder Works, 98 U. S. 126, 25 L. Ed. 77. The second defense is that the facts constitute an abandonment of the invention claimed in the second patent. The result is that a single plea relies upon the indivisibility of the two alleged inven-

tions, and also upon an abandonment to the public of the invention for a product. "A double plea is informal and multifarious, and therefore improper," and "it is a general rule that a plea ought not to contain more defenses than one." Story, Eq. Pl. § 653; Rhode Island v. Massachusetts, 14 Pet. 259, 10 L. Ed. 423; 1 Daniell, Ch. Prac. 633; McCloskey v. Barr (C. C.) 38 Fed. 165. I see no adequate reason for permitting two separate pleas, and the proper course is to let the plea stand for an answer.

## THE CATALINA.

(Circuit Court of Appeals, Fifth Circuit. December 18, 1900.)

No. 963.

1. SALVAGE—CHARACTER OF SERVICES—VESSEL IN DISTRESS.

Where a steamship in the Gulf of Mexico, 60 miles from the mouth of the Mississippi, was disabled, by the breaking of her shaft, beyond any temporary repairs that could be made, and in need of assistance to reach her port, although not in immediate peril, she was so in distress that aid voluntarily given her by towing her to the mouth of the river constituted salvage services.

2. SAME—AMOUNT OF COMPENSATION.

The Catalina, a large Spanish steamship valued at $200,000, while in the Gulf of Mexico, on her way in ballast from a Mexican port to New Orleans, broke her propeller shaft beyond temporary repair. She attempted to proceed by sail, but was becalmed about 60 miles from the mouth of the river, and during the night signaled the Olympia, a steamship bound outward in ballast, for assistance. By agreement, the Olympia undertook to tow her to the South Pass, the amount of compensation to be determined later. The crew of the Catalina delivered a hawser on board the Olympia, and the towage was performed in safety, the weather being calm and the sea smooth. The Olympia was delayed by the service about 24 hours. She was a vessel worth $75,000. *Held*, that the service rendered was properly a salvage service, and entitled to be compensated as such, but was not of a high order of merit; that as the service contracted for was merely towage, which was performed without risk to the Olympia or her crew, it should be compensated on the basis of the value of such towage, an equal amount to be added as salvage compensation; and, it appearing that $50 per hour was full compensation for the towage, an award of $2,400 should be made.[1]

Appeal from the District Court of the United States for the Eastern District of Louisiana.

George Denégre and J. P. Blair, for appellants.

W. W. Howe, C. P. Cocke, and W. B. Spencer, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is a libel for salvage, and the appellants have brought the case to this court complaining of the amount awarded. It appears that on or about November 15, 1899, the Spanish steamship Catalina, a large, well-appointed steamship, of the value of

[1] Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

about $200,000, left the port of Barcelona, with a general cargo for sundry ports in Canary Islands, Puerto Rico, Cuba, and Mexico, and, having discharged the last of her cargo at Tampico, left that port in ballast for the port of New Orleans. While on her course, some 80 or 90 miles off Southwest Pass, her shaft broke, thus disabling her as a steam vessel. The shaft and propeller were secured, and the Catalina undertook to proceed, directing her course more to the eastward, towards the usual course of vessels plying between the ports of New Orleans and Cuba and Central America. The weather and sea were calm, and the wind light. On the 12th of January the wind died down, and the Catalina was temporarily becalmed; and when in latitude 28° 8′ N., and longitude 88° 39′ W., at a distance of about 60 miles south of east from South Pass, at the mouth of the Mississippi river, at about 9:30 p. m., she sighted, at a distance of about 7 miles, the steamship Olympia, a steam vessel of about the value of $75,000, bound in ballast from the port of New Orleans to Port Limon, Costa Rica. The Catalina signaled with Bengal lights. The Olympia changed her course slightly to meet her, and when at the distance of about 3 miles answered the signals. The Olympia then approached within about 1,000 yards of the Catalina, and the master and first officer of the Catalina went aboard in a boat, and asked the captain of the Olympia to tow the Catalina to the mouth of the Mississippi river. Thereupon, after a consultation between the master of the Olympia and his officers, an agreement was made and reduced to writing as follows, to wit:

"United Fruit Company Steamship Lines. Steamship Olympia. At Sea.

"Thurs., Jan. 12th, 1900, at 10:45 p. m.

"Position: S., 28° E.,—60 miles from South Pass Light Vessel.

"It is hereby agreed between Captain Higinio Andraca, of the S. S. Catalina, now disabled, and Captain Edmund J. Seiders, of S. S. Olympia, that the latter tow the former to a safe anchorage at the mouth of the Mississippi river (South Pass). All renumeration (remuneration) for this service to be decided by arbitration in New Orleans. The arbitrators to be selected in part by the managers of the United Fruit Company, and in part by those representing the owners of the disabled ship.

"[Signed] Higinio Andraca.
"[Signed] E. J. Seiders.

"Witness: [Signed] W. S. Amoss, Purser Olympia."

Thereupon, the Olympia coming within the distance of about 300 yards from the Catalina, a hawser of the Catalina was carried aboard by the crew of the Catalina, made fast on the Olympia, and the towage service commenced. The weather was calm and pleasant, the sea also, and the towage service went on without incident until about 12:45 p. m. of the 13th of January, when, near South Pass, the Olympia stopped to take on pilots, and then, starting abruptly, the hawser parted. Thereupon the Catalina furnished another hawser, delivered it aboard the Olympia, and the towing proceeded until about 2 p. m., when the Catalina was left in a condition of safety at South Pass, and the Olympia resumed her voyage; having been detained by the services rendered to the Catalina from 22 to 24 hours.

It seems that the stipulation for arbitration was abandoned, and

the libel in this case was filed. There is very little, if any, conflict in the evidence. The judge of the lower court rendered the following "Reasons for Judgment":

"This cause having been submitted on the evidence, and after arguments of counsel, the court finds: The court thinks this is clearly a case of salvage. The steamer had broken her shaft, and was without sufficient sails to make steering way; and in the month of January, in the Gulf of Mexico, in that condition, she was in need of assistance. She was in distress. She so signaled, and received the necessary aid. The late Judge Billings, in the case of The Delhonde, very properly says that a vessel in the Gulf of Mexico with a broken shaft or propeller is at the mercy of the elements, because the Gulf of Mexico is a dangerous water. It is true that both of the vessels in this case were in ballast and without passengers, and that there was no evidence of immediate or imminent peril. There was little or no immediate danger to the officers or crew of either of the vessels. Had there been, the award in this case would necessarily have been much larger. The award, in view of the value of the salved property ($200,000), is not large, and its payment will not be onerous upon the owner of the steamer; yet the amount given will be sufficient to accomplish the purpose in such cases, to wit, to cause the officers and crews of salving vessels or any other mariners to go promptly and eagerly to the rescue of any vessel so disabled in future. The court awards $6,000 to the salvors, one-third of this amount to the officers and crew, in proportion to their wages, and the balance to the owners of the vessel."

On this decree the following errors are assigned:

"(1) The court erred in holding that the services herein were salvage services. (2) That the court erred in allowing libelants more than a liberal compensation pro opere et labore; that the amount fixed as compensation for the services performed by libelants, six thousand dollars, is more than ten times the actual value of the services estimated pro opere et labore, and six times more than the value of such services considered and valued as salvage services."

The Catalina was disabled in the open Gulf beyond any temporary repairs that could be made upon her machinery, out of reach of ordinary towing vessels whose help she needed, and, while in no immediate or proximate danger, was in need of outside assistance to reach port. To have trusted to her sails would have been to incur needless delay and danger, and risks from possible, if not probable, changes in the weather. We may say here, as we said of the Dupuy de Lome with her broken propeller-shaft (Compagnie Commerciale de Transport a Vapeur Francaise v. Charente S. S. Co., 9 C. C. A. 292, 60 Fed. 921): This ship "was so far disabled as to be in need of assistance to enable her to complete her voyage, and, although not in immediate peril, was so in distress as to justify the use of the word 'salvage' in designating the aid she required." The first assignment of error is therefore not well taken.

In The Rita, 10 C. C. A. 629, 632, 62 Fed. 761, 763, this court declared in regard to salvage principles as follows:

"'Salvage, in its simple character, is the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea, under the responsibility of making restitution, and with a lien for their reward.' Macl. Shipp. 608. 'Salvage is the compensation due to persons by whose voluntary assistance a ship or its lading has been saved to the owner from impending peril, or recovered after actual loss.' Ben. Adm. § 300. 'Salvage consists of an adequate compensation for

the actual outlay of labor and expense used in the enterprise, and of the reward as bounty allowed from motives of public policy as a means of encouraging extraordinary exertions in the saving of life and property in peril at sea.' The Egypt (D. C.) 17 Fed. 359. 'The amount awarded as salvage comprises two elements, viz. adequate remuneration, and a bounty given to encourage similar exertions in future cases, the relative amount to depend on the special facts and merits of each case.' The Sandringham (D. C.) 10 Fed. 556. 'The leading considerations to be observed in determining the proportion or amount of an award for salvage services are well defined. * * * We are to consider (1) the degree of danger from which the lives or property are rescued; (2) the value of the property saved; (3) the risk incurred by the salvors; (4) the value of the property employed by the salvors in the wrecking enterprise, and the danger to which it is exposed; (5) the skill shown in rendering the service; (6) the time and labor occupied. These are the ingredients which must enter, each to a greater or less degree, as a sine qua non, into every true salvage service.' The Sandringham, supra."

In the instant case the award made in the district court seems to have been based almost wholly upon the value of the salved property, and with the view of making a considerable reward to the salvors, in the main disregarding the other elements of salvage, and particularly the character and risk of the services actually rendered. The services required by the Catalina were simple towage services; those applied for and those contracted for and furnished by the Olympia were simple towage services. The Olympia was not required to and did not approach the Catalina within any dangerous distance. The hawsers of the Catalina were put aboard the Olympia by the crew of the Catalina, and we are unable to perceive that the services rendered to the Catalina by the Olympia were attended with any extra risk not accompanying ordinary towage, except that they were rendered by a ship not constructed for, nor engaged in, the towing business. It may be that the services rendered were enhanced by the fact that the Olympia, to render them, made a deviation in her voyage; but she was in ballast, and we find nothing in the record to show that she suffered any damage or great inconvenience therefrom. While we agree with the district court in holding that the services rendered were salvage services, we are clearly of opinion that they should be held to be salvage services of a low order, and be compensated on the basis of towage services. We find no evidence in the record tending to show the value of towage services rendered large steamships in the open Gulf, but in other records we are advised that $25 per hour is a liberal compensation. As the Olympia was not constructed for, nor engaged in, the towage business, we think we may safely estimate the value of the towage services rendered to the Catalina at $50 per hour, and doubling this, to accent and reward the same as salvage services, will make $100 per hour, and considering that the Olympia was detained about the business 24 hours will guide in fixing the proper allowance at $2,400. This amount doubly pays for the services actually rendered, and it is sufficiently large to carry into effect the principles involved in salvage compensation.

As to the distribution of the amount allowed between the owners and the crew, no appeal has been taken, and we infer that the rule adopted, two-thirds to the owners and one-third to the master and

crew, is satisfactory to all the parties concerned. The judgment of the district court is reversed, and the case is remanded, with instructions to enter a decree in favor of the libelants, and against the claimants, for the sum of $2,400 and costs; the costs of this court, including cost of transcript, to be paid by the appellees.

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## THE NEW CAMELIA.

(Circuit Court of Appeals, Fifth Circuit. December 18, 1900.)

No. 970.

1. SALVAGE—AMOUNT OF AWARD—REVIEW.
An award of an admiralty court for salvage services in towing a disabled vessel into port, based on the value of the vessel salved, and which is many times the value of the towage, on which the award should have been based under the facts shown, is one made upon incorrect principles, and may properly be reviewed, and the amount reduced, by the circuit court of appeals.

2. SAME—AMOUNT OF AWARD—SERVICES OF CREW.
The New Camelia, a steamer worth $35,000, and having on board 150 passengers, broke her shaft when about the middle of Lake Pontchartrain, and was wholly disabled from further navigation. She was anchored, and a boat sent to a port 12 miles distant for a tug. Shortly afterwards a tug was sighted and signaled, and under direction of her owner, who was on board, such tug dropped her tow and proceeded to the steamer. On learning the facts the owner of the tug offered to tow the steamer to a port, which offer was accepted. The service required about two hours, after which the tug went back, and, securing her tow, proceeded on her way. It was in the daytime, and the lake was calm. No compensation was agreed upon, and the owner of the tug made no charge for salvage, but estimated the value of the towage service rendered at from $15 to $30. Subsequently members of the crew of the tug libeled the steamer for salvage services, and the court fixed the value of such services at 5 per cent. of the value of the vessel, amounting to $1,750, and apportioned one-half to the crew of the tug, which was equal to about three months' wages. *Held* that, while the services rendered might properly be considered salvage services, they were not of such an order of merit on the part of the crew, who were not volunteers, as to justify the award made them, but that, the vessel not having been in great peril, and the service having been offered and accepted merely as a towage service, and so regarded by the owner of the tug, the total award should not exceed double the value of such service as estimated by him, one-third to be apportioned to the crew.[1]

Appeal from the District Court of the United States for the Eastern District of Louisiana.

The steamer New Camelia, worth the sum of $35,000, a merchant vessel of the United States, licensed and enrolled in the coasting trade, proceeded on a voyage on Sunday, June 18, 1899, from Milneburg on Lake Pontchartrain, to other points and places on and across said lake and on the Tchefuncta river. On this occasion she carried upwards of 150 passengers. About midway of said lake she broke her shaft, and was thereby disabled. This steamer is provided with side wheels, and both wheels are operated by one shaft; hence the breaking of this shaft rendered her propelling power useless. She

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[1] Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

has no mast or sail power of any kind. The vessel was anchored, and the master sent off one of the steamer's small boats, manned by her steersman and three of her four deck hands, to West End, something like 12 miles distant, to procure the assistance of a tug. Some time thereafter smoke was seen on the horizon in a northwesterly direction. Thereupon the master of the steamer New Camelia directed the mate to run the ensign up and down,—dip it several times,—to attract the attention of the descried vessel. The vessel sighted, and for which the signal was given, proved to be the tug Claribel, from the Tchefuncta river, bound for New Orleans, with two sand barges in tow; and her master, seeing the signal made on board the steamer New Camelia, called the attention thereto of Mr. Fritz Jahncke, who was and is president of the corporation owning and operating the steamer Claribel and a large number of other vessels on Lake Pontchartrain, and who thereupon directed the master of the Claribel to cast adrift their tow and proceed to the New Camelia. At this time the Claribel was so far distant that the flag signal could be seen only by the use of marine glasses, and the barges in tow of the Claribel could not be seen at all by the steamer New Camelia. Upon arriving off the steamer New Camelia, Mr. Jahncke was informed that her shaft was broken, whereupon he volunteered the services of the Claribel to take the New Camelia either to Madisonville, on the north shore of the lake, or to Milneburg, on the south shore, and point of her departure. This offer was readily accepted by the master of the steamer New Camelia, with a request to be taken back to Milneburg. Nothing whatever was said about compensation. After some two hours' continuous service, the tug Claribel landed the steamer New Camelia at Milneburg in safety, and the tug proceeded out upon the lake in search of her abandoned tow, which was secured in about the same locality as where abandoned, except that it had drifted some towards the north or Madisonville shore, and was brought on to New Orleans. During all this time the lake was calm, the weather settled,—in no wise threatening. The owner of the tug Claribel makes no claim for salvage compensation, and in regard to value and compensation for the services testifies as follows: "Q. In other words, if you had made a charge for this service, what would you have charged for this two hours' towage service? A. I would say, in towing barges from Covington to New Orleans— Q. What distance is that? A. About 35 miles. I have received $15 for it. Q. And how long does that require? A. That requires about eight hours. Q. Now, go on and make any further explanation you desire. A. I would consider that this service rendered to be worth about $15. I fix it at that price to receive coal for it. In fact, I did not want any money at all (at least, I told him that) for the services we rendered, and only expected that he should coal up the boat once, which would take from three to four tons of coal. Q. What did he do? A. He didn't do that yet, because I never called upon him, but he is willing to do it whenever called on. I will modify that testimony in regard to that $15. I will say that I have or had a yearly contract for towing all barges for the brickyard on the Tchefuncta river to West End and Spanish Fort for $15, one trip. I wouldn't make one single trip for that. I generally carry two or sometimes three barges. I receive for each barge $15." Some three months after the services were rendered, John Clark, engineer, William H. Fleming, fireman, Edward O. McCormick, fireman, and Robert Clayton, cook, of the tug Claribel, filed the present libel to recover salvage for themselves and all others entitled. After the taking of considerable evidence, the court below entered a decree in favor of the libelants, and gave the following reasons for judgment: "This is a libel for salvage brought by some of the crew of the tug Claribel for saving the steamboat New Camelia, valued at $35,000. The New Camelia broke her shaft near the middle of Lake Pontchartrain in June, 1899. She had on board 150 passengers, including many women and children. She had no sails nor other means of navigation, and the break was such as could not be readily or promptly mended. There was no immediate danger from the weather to the boat, and none whatever to the tug that saved her or its crew. The suggestion made in the testimony that the steamer, with its passengers, could have in time drifted ashore by the wind, the court thinks,

is not reasonable. Nor is the allegation that they could have been taken ashore in the small boats. The number of said boats were not sufficient, and the distance was too great. The court finds, as a matter of fact, that Lake Pontchartrain is at times a dangerous water, sudden squalls being more or less common, and that the New Camelia was in distress. Inducements to tugs to go in the aid of disabled passenger boats in distress should not be doubtful. The court will award such sum for the salvage service as in its opinion will stimulate all parties at all times to aid any passenger vessel in distress, and yet, in view of the value of the saved property and the lives thereon, should not be considered large. The court awards 5 per cent. of the value of said boat ($1,750) for salvage,—one half to the tug Claribel, and the other half to the crew of said tug." A decree entered in accordance therewith was followed by a decree of distribution awarding John Clark, engineer, whose wages were $75 per month, the sum of $243; William H. Fleming, fireman, whose wages were $40 per month, the sum of $129.65; Edward O. McCormick, fireman, whose wages were $40 per month, the sum of $129.65, and Robert Clayton, cook, whose wages were $35 per month, the sum of $113.45. From these decrees the claimants appeal, assigning errors as follows: "(1) That the court erred in holding that the services referred to in the libel herein filed were salvage services, and not towage services. (2) That the said services were rendered at the instance and under the orders of the owner of the tug Claribel, who was on board of said tug at the time, and who fixed fifteen dollars as a reasonable compensation—a proper charge—for the towage service rendered by his said tug Claribel, and that in consequence thereof the court erred in not dismissing the libel. (3) That the court erred in allowing any salvage whatever herein, the steamer New Camelia being in no danger or peril whatever at the time the services were alleged to have been rendered; being as safe as if she had been tied up at the docks or upon the banks of the Mississippi river. (4) That libelants performed no voluntary service, nor did any extra work or labor, on the day the alleged services were rendered; that they simply on that day discharged their usual and customary duties under the orders of the owner of the tug Claribel; that they were at no time in any danger or peril; and that the court erred in allowing them salvage herein. (5) That libelants performed no salvage services whatever, and that the court erred in not entering a decree in favor of Charles G. Coyle, claimant and owner of the steamer New Camelia. (6) That if the libelants should be decreed entitled to extra compensation for the alleged services, and only in that event, then we say that there is error in the decree entered herein against defendants. The amount, being grossly excessive, should be reduced to a reasonable and proper sum. (7) That the decree herein in favor of libelants is otherwise erroneous and contrary to the law and evidence."

Horace E. Upton, for appellant.
John D. Grace, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). Considering the condition of the weather on the lake at the time the accident happened to the New Camelia, and that she was within the reach of the assistance required to return to her landing, it would be extravagant to say that the New Camelia at the time was in imminent peril or in a helpless condition. All that she wanted was towage service, and the record shows that that service was furnished without delay by the owner of the tug Claribel, who was on board his tug and personally directing its operations. As to whether that service should be furnished, the libelants in the present case had nothing to say, and nothing to do, except to remain aboard their own boat and perform their

usual duties, for which they were regularly compensated. Notwithstanding all this, there is much authority to hold that the New Camelia, when in the open lake, with her shaft broken, her propeller power disabled, was so far disabled as to need assistance, and, although not in immediate peril, was so in distress as to justify the use of the word "salvage" in designating the aid she required. See The Dupuy de Lome (D. C.) 55 Fed. 93. And we are constrained to sustain the court a qua in holding that the services rendered by the tug Claribel to the New Camelia were salvage services; but we must insist that they were of the lowest order of salvage services, and to be compensated on the basis of work and labor. In Ulster S. S. Co. v. Cape Fear Towing & Transportation Co., 94 Fed. 214, 36 C. C. A. 201, we quoted and followed The Connemara, 108 U. S. 359, 2 Sup. Ct. 754, 27 L. Ed. 751, as to the true rule to be followed by this court, on appeal, in inquiring into the propriety of the amount awarded in the lower court in a salvage case, as follows:

"In The Sybil, 4 Wheat. 98, 4 L. Ed. 522, Chief Justice Marshall said: 'It is almost impossible that different minds contemplating the same subject should not form different conclusions as to the amount of salvage to be decreed, and the mode of distribution.' And by the uniform course of decision in this court during the period in which it had full jurisdiction to reverse decrees in admiralty upon both facts and law, as well as in the judicial committee of the privy council of England, exercising a like jurisdiction, the amount decreed below was never reduced, unless for some violation of just principles, or for clear and palpable mistake or gross overallowance. Hobart v. Drogan, 10 Pet. 108, 119, 9 L. Ed. 363; The Comanche, 8 Wall. 448, 479, 19 L. Ed. 397; The Neptune, 12 Moore, P. C. 346; The Carrier Dove, 2 Moore, P. C. (N. S.) 243, Brown & L. 113; The Fusilier, 3 Moore, P. C. (N. S.) 51, Brown & L. 341."

The rule declared has been much pressed on us in argument in this case, and it seems to be about the only ground upon which the libelants can maintain the large award given by the lower court. It is further impressed upon us with ingenuity and pertinacity that the New Camelia was in dire peril, without much chance of rescue, and that the allowance, although based on the value of the New Camelia, is small compared to the value of the New Camelia and the very valuable lives that were aboard of her. We are clear, however, that the New Camelia was not in great peril; that the services rendered by the Claribel were simple towage services,—asked for as towage services, received as towage services. And we are of opinion that the lower court, in determining the amount of salvage to be awarded, ignored some of the important princicles to be considered in every salvage allowance, and considered mainly the value of the New Camelia, and the propriety, if not the necessity, of rewarding libelants, who could not be said to have volunteered, and who only incidentally rendered slight services in salving the New Camelia, so as to encourage future salvors. In our opinion, consideration should have been given to the character of the services rendered, as well as the value of the salved vessel; and, considering all the elements which should enter into the allowance for salvage, we are of opinion that in this case the compensation allowed

should be mainly on the basis of the towage services actually rendered, and any large allowance would be judicial liberality at the expense of suffering owners, not in fault, and already burdened by the accident to their vessel. A glance at the decree of distribution, as found in the record, shows that firemen and cooks, who actually did nothing in determining whether the service should be rendered, and nothing in rendering the same, save following their regular, ordinary daily work, are given over three months' extra pay. Their merit consists in being present while the tug on which they were employed rendered nearly two hours' towage services. We are not unmindful of the proposition urged in this and like cases that public policy requires generous rewards to be paid to salvors, to encourage and stimulate all parties at hand to aid vessels in distress, and in proper cases we have given it due effect. But in the instant case it is difficult to see how the giving of a large reward to the present libelants, who had so little to do with the salvage services rendered to the New Camelia, can be justified on grounds of public policy. Salvage services are volunteer services. The libelants herein may have been willing, but they were not volunteers. Salvage services must be meritorious. The services of the Claribel rendered to the New Camelia were meritorious. If the libelants had been volunteers on the Claribel to enable her to render the services, their services could well be classed as meritorious. As, however, they were regularly paid employés on the Claribel, were not volunteers, and performed no services beyond their ordinary duty, the merit was too remote to justify any considerable reward. The salvage law must be construed and applied with regard to the rights of property. A vessel that is so unfortunate as to break its shaft, lose its propelling power, thus putting its owners to delay and expense, ought not to be mulcted with large compensation to alleged rescuers who have been minor factors in rendering assistance. The right of the individual mariner to participate in the salvage compensation earned by his ship has been recognized from an early day, and is based on the proposition that in cases of salvage on the high seas, generally attended with risks to the salving vessel, individual effort and individual risk, voluntarily rendered and assumed, attend and aid the enterprise. And, notwithstanding the substitution of steam vessels for sailing vessels, the consequent changes in the abilities of ships to render salvage services and in the duties of mariners, the rule is still recognized and generally applied in every salvage case. The rule—not a hard and fast rule (see The Key West [C. C.] 11 Fed. 911)—now generally applied in this circuit is to give two-thirds to the owners, and one-third to the master and crew, and among the latter distinguishing in proper cases. With hesitancy, we apply this rule in this case. The enlightened owner of the Claribel, for the ordinary services rendered by his tug to the New Camelia when she was in distress, made and makes no claim for salvage. If he were before the court, we could see our way clear to reward him for the services he controlled, and furnished with a suitable bonus in addition to the actual value of the services rendered. To make a large allowance to the present libelants seems to verge on judicial liberality, and to be an un-

necessary and an uncalled-for hardship imposed on the owners of the New Camelia, not authorized by the facts and circumstances of the case, and would be based on the distress of the vessel, rather than on the services rendered. The distress and peril of the ship is the salvors' opportunity; but, as we have said above, the salvors' services must be volunteer, clear, and meritorious. Taking Mr. Jahncke's evidence most favorably to the libelants, and, considering that the towing of the New Camelia was equal to the towing of two barges, the towage services rendered the New Camelia were worth about $30. If doubled to include salvage reward, as is usual in salvage cases where the services are of a low order, the entire salvage services rendered the New Camelia would be fully compensated by an allowance of $60. That is the total sum for salvage which we think can be allowed in this case. The decree of the district court is reversed, and the cause is remanded, with instructions to enter a decree in favor of the libelants, fixing the sum of $60 as the total amount of salvage for the New Camelia, and awarding one-third thereof to the crew of the Claribel, and distributing to the libelants their proportion thereof, based upon their monthly wages.

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## S. S. WHITE DENTAL MFG. CO. v. DELAWARE INS. CO. OF PHILADELPHIA.

(District Court, E. D. Pennsylvania. December 31, 1900.)

No. 68.

MARINE INSURANCE—CONTRACT—MODIFICATION BY COURSE OF DEALING.

Libelant exported large quantities of dental goods of its manufacture, and for more than 30 years carried an open marine cargo policy issued by respondent, renewed from time to time, under which it insured all its shipments, except where its consignees had insurance. The policy provided that no risk should attach until approved and indorsed thereon by respondent, the premium to be then agreed on; but by a course of dealing between the parties, extending over many years, and adopted for mutual convenience, owing to the large increase in libelant's foreign business, no indorsements were made on the policy, nor was each risk approved before it attached thereunder, but was reported by libelant on receipt of the bill of lading on a slip furnished by respondent for the purpose, and respondent entered on each slip the rate and amount of premium in accordance with a schedule agreed upon between the parties, and at the end of each month transcribed the entries thereon into a pass book, which it also furnished libelant, and indorsed its approval thereon. It resulted from this method that respondent usually did not receive notice of a shipment until after the vessel had sailed, and frequently not until it had reached port; but the risks were treated as covered by the policy from the date of shipment. Respondent did not notify libelant of the acceptance of risks, but it had never rejected a risk because of any objection thereto. June 30, 1898, libelant shipped a consignment of goods from New York on La Bourgogne, a vessel of a line by which it had frequently shipped, which vessel was sunk in collision on July 4th. Libelant received the bill of lading July 5th, and on the morning of the 6th, and before notice of the loss, sent the usual slip stating such shipment to respondent. The loss became known before the slip was received by respondent, and after some delay it rejected the risk. *Held*, that the course of dealing pursued by the parties under the policy for so many years oper-

ated to abrogate and supersede its written provision requiring each risk to be approved before it attached, and bound respondent to accept the risk in controversy, which was within the requirements of the policy in respect to the kind of goods, character of the vessel, and port of destination, and in all respects similar to others which had uniformly been accepted.

In Admiralty. Action on policy of marine insurance.

Jos. C. Fraley, Henry N. Paul, and Richard C. Dale, for libelant.
Edward S. Sayres and John G. Johnson, for respondent.

J. B. McPHERSON, District Judge. There is not much dispute concerning the material facts of this case, and the following findings, although taken largely from the argument of libelant's counsel, are, therefore, in the main, either admitted or not denied by the respondent. Where a controversy exists, I have not always been able to adopt the libelant's view.

Facts.

(1) The S. S. White Dental Manufacturing Company is a Pennsylvania corporation, engaged in the manufacture and sale of dental instruments and supplies. Its business was founded by S. S. White, in Philadelphia, many years ago, where it has been conducted continuously ever since. The Delaware Insurance Company of Philadelphia is also a Pennsylvania corporation, authorized to make marine insurance, and having its office in Philadelphia.

(2) The libelant exports to foreign countries large quantities of dental goods of its own manufacture. All such foreign shipments (with the exception about to be noted) for over 30 years have been insured with the respondent, the insurance having been effected under a policy that was in force prior to 1867, and has been continuously renewed since that time. The last renewal was on January 1, 1895. The only exception from this insurance was the goods of certain customers, who, having their own open policies, instructed the libelant not to insure shipments to them; and of this exception the respondent had notice.

(3) The policy referred to was an ordinary marine cargo printed form. With some slight variance of phrase in the different renewals, it insured the libelant on "goods for account of whom it may concern per vessel or vessels and/or usual conveyances, * * * lost or not lost, at and from ports or places of loading to ports or places of destination." It contained the following written clauses: "No risk to attach to the policy until the amount and description of the same shall be approved and indorsed thereon by the company, and to be valued at the sum so indorsed." "Premiums as may be agreed upon at the time of indorsement, and to be settled monthly in cash."

(4) Libelant's business has increased greatly since the writing of the original policy by the respondent. For some time the amount insured under this policy has regularly exceeded a quarter of a million dollars each year, and the number of individual insurances has likewise increased. For example, during the month of July, 1897, seventy-one separate shipments were insured, an average of nearly three for each working day.

(5) Libelant's foreign forwarding was done through Healy & Earle, shipping brokers, of New York. The name of the vessel by which any particular shipment had gone forward was not known to libelant until the receipt from Healy & Earle of advices by mail containing the bill of lading. These were usually not received until after the vessel had left port. All of libelant's forwarding was done by vessels of regular lines, concerning whose seaworthiness no question was likely to arise. So far as appears, no risk reported by the libelant had ever required consideration, or been referred to one of the executive officers of the respondent.

(6) With the increasing volume of business transacted under this policy, and perhaps in recognition of the changed requirements of the business, there were established the following departures from what was no doubt originally contemplated when the written clauses of the policy were framed, over 30 years before:

(a) Instead of providing a place on the policy itself for indorsements, the respondent printed blank books (called "pass books") bearing on the cover in gilt letters:

"The S. S. White Dental Manufacturing Co.
"Open Policy with
The Delaware Ins. Co. of Philadelphia."

These pass books were ruled into columns headed as follows: "Date," "Name of Vessel," "Place of Shipment," "Place of Destination," "Description of Goods and for Whose Account Insured," "Amount to be Insured," "Rate of Premium," "Amount of Premium," "Date of Approval," "Signature." At first the policy was folded, and pasted opposite the inside of the front cover of the current pass book; and, a few pages further on, the following indorsement was printed: "It is hereby agreed that all approved indorsements on this book are to apply in all respects to policy No. ——— the same as if indorsed on said policy, and not otherwise." Afterwards the policy was left pasted in one of the old books filled with indorsements, and new pass books were issued without any policy being attached thereto.

(b) Instead of premiums "as may be agreed upon at the time of indorsement," the parties specially agreed by written schedules upon certain fixed rates to all points to which libelant made shipments. The last of such agreements is embodied in a letter from the respondent, dated November 8, 1897. Inter alia, this fixed the rates to European ports at one-fourth, net.

(c) Instead of requiring libelant to fill in a description in the first column of the pass book for each risk to be insured, and then immediately to bring the book to the insurance office for indorsement of the premium and approval, the respondent furnished the libelant with blank insurance orders (called in the record "slips"), made up into pads. The blank form of the slip is as follows:

Philadelphia, ———, 18—.

The Delaware Insurance Company of Philadelphia

Insure, under open policy No. ———, $———, on ———, valued at $———, per ———, at and from ——— to ———.
$——— at ———%, $ ———.

(d) Libelant could not, and did not attempt to, fill out these slips until after receipt of information from New York which enabled it to fill in the name of the vessel. The slips, thus filled in, were sent to the respondent at intervals, often in batches of a half dozen or more, and usually through the mail. By the time these slips reached the respondent, the vessels containing the shipments reported had usually been at sea some days. Not infrequently the vessel had arrived at its destination, and this arrival had been published in the shipping news of the New York Herald before the slips reached the respondent. Premium was charged by the respondent and paid by libelant on almost all risks at the full stipulated rate, irrespective either of the diminution of the premium at the time of the report to the respondent by reason of the vessel having sailed some days previously, or of the expiration of the risk by reason of the vessel having previously arrived at its port of destination. On two occasions,—one in 1886 and one in 1888,—when the respondent learned that it had been requested to insure after the ship had actually arrived, it notified the libelant of this fact, and refused to charge any premium.

(e) Instead of immediately entering in the pass books the amount and the description of each risk notified to the respondent as given in the slips, and filling in the columns for the rate and amount of premium, the marine clerk of the respondent to whom the approval of its marine risks was usually intrusted indorsed on each slip, when it was received from libelant, the rate and amount of premium in accordance with the stipulated rate, and laid the slip inside a box on his desk.

(f) Instead of indorsing approval of the risks on the pass book, the respondent regularly omitted making any indorsement for several weeks at a time. Both the respondent and the libelant used the pass book rather as a bill than as a policy.

At the end of each month, or perhaps a week or two later, the respondent sent to the libelant's office to obtain the pass book. The marine clerk of the respondent then transcribed in the pass book from the slips in his possession the amount, description, and premium for all of the risks contained on the slips that had been received during the preceding weeks. This transcription occupied the first eight of the columns of the pass book. The column headed "Date of Approval" was then filled in by an assumed date, and the signature column was signed once on each page by the marine clerk, with a bracket to indicate that the signature applied to all the risks on the page.

The marine clerk always made these assumed dates of approval correspond to the dates of the respective slips. His alternate clerk dated the approval according to the actual date of entry in the book. Upon payment, the premium column was receipted by the respondent, the book was returned to the libelant, and was not sent for until the end of the next month.

(g) For at least the past 10 years the libelant, under this changed system of business, reported to the respondent on slips every foreign

shipment sent by them, except the shipments to such customers as carried their own insurance. The respondent charged and received full premium on nearly all these risks, whether reported before or after the arrival of the vessel. There is no evidence that any risk reported by the libelant had ever been objected to.

(h) No notice of the acceptance or approval of any of the risks reported upon the slips that were thus sent by the libelant to the respondent was ever given to the libelant, but, if any risk had been disapproved, notice of disapproval would have been given at once to the libelant.

(7) In addition to the above course of dealing, which was fully known to both parties, the following course of business was adopted by the respondent concerning these risks, the facts of which were not known by the libelant:

(a) In July, 1895, the respondent entered into a contract of reinsurance with the British & Foreign Marine Insurance Company. By this contract, for a consideration equal to the net cash premiums received by the Delaware Company, less a bonus of 5 per cent., the reinsuring company took upon themselves "all risks accepted by the Delaware Insurance Company of Philadelphia at their Philadelphia office on merchandise and/or cargoes only." The policy contained this clause: "Warranted by the reinsuring company that all risks attaching hereunder are to be reported to Mather & Company, attorneys for this company, as soon as known to the reinsured." From time to time the respondent filled out printed returns to Mather & Co., agents for the reinsuring company, these returns consisting of a transcript of the entries upon the slips. It was the duty of the marine clerk of respondent to make this transcription from the slips to the return sheets for the reinsuring company, and upon making the entries upon the return sheets the clerk placed a tick mark in the upper left-hand corner of each slip thus transcribed. Since the existence of the contract of reinsurance the respondent has given less attention to its marine insurance business. It ceased to have a special secretary in charge of this branch, and left the matter largely to the marine clerk and his alternate.

(b) The respondent also had a large office book, ruled into columns, called the "Open Policy Book." This was a ledger for the transcription of the risks reported to them under the open policies that had been issued to their customers.

For at least several years past the risks reported by the libelant (being all described, with computation of premium, upon the slips) were not transcribed or entered up in the open policy book as the slips were received, nor until several days later, as might be convenient. Often no entry of the risks reported by the libelant was made in the open policy book until the end of the month, when this book was written up in the same manner as the pass book was written up.

(8) On June 30, 1898, the libelant shipped certain dental goods belonging to it, of the asserted value of $17,108.42, on the steamship La Bourgogne, then lying in the port of New York, and bound for

Havre, France. On the morning of July 4th the steamship was sunk with her whole cargo, and became a total loss by perils of the sea, off the Banks of Newfoundland, in the Atlantic Ocean. The news of the disaster was not known in Philadelphia until shortly before noon on July 6th. La Bourgogne was one of the regular steamers of the French Transatlantic Line sailing from New York every Saturday. Libelant's shipments were often forwarded by this line.

(9) Libelant's agents, Healy & Earle, who attended to this shipment, forwarded the bill of lading to libelant's office in Philadelphia by mail on July 1st; but, July 2d being a half holiday, July 3d being Sunday, and July 4th a legal holiday, the letter of Healy & Earle and the bill of lading were not received at libelant's Philadelphia office until Tuesday, the 5th day of July. On the morning of July 6th the clerk of libelant, whose duty it was, proceeded to fill out slips in order to report to the respondent all shipments which had been communicated to the libelant, but had not been previously reported. He began his work shortly after 10 o'clock, and in about a quarter of an hour had filled up eight of these slips, one of them relating to the shipment by La Bourgogne. A copy of this slip is as follows:

Philadelphia, 7/6, 1898.

The Delaware Insurance Company of Philadelphia

Insure, under open policy No. ——, $17,108, on Mdse., valued at $——, per S. S. La Bourgogne, at and from New York to Le Havre, France; thence R. R. to Zurich, Switzerland.

¼ net — a/c J. M. Ravel.

$——, at % $42.77. — The S. S. W. D. M. Co.

This slip was filled in by him, and signed with the name of the libelant, in the regular course of business, in ignorance of the disaster to the steamship, and a short time before the news had reached the office either of libelant or respondent. After eight slips were filled, he placed them on the desk of another clerk for mailing. They were forwarded by mail that morning, and reached the office of the respondent about 2 o'clock. The news of the disaster had been learned by the respondent about 12 o'clock that morning.

The envelope containing the eight slips from libelant was opened at respondent's office by the vice president, who, after reading them, handed them to the marine clerk, who thereupon took the slips, and inserted in each of them the rate and the premium, charged in the usual way in the place provided for this entry. Ordinarily, the marine clerk had full power to accept or decline marine risks. It was his custom to consult with one of the executive officers concerning risks that he considered doubtful.

(10) Shortly afterwards he had a talk with the vice president of the respondent about this risk, and upon his advice went over to see Mather & Co., the agents of the reinsurers, whose office was across the street. They advised rejection of the risk. Later in the afternoon, after consulting with the vice president, the marine clerk filled out the report of accepted risks to the reinsuring company that is printed on pages 50 and 51 of the notes of testimony. This report or return included all of libelant's risks that had been reported to

respondent during the last seven days, and the first line of entry related to the libelant's shipment on La Bourgogne, on the slip for which he made the customary tick mark in the upper left-hand corner. This return reached Mather & Co. the next day. They immediately sent it back to the respondent, who crossed out the first line of entry, and returned it to Mather & Co. in this condition. Mather & Co. again declined to receive the paper, and a return was finally made on which the shipment in question did not in any way appear.

(11) To a clerk of libelant, who called at the office of the respondent about 2 o'clock on the afternoon of July 6th, to inquire whether the slip had been duly received, the marine clerk stated that he would telephone that afternoon stating the position of the respondent in the matter. Although the vice president was at the office all afternoon, no message was sent. The next day the president of the respondent wrote, refusing to admit liability for the loss.

(12) Due proofs of loss were furnished to the respondent by libelant, and claim was made for the value of the goods, but payment has been refused by the respondent.

(13) Since December 1, 1894, another policy, called the "in-bound policy," was also in force between libelant and respondent. It applied only to platinum ore, of which libelant imports large quantities. It was limited to imports from European ports, and, being free from particular average, the rate was one-fifth of 1 per cent., instead of one-fourth, as in the outward-bound policy. It was pasted in a pass book similar to those relating to the outward-bound policy, and bore the inscription:

"The S. S. White Dental Manufacturing Co.
"Foreign Open Policy with
The Delaware Ins. Co. of Philada."

This policy contained the following clauses:

"To apply to and cover each and every shipment for account of S. S. White Dental Mfg. Co."

"Notice of each shipment to be given to the Delaware Ins. Co. of Philada. as soon as in receipt of bill of lading or other advice of shipment."

The course of dealing and reporting under this policy was identical with that adopted under the policy in suit. Insurances under it were reported to Mather & Co. on the same slip as risks reported under the policy in suit.

The foregoing facts raise the question, whether the parties had so changed the original contract of insurance upon outward-bound goods that the merchandise in question was protected by the policy, notwithstanding the fact that there had been no formal approval and indorsement of the risk, as the letter of the contract provides. I think that no weight is to be given to the circumstance that, a few months before the date when the last renewal of the outward-bound policy was made, a policy upon inward-bound goods was also issued that contained a different provision concerning the time when the risk should begin. If the outward-bound policy of January 1, 1895, had been the first contract between the parties upon goods leaving this

country, there would be much force in the argument that the two contracts were intended to be of different scope, and that the parties had chosen apt words to express the difference. But when it is considered that the outward-bound policy of January 1, 1895, was not the first contract concerning this class of risks, but was the last contract of a series extending over many years, and that the terms of the last policy are essentially the same as the terms contained in the preceding policies of the series, the conclusion is, to my mind, inevitable that the policy of January 1, 1895, was not intended to make an abrupt break in the course of dealing between the parties, but was merely intended to continue their relations in the same manner, and to the same extent, as had theretofore been established by a long and unbroken custom.

It cannot be denied, I think, that the parties to a written contract may set aside any one or more of its terms, and may thereafter deal with each other as if such terms no longer existed. Being competent to make one contract, they are competent to make another, different from the first; and, if the existence of the second contract is established by sufficient evidence, the first must give way. It cannot be doubted that by a written agreement the parties to the present suit might have nullified the provision for the need of a particular kind of acceptance of each risk, and might have thus agreed that every shipment by a seaworthy vessel would be accepted upon notice, the risk to begin from the day of sailing; and I think it is equally clear that the parties to the contract might so act that no other inference than such a change in the agreement can be properly drawn. Change by the concurrent acts of the parties to a contract is very different from an attempt by one party to change a term by setting up an inconsistent parol agreement that is denied by the other party. A familiar rule of evidence forbids success to such an attempt; but the rule does not apply if both parties agree that a particular course of dealing has been followed for years, and where such dealing has been wholly inconsistent with a certain provision of the written contract. After such a provision has been disregarded, and a new term has been put into the agreement by the long-continued and deliberate acts of the parties, it would be most inequitable to permit one of the parties, as the respondent now asks to be permitted, suddenly to recur to the superseded provision, and insist upon its present validity. No previous notice of an intention to change the established method of transacting the business was given, and it is certain that no attempt would now be made to change it if the respondent was not to be advantaged thereby.

In my opinion, this is the whole case. For many years, with one or two exceptions, the respondent has treated the libelant's outward-bound shipments of which the respondent had notice as covered by the policy, not merely from the time when notice was received, but from the time when the voyage began. Premiums to a large amount have been paid and received upon this understanding, and, as long as no losses occurred, the respondent was content that the practice should continue; but, as soon as a loss of significant size happens, then for

the first time the disregarded provision is appealed to that requires an acceptance of each particular risk before the respondent's liability shall attach. I cannot believe that this appeal should be sustained. In my opinion, the respondent was bound by its course of dealing to accept the risk in controversy. The risk was precisely the same as in hundreds of other instances that had been accepted without question. The goods were like those that had been previously shipped; the vessel was a first-class ocean steamship; the ports of departure and arrival were within the policy; the rate of premium was agreed upon; and nothing remained to be done except notice to the respondent, and the formal acceptance that had never yet been withheld. As it seems to me, the libelant had acquired a right to rely upon the respondent's acceptance of every such risk as this, and the respondent had disabled itself from refusal. It could not suddenly depart from the unbroken custom that had been so long established, without previous notice of its intention so to do.

My conclusion is, to use the words of libelant's counsel:

> "The written policy was not, at the time of this loss, the actual contract between the parties. The real contract, as is evidenced by a course of dealing established for many years, did not require acceptance, fixing of premiums, and indorsement of each special risk as a condition precedent to insurance, but was similar to an ordinary open policy, by which all of libelant's foreign shipments of the class subject to insurance were insured at a fixed rate, subject to the requirement that such shipments should be reported to the insurance company in the regular course of business for subsequent indorsement on the pass book, and computation and collection of the premiums due thereon. In other words, premiums had been agreed upon, acceptance was waived, and indorsement had become a condition subsequent."

It was also argued that, even if acceptance were necessary, the risk had actually been approved, and had been notified to the reinsurer for protection under the policy of reinsurance. I express no opinion upon this point, however, inasmuch as the decision of the other question establishes in this court the respondent's liability. But, if this decision should be wrong, it will then be worth considering whether the respondent may not have gone too far in the attempt to occupy an inconsistent position in seeking, upon the one hand, to reinsure a risk as if it had been accepted, while, upon the other hand, acceptance of the risk was being denied.

In my opinion, the libelant is entitled to recover the value of the goods shipped upon La Bourgogne, and, if the parties cannot agree upon the amount of the decree, a commissioner will be appointed.

# THE ELLA ANDREWS.

(Circuit Court of Appeals, Fifth Circuit. December 18, 1900.)

No. 986.

1. COLLISION—NEGLIGENT NAVIGATION—LEAVING WHARF IN FOG.

The mere fact that a tug left her landing opposite New Orleans to cross the river with a heavy tow during a fog did not constitute negligence which would render her in fault for a collision, where she observed the rules as to speed and signals, and took all proper precautions.

2. SAME—STEAM VESSELS—NAVIGATION IN FOG.

A tug left her landing opposite New Orleans during a fog to cross the river with a tow laden with coal and a coal palace for loading the coal on a steamship. She observed the proper rules as to speed and signals. Almost immediately afterwards a second tug left an adjoining landing with a lighter tow, intending to take a course following the first tug, but she in fact took one which brought her across the course of the first tug, and came in collision with and sunk the coal boat being towed by the latter. She failed to give the proper signals on leaving the landing, and, on danger of collision becoming imminent, increased her speed, while the first tug stopped and reversed. *Held*, that the second tug was solely in fault for the collision, regardless of whether her failing to reverse was a fault under the circumstances.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

The present action is for the recovery of damages resulting from a collision which occurred in the port of New Orleans on the morning of February 6, 1899. The facts as alleged in the libel are as follows: "Shortly after seven o'clock on that morning the tug Maud Wilmot left the coal landing of libelants on the Algiers or right bank of the Mississippi river with a tow consisting of a coal boat laden with 7,702 barrels of Pittsburg coal and a coal palace. Both the coal boat and coal palace were made secure on the starboard side of the tug. The tug Maud Wilmot blew one long whistle, and started with said tow from said landing out into the river, quartering up the same and across the same, in order to avoid the swift downward current to get into the so-called eddy or up-stream current that reaches for a considerable distance from the New Orleans or left bank of the Mississippi river, in order to proceed with her tow up the river to the foot of Jackson street, where the steamship was lying which libelants were to coal. The Maud Wilmot started with said tow from the coal landing of libelants, which adjoins the coal landing of W. G. Coyle & Co., on the said Algiers side of the river, opposite the city of New Orleans. The tug Maud Wilmot, on leaving her landing, blew one long whistle. At the time the weather was moderately clear, and the tugs Maud Wilmot and Ella Andrews in plain sight of each other, but soon after a fog of considerable density shut in. The tug Maud Wilmot, with said tow, therefore proceeded with caution, at half speed, sounding the regular fog whistles. When the tug Maud Wilmot was well out in the river, say from two hundred and fifty to three hundred feet from the shore, and nearly opposite the landing of libelants, those on board heard one short whistle blown by the steam tug Ella Andrews, then at or near W. G. Coyle & Co.'s coal landing. That at once the Maud Wilmot blew one long whistle, and continued to blow the customary fog signals. That very shortly thereafter the lookout on top of the palace mentioned called out that the Ella Andrews was closing upon them, and thereupon and at once the engines of the Maud Wilmot were reversed at full speed, and the proper signals blown, and every effort made to avoid the threatened collision. That, instead of responding, the Ella Andrews rang one bell and blew two blasts of her boiler whistle as a signal for full speed ahead, and did come ahead at full speed, and immediately thereafter the

Ella Andrews struck with great violence, and collided with the coal boat and with the palace, tearing off the starboard plank side of said barge, causing same to fill with water, and, with the Pittsburg coal laden thereon, to sink, and become a total loss, and injuring the palace to the extent of seventy-five dollars." The Ella Andrews pursued her course without stopping to ascertain the injuries or to render assistance. The libel then charges that the Ella Andrews was out of her proper place in the river, and did not give the proper signal on leaving her landing; that she did not blow the fog signals as required by law; that she did not properly answer the signals of the Maud Wilmot; that the Ella Andrews, in giving the signal for and going ahead at full speed towards the starboard side of the Maud Wilmot and tow, instead of going to her port side, as she was in duty bound to do, and in persisting to cross and crossing the bow of the Maud Wilmot and tow, was guilty of culpable negligence, and disregard of the law and of the rules and regulations for navigating the waters of the Mississippi river; and that during all the time the Maud Wilmot was without fault, and was navigated strictly in compliance with law and the rules and regulations in such cases made and provided. Libelants claim that the steam tug Ella Andrews is liable to them for the loss and damage suffered by them, to wit, the value of the coal boat (named and styled "S. S. Crump, 1550"), $75; of Pittsburg coal laden thereon, $1,690.40; and the damages to said palace, $75.

The respondents' answer denies that on the morning of February 6, 1899, shortly after 7 o'clock, the time libelants allege the steam tug Maud Wilmot started with her tow from the coal landing of libelants, the weather was moderately clear, and the tugs Maud Wilmot and Ella Andrews in plain sight of each other, and that, soon after, a fog of considerable density shut in; but alleges specially that on the morning of February 6, 1899, at and before 6 o'clock on that morning, a dense fog had already shut in, and that said fog existed continuously from before 6 o'clock, and that at no time on said morning prior to the collision hereafter referred to were the tugs Maud Wilmot and Ella Andrews in plain sight of each other. The respondents deny that the Maud Wilmot proceeded with caution, at half speed, sounding the regular fog signals, as alleged in said libel, and that the tug Maud Wilmot was out in the river from 250 to 350 feet from the shore, and opposite the landing of the libelants, on the morning of February 6, 1899, when one short whistle was blown by the steam tug Ella Andrews, then at or still near W. G. Coyle & Co.'s coal landing, as alleged in said libel. The respondents allege that the steam tug Ella Andrews left the coal landing of W. G. Coyle & Co. shortly after 7 o'clock on the morning of February 6, 1899, having in tow on her port side a small coal flat; that on leaving said landing she blew one long whistle; that she immediately thereafter heard a fog whistle blown by the Maud Wilmot; that the Ella Andrews then responded by blowing the usual fog whistle, and immediately thereafter another fog whistle was blown by the Maud Wilmot, and that at that time the Ella Andrews was opposite the coal landing of W. G. Coyle & Co., about 100 to 150 feet from said landing, and was steering a southwesterly course up and across the river from the Algiers shore towards New Orleans, when the heavily laden coal boat which the Maud Wilmot had in tow crashed into and collided with the tug Ella Andrews; that the said collision occurred about half a minute after the tug Ella Andrews had left the coal landing of W. G. Coyle & Co. The respondents' answer further alleges that every effort was made by the tug Ella Andrews to prevent and avoid the collision without success; that the proper bells were rung by the tug Ella Andrews, her helm ported, but that the coal boat which the tug Maud Wilmot had in tow ran into, collided with, and struck the steam tug Ella Andrews on her starboard side, abaft of amidship, with great force and violence, knocking down one of the doors on said steam tug Ella Andrews, upsetting the kitchen utensils, chairs, lamps, oil, etc., leaving a part of her upper planking upon the deck of the steam tug Ella Andrews; and charges that said collision was caused and occasioned solely through the culpable negligence and fault of those in charge of the steam tug Maud Wilmot, and not through any fault or negligence of those in charge of the steam tug Ella Andrews. The respondents deny that the Maud Wilmot blew a long whistle

just prior to the collision, or that any signals except fog signals were blown, and deny that the Maud Wilmot made every effort to avoid the collision; that the Ella Andrews was on a course quartering down the river tending towards the New Orleans, or left, bank, but avers that at the time the steam tug Ella Andrews was in the act of leaving the coal landing of W. G. Coyle & Co., so as to take a course across and up the river with the coal flat which she had in tow, and which she intended towing and did tow to the steamboat landing on the left bank of the river. The respondents allege that the tug Maud Wilmot was guilty of culpable negligence, and was in fault in leaving the coal landing of libelants with a heavy tow in a dense fog, which had existed continuously for several hours prior to her leaving said landing, and which continued to exist for several hours thereafter; that, in consequence of said fog, at no time on that morning were the tugs Maud Wilmot and Ella Andrews in sight of each other; that the Maud Wilmot left her landing without giving the proper signals; that she did not blow the fog signals thereafter as required by law; that she was out of her place in the river, being in an eddy which runs close to the coal landing of libelants and W. G. Coyle & Co. on the Algiers shore, and which eddy, running at the rate of three to four miles an hour, accelerated to that extent the speed of the Maud Wilmot at the time of the collision, and that, if the Maud Wilmot had been in her proper place out in the river, the collision would have been avoided; that the collision occurred through the fault and negligence of those in charge of the Maud Wilmot, and their utter disregard of the law and of the rules and regulations for navigating the waters of the Mississippi river, and that said Maud Wilmot took no steps to avoid said collision.

From a decree condemning the Ella Andrews this appeal is prosecuted, and the following are the errors assigned: "(1) That the court was in error in finding the tug Ella Andrews to be at fault, and condemning claimant, William H. Crump, and William G. Coyle, surety on the release bond, in solido to pay to libelants damages as claimed in the libel filed herein. (2) That on the morning of February 6, 1899, the date when the collision occurred, referred to in the libel and answer, a dense, thick, heavy, and unusual fog prevailed; that it existed continuously for some time prior to the collision, and existed continuously for some time afterwards; that it was not only a dense and continuous fog, but was general, prevailing or existing on both sides of the river and in the middle of the river; that such was the condition of the weather at the date of the collision; that libelants' tug, the Maud Wilmot, left her landing first, led the way into the obscurity of the fog, and libelants, having thus voluntarily encountered the hazards of the navigation, should bear the loss sustained, and that the court erred in holding otherwise. (3) That the law requires in a collision case that the libelants must show the alleged negligence by a fair preponderance of evidence, which we respectfully submit does not exist in the instant case, and the court erred in not dismissing the libel. (4) That libelants' loss was occasioned by and resulted directly from the utter disregard which libelants and their tug the Maud Wilmot had for the safety of the property which she had in tow on the morning of the collision, February 6, 1899. That the court erred in not holding libelants guilty of gross and culpable negligence and fault in permitting, and ordering their tug to proceed on that morning with a heavy tow consisting of a coal boat laden with over 7,000 barrels of coal and a coal palace, in a dense, thick, continuous, and uninterrupted fog, and a decree should have been rendered herein dismissing the libel. (5) The rules of navigation are intended solely for the prevention of collisions; that when the observance of a certain rule in a particular case would not have prevented a collision, the nonobservance of such rule becomes immaterial; that the law is settled that, after two vessels have approached each other so near that a collision has become inevitable or imminent, the master of either may, in the exercise of a sound judgment, put his engines at full speed with a possibility of escaping contact or of easing the blow. (6) That there is error in the decree of this honorable court in not dismissing the libel filed herein, the collision not being attributed to any fault or negligence of the tug Ella Andrews. (7) That in the instant case the tug Ella Andrews was not equally in fault with the tug Maud Wilmot in running in a thick,

dense fog. She was a more powerful tug than the Maud Wilmot, and had a very light tow,—light coal flat containing only about 700 barrels of coal,—and the case is not one even, under the law, where damages should be apportioned or divided. (8) That the court erred in not finding the tug Maud Wilmot solely in fault for having proceeded with her heavy tow on the morning of the collision, and should have rendered a decree dismissing the libel. (9) That the decree herein is otherwise contrary to the law and the evidence."

Horace E. Upton, for appellant.

Chas. S. Rice and R. B. Montgomery, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The coal yard of Wilmot & Co. is on the Algiers bank of the Mississippi river, and occupies a space on the river front of about 400 feet. The coal yard of Coyle & Co. is just above and adjoining. On the morning of the 6th of February, 1899, at about 7 o'clock, the tug Maud Wilmot, with a coal boat containing about 8,000 barrels of coal and a coal palace, which is an elevated floating structure used in transferring coal from coal boats, started out from the Wilmot yard. The coal boat was fastened on the starboard side of the tug, and the coal palace was on the starboard side of the coal boat, but, being much shorter, was fastened well astern. The destination was a landing up the river on the New Orleans side, and the course taken by the tug was up and quartering across the river; compass course, S. W. ½ W. Just after the tug Maud Wilmot, with her tow, left the Wilmot yard, the tug Ella Andrews, with a coal barge in tow on her port side, left the Coyle yard for her destination on the New Orleans side about five blocks down the river. The master of the tug Ella Andrews testifies that his course was a southwesterly course, that would take him quartering up the river a little. Very shortly after the Ella Andrews left her landing the starboard side of the Ella Andrews collided with the starboard bow of the coal boat in tow of the Maud Wilmot, inflicting some little damage to the Ella Andrews, sinking the coal boat, and inflicting some slight damage to the coal palace of the same tow. This collision occurred within a short distance of the Algiers shore, not over 300 or 400 feet out in the river. At the time of the collision the Maud Wilmot, with her tow, was headed up the river, and nearly straight. It follows that the Ella Andrews and her tow which collided with the starboard bow of the coal boat must have been headed down the river. It thus seems that, immediately after the Wilmot left her landing, the Ella Andrews rounded out from the landing just above, ahead, and in front of the Maud Wilmot, each tug heading across, quartering the river, towards its destination; the Maud Wilmot up and the Ella Andrews down the river. The weather was foggy,—in the main, densely foggy; but, to reconcile the evidence of all the witnesses, there must have been occasional lifts or rifts in the fog. There is no doubt that between 6 and 7 o'clock that same morning the Maud Wilmot had made a successful tow to the New Orleans side of the river, and from the evidence of the captain and other witnesses the fog must have been more dense in some places than others; was shift-

ing in density, and sometimes lifted on the New Orleans side and remaining thick on the Algiers side, and vice versa. The master of the Wilmot testifies that when he left the landing he could see the Ella Andrews above at her landing a distance of 200 or 300 feet, and he testifies that before he started and from thenceforward he gave all the signals required by the rules of navigation and the circumstances of the case. It is by no means clear, under the evidence, that the Ella Andrews, before leaving the landing, gave the necessary signal required by the rules of navigation under such circumstances. The evidence is conflicting as to whether she gave a short whistle, or "toot," or a long whistle, required by the rule. After leaving the landing, she probably did give all the fog signals. When the close proximity of the two boats was discovered, the master of the Maud Wilmot gave the required signal to pass to the starboard. The evidence does not show that this signal was answered by the Ella Andrews. Immediately thereafter the Ella Andrews came in sight, and the master of the Maud Wilmot followed the rules, reversed his engines, and backed his tug at full speed. At this juncture the master of the Ella Andrews, instead of stopping and backing his tug, proceeded full speed ahead. It is proper to say in regard to this that the master of the Ella Andrews testifies as follows: "The only course that I pursued, knowing we had headway on our boat, I ordered full speed ahead, and kept on trying to clear the tow. That was my only hopes of avoiding a collision. Stopping and backing would have done no good at all, sir; not in the position that we were in." Considering that at the time the Ella Andrews and her tow, instead of being headed up stream quartering across the river, as the master supposed, was really headed down stream under steerageway, and moving with the additional force of the current, and that it would have been very difficult, if not impossible, to have stopped the headway of the Ella Andrews in time, there may have been a chance that by driving ahead the bow of the towboat would have been passed in safety. In fact, as the collision occurred, it was with the outside bow of the towboat and the side of the Ella Andrews amidship. A little quicker action and more headway might have averted the collision. If this were the only fault chargeable to the Ella Andrews, it might be considered a fault in extremis, not directly causing the collision, and the Ella Andrews exonerated. In the record is a large mass of evidence, direct, indirect, and more or less expert. From the careful examination we have given it, we find that the preponderance is in accord with the finding of the lower court that the Maud Wilmot was not in fault, and that the Ella Andrews was in fault. The only fault charged against the Maud Wilmot is that she proceeded with a heavy tow, consisting of a coal boat laden with over 7,000 barrels of coal, and a coal palace, "in a dense, thick, continuous, and uninterrupted fog," and thus voluntarily encountered the hazard of being run down. We do not find from the evidence that the fog was "dense, thick, continuous, and uninterrupted," but, if it were, we are unable to hold that the Maud Wilmot had not the right to proceed about her business, observing the rules of navigation, and otherwise taking all precautions for the safety of other

vessels as well as her own. The Ella Andrews, immediately following the Maud Wilmot, ran out into the same fog, rounding out just ahead of the Maud Wilmot, and did not observe the rules of navigation, or take the precautions necessary and proper for the safety of other vessels. The Ella Andrews was in fault in so soon following the Maud Wilmot after she left the landing; in not giving the signals required by the rules before she left the landing; because her master did not know, as he should have known by his compasses, that he was not pursuing the course which he says he intended, and which would have followed the Maud Wilmot, instead of heading her off; and in fault (perhaps minor) in not reversing his engines and backing as soon as he found he was approaching dangerously close to the Maud Wilmot and her tow.

The first assignment of error is too general to merit attention. The second assignment of error is not well taken, because, if the facts averred are true, the proposition that, because the Maud Wilmot left her landing first, the Ella Andrews might disregard all rules, and run her down without responsibility, is decidedly unsound. The third assignment of error, relating to the preponderance of evidence, has been disposed of, as well as the fourth, which questioned the right of the Maud Wilmot to commence her voyage in a fog with a tow of 7,000 barrels of coal. To the fifth assignment of error we agree thus far: that the rules of navigation are intended for the prevention of collisions, and that, when the observance of a certain rule in a particular case would not have prevented a collision, the nonobservance of a set rule becomes immaterial, provided the vessel is otherwise without fault. As noticed above, if the only fault of the Ella Andrews had been in not reversing her engines and backing when approaching the Maud Wilmot, we might have excused her master from responsibility for the collision. The sixth assignment of error is general. The seventh and eighth, to the effect that the Ella Andrews was not equally in fault with the Maud Wilmot, are not well taken. The ninth assignment of error is general. On the whole case, we are of opinion that no reversible error is to be found, and that the decree of the district court should be, and it is, affirmed.

## McKOWN v. KANSAS & T. COAL CO.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. January 3, 1901.)

1. REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY—COUNTERCLAIM.
Sand. & H. Dig. Ark. §§ 5722, 5723, authorize, but do not require, a defendant to plead a counterclaim as a defense. Act March 3, 1887 (24 Stat. 552), as amended by Act Aug. 13, 1888 (25 Stat. 433), §§ 1, 2, provides that civil actions involving more than $2,000, exclusive of interest and costs, between citizens of different states, may be removed from the state courts to the United States circuit court. *Held*, that an action for $2,000 in the state court, to which the nonresident defendant pleaded a counterclaim for $10,000, was not removable to the United States circuit court by the defendant, since the suit as brought could not be so removed.
2. SAME—WHO MAY REMOVE.
Under Act March 3, 1887 (24 Stat. 552), as amended by Act Aug. 13, 1888 (25 Stat. 433) §§ 1, 2, providing that certain civil actions may be removed from the state courts to the United States circuit court by the defendant, a plaintiff, who has brought an action in a state court, in which the defendant has pleaded a counterclaim, is not entitled to remove to the United States circuit court by reason of such counterclaim.
3. SAME—REMAND.
Where it is doubtful whether the United States circuit court has jurisdiction of a suit removed from a state court, the suit will be remanded.

At Law. On motion to remand.

The plaintiff, Charles S. McKown, on the 18th day of June, 1900, instituted a suit at law in the circuit court of the Greenwood district of Sebastian county, Ark., against the Kansas & Texas Coal Company for the sum of $2,000. On the 2d day of July, 1900, three days before the defendant was required to plead, it filed an answer denying specifically the allegations of the complaint, and setting up a counterclaim against the plaintiff in the sum of $10,000, and at the same time filed its petition, accompanied by a bond in apt form, for the removal of the cause into this court. The motion now is to remand the cause on the ground that the sum sued for by the plaintiff was not sufficient to give this court jurisdiction.

Mechem & Bryant, for plaintiff.
Hill & Brizzolara, for defendant.

ROGERS, District Judge (after stating the facts). It is insisted by plaintiff's counsel that plaintiff could not have instituted his suit in this court for the sum of $2,000, because the amount is not sufficient to give the court jurisdiction, and that the amount involved in the counterclaim cannot be considered in order to increase the sum sued for by the plaintiff so as to give this court jurisdiction; and this contention is denied by the defendant. The sole question, therefore, is as to whether or not the counterclaim can be taken into consideration to increase the amount sued for by the plaintiff so as to give this court jurisdiction of the cause. The cases are conflicting and irreconcilable, and it is useless to review them. The following cases go to sustain the contention of the plaintiff: La Montagne v. Lumber Co. (C. C.) 44 Fed. 645; Manufacturing Co. v. Broderick (C. C.) 6 Fed. 654; Bennett v. Devine (C. C.) 45 Fed. 705. The following cases are relied upon to sustain the contention of the defendant: Lee v. Insurance Co. (C. C.) 74 Fed. 424; Clarkson v. Manson (C. C.) 4 Fed. 257. The following cases relate to the right of a nonresident

plaintiff, who has brought a suit in a state court for a sum less than the jurisdictional amount, to which a counterclaim has been filed for a sum in excess of the jurisdictional amount, of becoming a defendant as to the counterclaim, so as that he may remove the cause to the federal court under the act of March 3, 1887: Lumber Co. v. Holtzclaw (C. C.) 39 Fed. 578; Waco Hardware Co. v. Michigan Stove Co., 91 Fed. 289, 33 C. C. A. 511; West v. Aurora City, 6 Wall. 139, 18 L. Ed. 819; Walcott v. Watson (C. C.) 46 Fed. 529. The labors of the court in this case have been greatly facilitated by the wide research and very capable way in which this question was argued and presented by the respective counsel. The argument, however, took a wide range, and the citation of authorities equally so, many of them throwing more or less light upon the subject. But the cases cited above are the only cases which the court thinks are directly in point with reference to the three propositions there stated; and it will be seen that three distinct views are maintained by certain lines of authority. Under the first head it is held that the court will not take into consideration the counterclaim of the defendant to make up the jurisdictional amount when the defendant petitions for the removal. Under the second head the contrary is distinctly held, and under the third head two cases (Lumber Co. v. Holtzclaw [C. C.] 39 Fed. 578, and Walcott v. Watson [C. C.] 46 Fed. 529) hold that, where a nonresident plaintiff institutes, in a state court, a suit for a sum less than the jurisdictional amount in the federal court, and thereupon the defendant files a counterclaim for an amount within the jurisdiction of the federal court, the plaintiff becomes a defendant as to the counterclaim, and can remove the cause to the federal court; while Waco Hardware Co. v. Michigan Stove Co., 91 Fed. 289, 33 C. C. A. 511, and West v. Aurora City, 6 Wall. 139, 18 L. Ed. 819, hold directly to the contrary. I have considered all of these questions carefully, and I have examined every case cited by counsel, and I have reached the following conclusions:

1. That no suit can be removed, under the act of 1887, to the federal court, which could not have been originally instituted in that court. Wahl v. Franz, 100 Fed. 680, 40 C. C. A. 638, 49 L. R. A. 62; State of Tennessee v. Union & Planters' Bank, 152 U. S. 461, 462, 14 Sup. Ct. 654, 38 L. Ed. 511, and cases there cited; Railroad Co. v. Davidson, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672. See, also, section 2, Act March 3, 1887 (24 Stat. 552), as corrected by Act Cong. Aug. 13, 1888 (25 Stat. 433).

2. That in a case like the one at bar the defendant in the action as originally brought, or the titular defendant, only, can remove the case from the state court to the circuit court of the United States.

3. That, whether either of these two propositions be correct or not, the question is so doubtful that it should be remanded to the state court upon the authority of Fitzgerald v. Railway Co. (C. C) 45 Fed. 813, and Plant v. Harrison (C. C.) 101 Fed. 307. In states where the defendant, if he has a counterclaim, is compelled, under the state code, to plead the same, a contrary rule may be essential to the ends of justice; but in this state a defendant is not compelled to plead his counterclaim. He may or may not do so, at his election. Sand.

& H. Dig. §§ 5722, 5723. The cause is remanded to the circuit court of the Greenwood district of Sebastian county, Ark., at the costs of the defendant, the Kansas & Texas Coal Company.

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ADAMS v. SHIRK et al.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1901.)

No. 679.

1. APPEAL—SPECIFICATIONS OF ERROR.
The requirement of rule 11 of the circuit court of appeals (31 C. C. A. cxlvi., 90 Fed. cxlvi.) that a specification of error upon the admission or rejection of evidence "shall quote the full substance of the evidence admitted or rejected" has reference to the portion of the evidence concerning which it is sought to make some question, and a specification of error in the admission of a document which merely identifies such document as an assignment "transferring the leasehold" does not comply with the rule, where there was no dispute as to the effect of the assignment as a transfer of the leasehold, but the point in controversy was in relation to certain provisions supposed to create a personal liability on the part of the assignor for the payment of rentals thereafter accruing.

2. FEDERAL COURTS—FOLLOWING STATE PRACTICE—FORM OF ACTION.
Where the local practice in a state permits a lessor to sue an assignee of the lessee at law for rent, upon a contract of assumption in the assignment, such practice will be followed by the federal courts in the state.[1]

3. SAME—JURISDICTION—SUIT BY ASSIGNEE.
An action by a lessor against one to whom the lessee has transferred the lease, for the recovery of rent, is not one in which the plaintiff sues in the right of an assignee, but is brought in his own right as an original party to the contract and on a cause of action which never existed in favor of the lessee, and the citizenship of the latter cannot affect the jurisdiction of a federal court in the case.

On Petition for Rehearing. For former opinion, see 104 Fed. 54.

William Burry and John S. Runnells, for plaintiff in eror.

Frederic Ullmann and N. W. Hacker, for defendants in error.

Before WOODS and GROSSCUP, Circuit Judges, and KOHLSAAT, District Judge.

WOODS, Circuit Judge. The petition for a rehearing shows a misapprehension of the opinion handed down. When it was said that, if the court erred in holding or not holding as stated in certain specifications of error, "it must have been in giving or refusing instructions," it was not intended that there is something in the word "holding" "that necessarily implies instructions, or even the presence of a jury." That "any formulated conclusion of the court upon a question of law" is a holding, it did not need argument and illustration to demonstrate. The expression in the opinion is a concrete one, which has reference only to the case presented. There was a jury in the case, and, as the trial was conducted, it was impossible that the court should have held as stated in the specifica-

[1] Conformity of practice to that of state court, see notes to Nederland Life Ins. Co. v. Hall, 5 C. C. A. 594, and O'Connell v. Reed, 27 C. C. A. 392.

tions of error unless it was done "in giving or refusing instructions." So this court inferred, and the inference is completely justified by the petition itself, wherein, after quoting from the opinion in Woodbury v. City of Shawneetown, 20 C. C. A. 400, 74 Fed. 205, 34 U. S. App. 655, it is said: "It becomes an authority in our favor, for in the charge to the jury in our case the court states just what it did hold;" and this is followed with four quotations from the charge, on the strength of which it is assumed that "the record shows the holdings objected to." It is therefore impossible to escape the applicability of the provision of rules 11 and 24 (31 C. C. A. cxlvi., clxiv., 90 Fed. cxlvi., clxiv.) that each specification of error upon the charge shall "set out the part referred to totidem verbis," and of rule 10 (31 C. C. A. cxlv., 90 Fed. cxlv.) that in the bill of exceptions the excepting party shall "state distinctly the several matters of law in the charge to which he excepts." The significance of rule 10 has been explained in Stewart v. Morris, 37 C. C. A. 562, 96 Fed. 703; Columbus Const. Co. v. Crane Co., 40 C. C. A. 35, 98 Fed. 946, 101 Fed. 55. There is nothing in the opinion in Woodbury v. Shawneetown to justify a disregard of these requirements. It was a fact in that case, mentioned in the opinion, that there was nothing in the record to show the alleged rulings or holdings except the specifications of error; but it is not to be inferred that, if the record had contained a charge of the court in which the rulings could have been found, the specifications which were condemned would have been deemed sufficient to present the questions. To so hold, besides being a total disregard of the rules governing the saving of exceptions and the assignment of error upon instructions, would be inconsistent with the ruling in Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 12 C. C. A. 350, 63 Fed. 891, 24 U. S. App. 38, that a specification of error cannot be good under rule 11 if it is necessary to look beyond its terms, to the brief, for a specific statement of the question sought to be presented."

It is especially urged that by the eleventh specification a proposition of law is clearly stated. That assignment reads in this way:

"(11) The court erred in holding that a contractual relation between the plaintiffs and defendant was created by the document assigning the ground lease from the Smiths to Adams, being plaintiffs' Exhibit 5."

What is the proposition of law there stated? Merely that a contract relation between the plaintiff and the defendant was created by the document mentioned. That is a proposition of fact, perhaps, as much as of law; but, if treated as one of law purely, of what significance is it? Beyond question, there arose some kind of a contract relation between the parties, but to say that much by no means reaches the propositions advanced by counsel concerning liability for the rents sued for; and those propositions are not to be found in this specification of error, but, as the petition says, "are fully set forth in our brief." But, again, it is a fatal objection to this specification, as well as to the others condemned with it, that only in its charge did the court declare a contract relation between the parties, and the error should have been so specified.

The first, second, third, fifth, and seventh specifications of error

were condemned because they "do not, as required by rule 11, quote the substance of the evidence admitted or rejected." The second specification is that "the court erred in admitting in evidence the assignment dated December 27, 1895, from Perry H. Smith, Jr., in his own right and as administrator, to J. McGregor Adams, transferring the leasehold, etc., being plaintiff's Exhibit 5." That document, it is now urged, is fully identified, and by the expression "transferring the leasehold" "the substance or main object of the assignment was given." The trouble with this is that there has been no question in the case of the validity of the assignment, or of its effect as a mere transfer of the leasehold. The point of complaint is that the court did not declare the force of the provisions which touch the right of Adams to assign to another, and his liability for rents thereafter accrued; and the requirement of the rule that a specification of error upon the admission or rejection of evidence "shall quote the full substance of the evidence admitted or rejected" has reference to the portion of the evidence concerning which it is sought to make some question. It is argued that, so construed, rule 11 (31 C. C. A. cl., 90 Fed. cl.), which also requires that "such assignment of errors shall form part of the transcript of the record and be printed with it," is inconsistent with clause 3 of rule 10 (32 C. C. A. lxxxvii., 91 Fed. v.), which says: "No document shall be copied more than once in a bill of exceptions or in a transcript of the record of the case, but instead there shall be inserted a reference to the one copy set out." Manifestly there is no inconsistency. The "full substance" of a document is not a copy of it, and if, in any case, a full copy of a writing is set out in the assignment of errors, it will be the duty of the clerk below in preparing the transcript, and of the clerk of this court in supervising the printing, to cause it to so appear, and to make the proper references thereto from other parts of the record. Rule 10 is for clerks. Rule 11 is for attorneys. It follows, necessarily, that the first, second, third, and fifth specifications of error were properly declared unavailing. Each of them alleges error in the admission in evidence of a document well enough identified by description, but of which the substance is not stated.

It is further urged that "the objections shown in these specifications raised the question of the effect of the documents offered. If they did not support the declaration, they were improperly admitted in evidence." There are two fallacies here, both of which were noted in the original opinion. The specification of error does not conform to the rule, and, if that were waived, the objection shown by the bill of exceptions was only the general one of irrelevancy and incompetence, while the objection now is that the suit should have been in equity and not at law. It is not a question of the competency of the evidence and its relevancy to the actual dispute between the parties,—to the cause of action alleged,—but of the competency of the court to try the case. That ground of objection was not suggested at the first opportunity, and, if otherwise available, was waived. The documents were clearly admissible in evidence because directly relevant to the controversy. They supported the declaration. Indeed, it is stated in the brief, in support of the pe-

tition for a rehearing, that when they were offered in evidence "it was stated, and agreed to by the court, that argument upon the effect of the documents would properly be delayed until all the documents were before the court (that is, at the end of the plaintiff's case); and that at that time, and again upon a similar motion at the end of the whole testimony, * * * all the questions argued in our main brief in this case were fully discussed." That, plainly, was the reasonable course; and accordingly the court, in the beginning of its charge to the jury, said: "The difficult questions are questions of law, which have been determined by the court; that is, as to the effect of these various contracts and parts of contracts which have been introduced in evidence;" and, proceeding, the court instructed the jury that Adams "became bound by all the terms and provisions of this lease," and that, "by his agreement entered into at the time of taking the assignment, he was obligated for the lease, whether assigned or not," unless released by a transfer to a party satisfactory to the plaintiff. No exception was saved or error assigned upon these or other parts of the charge, and no requests were made for special instructions, except in respect to the effect of the tenders made by Pattison and refused by Shirk. "The main cause of complaint we have in this case against the trial court," says the petition, "was that it improperly construed the documents, not in the light of outside facts and surrounding circumstances, but considering them simply as documents set before the court for a determination or holding of the legal effect of their words. Believing that to be the point on which, mainly, an injustice had been done in the nisi prius court, the assignments of error concerning the holdings of the court were framed with the intention of calling up for review the decision, judgment, and holdings of the trial judge in holding and determining that a contractual relation between Shirk and Adams was created by any or all of the documents." It is reiteration to say that there is no assignment or specification of error so framed as to present any question of the legal effect of the documents mentioned,—even the indefinite, and, for the purposes of the case, unimportant, question, whether they evidenced a contract relation between Adams and the Shirks. It is to be observed, however, that the question whether there was such relation, and, to some extent, what was the scope of it, was involved, and was determined by this court in connection with other points ruled upon. In considering the effect of the tender we said, and now repeat it, as a direct proposition upon the force of the writings referred to:

"In the original lease it was stipulated that the lessees and their assigns should make no transfer of the leasehold, except by way of mortgage or trust deed, except upon the written consent of the lessor. Whether or not, without further stipulation, that restriction would have bound Adams, it is not necessary to consider. A further stipulation was made. He accepted an assignment by which, in express terms, 'for himself * * * and assigns personally,' he assumed 'all the terms, covenants, and agreements in said lease contained.'"

The binding character of such contracts of assumption by the grantee of a deed of conveyance or of a lease is too well settled to be open to discussion, though whether enforceable at law in a fed-

eral court, if the question be duly raised, may be debatable. In Illinois, however, the right to sue at law seems to be recognized. Dean v. Walker, 107 Ill. 540; Webster v. Fleming, 178 Ill. 140, 52 N. E. 975. And, that the local practice will be followed in the federal courts, see Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210; Insurance Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118.

Whether the mere assignment of a lease like the one under consideration, without any stipulation on the part of the assignee to be bound by the original restriction against reassigning, would keep that restriction alive, seems to be the question of which mainly a decision is desired; but manifestly it is not presented by this record, and could not arise upon writings which contain explicit stipulations on the point.

The proposition, now first advanced, that there was a lack of jurisdiction in the lower court, because the citizenship of Smith, the original lessee, was not alleged, is manifestly untenable. The statutory inhibition against a suit to recover in a circuit or district court of the United States the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder of such instrument, unless the suit might have been prosecuted in such court if no assignment or transfer had been made, evidently is inapplicable. The Shirks do not sue as assignees, but in their own right, as original parties to the contract, and upon a cause of action which never existed in favor of Smith. Before the rents accrued which the action was brought to recover, the leasehold had been transferred by Smith to Adams, and the plaintiffs had assented to the transfer in a way which doubtless released Smith from further liability even as surety for his assignee. See Smith v. Packard, 39 C. C. A. 294, 98 Fed. 793, where a somewhat analogous question was considered. The petition is denied.

## RELIABLE INCUBATOR & BROODER CO. v. STAHL.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 626.

1. CIRCUIT COURT OF APPEALS—JURISDICTION.

Primarily, at least, the assignment of errors determines the scope of an appeal to the circuit court of appeals, and if, in any case, errors other than the lack of jurisdiction in the lower court are asserted, the whole case is before the court, including the question of jurisdiction, if there be such question, notwithstanding it may be found on examination that for the lack of a proper bill of exceptions, or for failure to comply with the rules of practice, other questions are not presented, or are so imperfectly presented that the court might refuse to consider them.

2. APPEAL—QUESTIONS PRESENTED FOR REVIEW.

The fundamental question whether the facts alleged in a declaration, aided as far as may be by the verdict, are sufficient to sustain a judgment for the plaintiff, arises on an appeal, notwithstanding the lack of a bill of exceptions; and, under rule 11 of the circuit court of appeals, if the lack of essential facts be plain, the court may take cognizance of the error, though it is not well assigned.

3. JURISDICTION OF FEDERAL COURTS — ACTION FOR INFRINGEMENT OF PATENT —JOINDER OF CAUSES OF ACTION.

Where the gravamen of an action is the alleged breach of a contract of license by defendant, and the parties are citizens of the same state, the plaintiff cannot invoke the jurisdiction of a federal court by joining in the declaration a minor claim, imperfectly stated, for infringement of a patent.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

This action was brought by George H. Stahl against the Reliable Incubator & Brooder Company. A motion made by the defendant in error to strike from the record the bill of exceptions has been sustained (42 C. C. A. 522, 102 Fed. 590), but it is still insisted by the plaintiff in error that upon the face of the declaration the court below was without jurisdiction of the cause.

The second amended declaration, on which the trial was had, purporting to be for trespass on the case, shows that both parties were citizens of Illinois when the suit was commenced; that on November 1, 1892, the plaintiff was a resident of the city of Quincy, and was engaged in the business of manufacturing and selling, and was the owner of letters patent of the United States pertaining to, incubators and incubating and brooding devices and appliances; that at the same time and place the defendant was engaged in a similar business in competition with the plaintiff, and being so engaged they entered into a contract, a copy of which is set out; that afterwards, on October 1, 1893, differences and disputes having arisen between them, they entered into a new contract in lieu of the first, a copy of which is set out, and of which the provisions bearing upon the present question are as follows: "Now, therefore, this agreement made and entered into this 21st day of October, A. D. 1893, by and between George H. Stahl, of the first part, and John W. Myers, William B. Dean, Clarence A. Myers, and the Reliable Incubator and Brooder Company, a corporation, parties of the second part, witnesseth: That the said party of the first part is the owner of certain letters patent upon incubators bearing dates and numbers as follows, to wit [a list of 38 patents], * * * [and,] in consideration of the premises herein set forth, contracts to license and permit, and hereby does license and permit, the parties of the second part to make, use, and sell, anywhere in the United States, incubators of the same pattern and style as are now made and sold by them under the name and style of the Reliable Incubator and Brooder Company and similar to the sample furnished by the said party of the first part, and to give to them the full protection of all of his said letters patent, against all parties whatsoever, in the manufacture, use, and sale of the said incubator in its present style and pattern; but this license is not to be construed as authority to said party of the second part to make or sell any other incubator, or to modify the said incubator so as to incorporate any additional features or improvements in incubators which may be covered by any of the letters patent of the said party of the first part, and the said party of the first part expressly reserves to himself all rights to make, use, and sell all incubators and improvements covered by his said letters patent, and to grant license to and contract with all other parties concerning the same. And the said parties of the second part, for and in consideration of the permission and license set forth, and the further consideration of the protection of the aforesaid letters patent of the party of the first part, hereby promise and agree and contract to pay to the said party of the first part the sum of 75c. for each and every incubator of capacity not to exceed 55 eggs, and known as No. 0, and one dollar for each and every other incubator made and sold, leased, or rented by them or their agents after the 21st day of October, 1893. * * * It is further expressly agreed that the said parties of the second part shall make on the first day of each month a sworn statement to the said party of the first part of the number of incubators made, used, and sold by them and their agents for and during the preceding month, and thereupon to pay to the party of the first part the amount found due him according to the terms of this contract at the rate of $1 for each incubator, except the 55-egg capacity incubator, and 75c. for each incubator of that size and number, and, [for] the failure to make

such report and pay over all sums found due according to the terms of this contract, said party of the first part may, at his option, terminate this contract upon giving said party of the second part twenty days' notice in writing of his election so to do. * * * It is agreed that this contract shall continue in force for the term of ten years from the 1st day of November, A. D. 1892, but the parties of the second part shall not assign their interest herein, except upon the written consent of the said party of the first part. In witness whereof," etc.

Compliance with the contract by the defendant until February 1, 1896, is next alleged, and then the declaration proceeds: "And the plaintiff avers that thereby and by reason of the premises the defendant then and there became, and was and still is, the licensee of the plaintiff under the patents mentioned in said contract of license last aforesaid; and it became and was then and there the duty of the said defendant not to make its said incubators in any style or pattern different in any respect from the said style and pattern in which it was licensed to make the same by the terms, conditions, and limitation of the said last-mentioned contract of license in writing, and not to modify the said incubators so as to embrace or include therein any device or contrivance covered by or embraced in the claims or specifications of any of the plaintiff's said patents described in the said contract of license secondly hereinabove set forth, and to make truthful and complete monthly reports of the number and sizes of its said incubators made and sold by it, and to pay the license fees thereon according to the tenor and effect of the said last-mentioned contract of license, and to maintain and not to impeach or deny with and against the public the validity of the said letters patent in the said contract of license set forth, and not to deny or in any manner impeach the novelty and utility of the devices embraced in or covered by its said license, or the title of the plaintiff in and to the letters patent set forth in the said secondly above set forth contract of license. Yet the defendant wholly disregarded its said duties and obligations to the plaintiff, at and within the United States, to wit, the city of Quincy, in the county of Adams and state of Illinois, aforesaid, and during the term of duration of the said contract of license secondly hereinabove set forth, and while said last-mentioned contract of license was in full force and effect and binding upon all the parties thereto, and contrary to the terms and conditions thereof, and against the statutes of the United States in relation to letters patent of the United States, and wrongfully and fraudulently intending and designing to injure and more effectually to compete with the plaintiff in his said business, and to deprive him of the just benefit and advantage of his said letters patent, and to deprive him of the large profit he would otherwise have made in the manufacture of and sale of incubators and kindred devices, and to defraud him of the license fees justly due him under and by reason of the said last-mentioned contract of license prior to the commencement of this suit, to wit, between the 21st day of October, 1893, and the sixteenth day of April, 1896, made 4,500 of its said incubators in styles and patterns different from the style and pattern in which it was and had been making the same at the time of and prior to the making of the said contract of license hereinabove secondly set forth, and different from the sample mentioned in said contract of license, and put upon sale and sold and disposed of the same in the markets of the United States, and modified and changed the style and pattern of its said incubators by omitting therefrom the water tank, which was a feature of and in the style and pattern of incubator the defendant was licensed to make as aforesaid, and at the time and place aforesaid made 2,000 other incubators in such said changed style and pattern, and sold and disposed of the same in the markets of the United States, and changed and modified the said style and pattern in which it was licensed as aforesaid to make the said incubators by omitting therefrom certain openings with thumb-plate covers for the purpose of ventilating, and substituting therefor additional openings in the bottom of the incubators, covered with channeled blocks, and by extending the incubator frame at one end so as to form and include a chamber surrounding the lamp or heating apparatus, and by constructing a continuous air space in the two sides and one end of the incubator frame, with openings from the chamber about the lamp into such air space, and by changing the form of the hood or warm air conduit above the lamp so as to allow the heat from the

lamp to pass directly upward into the open air when not obstructed by a damper or a cover, and by attaching a certain heat-regulating device, known as and called by the defendant the 'Greenleaf Heat-Regulating Device,' and of this said so changed and altered style and pattern last above described the defendant made 2,000 other incubators, and sold and disposed of the same in the markets of the United States. And at the same time and place the defendant changed and altered the said licensed style and pattern of its said incubators by using a different form of metal pipe as a conduit for hot air, and by placing a metal shield over the middle portion of such pipe, and by divers other pretended and immaterial changes in form, style, and pattern; and of incubators of the last above mentioned changed and altered style and pattern the defendant made 2,000 other incubators, and sold and disposed of the same in the markets of the United States. And at the time and place aforesaid the said defendant changed, altered, and modified its said style and pattern of incubator in which it was licensed as aforesaid to make its said incubators so as to include and embrace a certain heat-regulating device operated by the expansion and contraction of mercury with some other liquid in a tube in varying temperatures, which said heat-regulating device was and is embraced under and covered by the claims and specifications of letters patent of the United States set out and described in said contract of license secondly hereinafter set forth as No. 230,086, July 13, 1880, the same being particularly described in the claims of said patent No. 5 and 6; and of the said incubators so modified and changed in style and pattern as lastly hereinabove set forth the defendant at the time and place aforesaid made 2,000 incubators, and sold and disposed of the same in the markets of the United States. And the defendant at the time and place aforesaid continually during the time aforesaid made divers other changes and alterations in the style and pattern of its said incubators, and made and sold the same in such changed and altered style, and continually denied, impeached, and disparaged the validity, novelty, and utility of the plaintiff's said patents under which it was licensed as aforesaid to manufacture and sell its incubators, and fraudulently pretended that its said incubators were and are not covered and embraced in the said contracts of license, or either of them, and refused to pay to the plaintiff, and has not paid to the plaintiff, any of the license fees due by the terms of the secondly above set forth contract of license since the said first day of February, 1896, and since said last-mentioned date and up to the commencement of this suit the defendant had refused to and has not made to the plaintiff any report, monthly or otherwise, of the number and sizes of the incubators by it made and sold under said license, and prior to said first day of February, 1896, and from thence hitherto from the said twenty-first day of October, 1893, the said defendant made partial and incomplete reports of the number and sizes of the incubators made and sold by it under said license, and wholly failed, neglected, and refused to report to the plaintiff a large number of such incubators made and sold by it under said license, to wit, 2,000 of such incubators, and has never paid, and has continually refused to pay, the said license fees mentioned and stipulated in said contract of license, and has withheld the said fees from the plaintiff in a large sum, to wit, the sum of $4,000, whereby and by reason of the premises the plaintiff has been and is greatly injured, and has been deprived of large royalties which he might and otherwise would have derived from the manufacture and sale of incubators in his said business, and from the sale of licenses to make, use, and sell incubators of the style and description licensed to be made by the defendant in the said contracts of license, and has sustained actual damage thereby to the amount of $10,000, whereby, by force of the statutes of the United States, a right of action has accrued to the said plaintiff to recover the said actual damages, and such additional amount, not exceeding in the whole three times the amount of such actual damages, as the court may see fit to adjudge and order, besides costs. Yet the defendant, though often requested so to do, has never paid the same, nor any part thereof, but has refused, and still refuses, so to do, and therefore the plaintiff brings this suit."

Frank D. Thomason, for plaintiff in error.

J. F. Carrott, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The bill of exceptions having been stricken out, the point is made by the appellee that the "only question now raised upon the record is that of the jurisdiction of the lower court," and that "the writ of error should be dismissed for want of jurisdiction in this court to entertain it." Manufacturing Co. v. Barber, 18 U. S. App. 476, 9 C. C. A. 79, 60 Fed. 465; Beck & Pauli Lithographing Co. v. Wacker & Birk Brewing & Malting Co., 46 U. S. App. 486, 22 C. C. A. 11, 76 Fed. 10,—are cited. This proposition assumes that, as the case stood before the bill of exceptions had been stricken out, the question of jurisdiction, in connection with other questions, was within the rightful cognizance of this court, and, if so, the power to decide it was not lost by passing upon or disposing of other questions first. A party against whom a judgment is rendered, instead of going to the supreme court upon a certificate of the question of jurisdiction alone, may take "the whole case" to the circuit court of appeals; and that court may then decide, or, if it deem proper, certify the question of jurisdiction to the supreme court. This was declared in McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893, and reaffirmed in U. S. v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87, in an opinion from which we quote the following:

"Of course, the power to certify assumes the power to decide." "Although the question of jurisdiction was not put in issue in the circuit court, still, as the objection in the circuit court of appeals went to jurisdiction over the subject-matter, no omission in that regard could supply absolute want of power, and the circuit court of appeals was bound to take notice of the question." "It is conceded that the United States had assigned errors on the merits, as well as the error under consideration, and as the question of jurisdiction lay at the threshold," etc.

Just what scope may be given to the phrase "upon the whole case," as used by the supreme court in these cases, is uncertain. In the opinion of this court in Beck & Pauli Lithographing Co. v. Wacker & Birk Brewing & Malting Co., supra, it was said:

"It is clear, therefore, upon the weight of authority, that a question of jurisdiction alone may not be taken to a court of appeals, though, on principle, once the supreme court had enunciated the doctrine of McLish v. Roff, it is difficult to see why such a question may not be entertained and decided by one of those courts as well when standing alone and constituting the whole case as when accompanied with another or other questions, which might be injected on mere pretense, in order to obviate the objection to jurisdiction."

In this case, as in U. S. v. Jahn, errors were assigned upon the merits; and this court, being bound to take notice of the question of jurisdiction, as one lying at the threshold, had power to dispose of it before considering the motion to suppress the bill of exceptions. Primarily, at least, the assignment of errors determines the scope of an appeal, and, if in any case errors other than the lack of jurisdiction in the lower court are asserted, the "whole case" is before the court, including the question of jurisdiction, if there be such question, notwithstanding it may be found on an examination that

for the lack of a proper bill of exceptions, or for failure to comply with the rules of practice, the other questions are not presented, or so imperfectly presented that the court might refuse to consider them. By rules 11 and 24 (31 C. C. A. cxlvi., clxvi., 90 Fed. cxlvi., clxvi.) this court, at its option, may notice errors, though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested, was not waived in the court below, and involved the merits of the case. Whether a bill of exceptions is properly in the record is not a primary question, but only an incident to the disposition of such alleged errors as the bill was designed to show. Under the rules the bill may or may not be indispensable, and whether it be so or not should not affect the power of the court over the question whether the lower court had jurisdiction, because if that court was without jurisdiction the court of errors or appeals should so determine at the threshold, and, without entering upon any other question, remand the case for proper disposition below. It is, of course, true that every court must first determine its own jurisdiction, and, if it depends necessarily upon the question of the validity of a bill of exceptions in the record, that question, of course, must be determined as a part of the primary question; but the more reasonable and practicable course, indicated by the supreme court in U. S. v. Jahn, supra, is to look to the assignment of errors for the scope of the questions presented, and whether or not they can be disposed of because a bill of exceptions is lacking or may be suppressed, or for other technical reason, is not a question which must be answered before the court can consider whether the court below had jurisdiction of the case.

If, however, the case were to be considered as if there had been no bill of exceptions in the record, and the specifications of error dependent thereon were eliminated, the power of this court to consider the question of the jurisdiction below would still be clear, since, aside from that question, the sufficiency of the declaration to sustain the judgment, upon any theory of the nature of the cause of action, is disputed. The last specification of error is that the court erred in entering judgment for the plaintiff and against the defendant. An assignment so general as this the court may refuse to consider, but is not bound to do so. See World's Columbian Exposition Co. v. Republic of France, 33 C. C. A. 333, 91 Fed. 64. As was there said, "It is fundamental that a judgment cannot stand unless the facts of record, apart from any showing by the bill of exceptions, aided as far as may be by the verdict, will support it;" and, if the lack of essential facts be plain, this court, in accordance with rule 11, may take cognizance of the error, though it be not well assigned. It cannot be said in this case that, besides the question of jurisdiction of the court over the parties and the subject-matter, there does not arise the question of the sufficiency of facts of record to support the judgment rendered. To illustrate: It is pointed out that the declaration contains no averment of ownership of the patents referred to at and during the time covered by the transactions out of which the right of action is supposed to have arisen. It may be, as insisted, that in that and other particulars the verdict has cured whatever de-

fect there was in the declaration; but to say that is only to demonstrate the presence of the question, and to refute the objection that this court is without power to proceed further in the case. If the court below had jurisdiction, it was confessedly not because of diverse citizenship of the parties, but because the action was for the infringement of patents for inventions. Judged by its averments, however, the declaration was drawn upon the theory of enforcing, or of recovering damages for the breach of, rights, duties, and obligations arising out of contract, rather than to recover for the infringement of letters patent. It begins, it is true, by professing to be a plea of trespass upon the case, and ends by asserting a right by force of the statutes of the United States to recover the actual damages alleged, and such additional amount as the court should see fit to allow, not exceeding three times the amount of actual damages; but such a beginning and ending can amount to nothing unless in the body of the pleading it is shown by proper averment that the plaintiff is entitled to recover of the defendant damages for infringement of a patent right. That does not appear in this declaration. It is shown that at a date more than three years prior to the bringing of this suit, and two years or more before the transactions out of which the supposed cause of action arose, the plaintiff was the owner of, and gave the defendant the right to use within restricted limits, a large number of patented inventions; and it is charged that after two years' compliance the plaintiff in error, in violation of the contract of license, modified the article, which it was authorized to make only according to a pattern agreed upon, so as to include other elements, but it is not alleged that in so doing the defendant infringed any patent right then or theretofore owned by the plaintiff. It is alleged that the defendant manufactured and sold 4,500 incubators which in specified particulars differed from the sample, 2,000 others that differed in certain other respects, 2,000 others that differed as stated, and finally 2,000 others were so modified as to include a certain heat-regulating device, which it is alleged "was and is embraced under and covered by the claims and specifications of letters patent of the United States set out and described in said contract of license secondly hereinafter [before] set forth as No. 230,086, July 13, 1880; the same being particularly described in the claims of said patent No. 5 and 6." If the last averment stood alone, constituting the entire gravamen of the declaration, it might possibly be regarded as an attempt to allege infringement of the particular patent mentioned, though it falls far short of the usual and of some of the necessary averments employed for that purpose; but, taken in connection with the other allegations, which are more important, inasmuch as they cover 9,500 articles, while this includes only 2,000, it cannot fairly be treated as intended to proceed on a basis different from and inconsistent with the theory of the other and more substantial averments. There is no allegation of damages on the theory of infringement, and no basis furnished for estimating damages, except the stipulated license fees, which it is alleged the defendant "has never paid and has continually refused to pay." The plaintiff had no right in the same suit, though in the form of trespass on the

case, to seek a recovery of damages for breach of contract and for infringement of patent rights. The gravamen of this declaration is beyond question in the allegations of breach of contract, and, if good at all, it is good only for that purpose. If its defects are to be considered as cured by the verdict, it must be in the direction of its main design, and not in the direction of a minor averment, which, if amplified as proposed, would introduce an inconsistent cause of action.

The judgment below is reversed, and the cause remanded, with direction to dismiss the action, unless, on such terms in respect to costs as the court shall determine, leave shall be given for a further amendment of the declaration.

NATIONAL AUTOMATIC MACH. CO. v. AUTOMATIC WEIGHING, LIFTING & GRIP MACH. CO. et al.

(Circuit Court of Appeals, First Circuit. January 17, 1901.)

No. 346.

APPEAL—INTERLOCUTORY ORDER.

Under the statute creating circuit courts of appeals, as amended by Act June 6, 1900 (31 Stat. 660), no appeal lies to such courts from interlocutory orders denying injunctions, even in cases in which a right of appeal existed at the time the amendment went into effect.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

A. Parker Smith, for appellant.

J. Lewis Stackpole, Jr. (Frederick P. Fish and William K. Richardson, on the brief), for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PER CURIAM. This was an appeal by the complainant from so much of an interlocutory decree in the court below, entered after hearing on bill, answer, and proofs, as refused an injunction asked for by it. The appellee has moved this court to dismiss the appeal on the ground that since the passage of the act approved on June 6, 1900, c. 803 (31 Stat. 660), we have no jurisdiction of the subject-matter. The circuit courts of appeals in two circuits have decided that this act abrogated the provisions of law giving us jurisdiction in appeals of this character. Wire Co. v. Boyce (C. C. A.) 104 Fed. 172; Westinghouse Air-Brake Co. v. Christensen Engineering Co. (C. C. A.) 104 Fed. 622. We see no reason why we should not concur in the conclusions reached by those courts. In the present case, however, the interlocutory decree in the court below was entered on May 31, 1900; and the appellant contends that, inasmuch as the act of June 6th contains no express repeal of any previous statute, it is not to be construed to reach cases where a right of appeal existed at the time it went into effect. A careful examination of the numerous decisions of the supreme court bearing on this question

fails to disclose anything which justifies us in assenting to any distinction of this character, and we must hold that we have no jurisdiction in this case. The appeal is dismissed, without prejudice to a new appeal after a final decree is entered in the court below, and without costs, except the appellees' costs on their motion to dismiss.

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## ZEIS v. POTTER et al.

## POTTER et al. v. ZEIS.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

Nos. 694, 697.

1. MORTGAGES—REPRESENTATIONS BY ASSIGNOR—ESTOPPEL.
   One who sells notes secured by a second mortgage, falsely representing such mortgage to be a first lien, cannot invoke the record of a prior mortgage held by himself as notice to the purchaser, but as between them the purchaser is entitled to priority of lien.
2. BILLS AND NOTES—TRANSFER OF NONNEGOTIABLE INSTRUMENTS—RIGHTS OF PURCHASER.
   The reasonable rule would seem to be that purchasers of overdue or nonnegotiable paper should take subject to the equities of all who appear or are known to have had an interest in it.
3. ASSIGNMENTS—CERTIFICATE OF PURCHASE OF REAL ESTATE—RIGHTS OF ASSIGNEE.
   A borrower from a bank pledged as collateral, among other securities, a certificate of purchase of real estate at judicial sale; the consideration stated therein being $6,740. The certificate was in an envelope, which was indorsed with the figures "$4,750." On inquiry as to the discrepancy, the pledgor stated that a third person owned an interest of $2,000 in the certificate, and that he could only pledge the same for the amount of his own interest, which was $4,750. Whether the name of the third person interested in the certificate was asked for or given did not clearly appear. In fact, as between the pledgor and such third person, the latter was entitled to priority of interest in the certificate. A statute of the state (Hurd's Rev. St. Ill. c. 77, § 29) made such certificates assignable by indorsement, and declared the assignee "entitled to the same benefits therefrom in every respect that the person therein named would have been if the same had not been assigned." *Held*, that the bank was put upon inquiry, and took the certificate subject to the rights which might have been asserted as against the pledgor.
4. BANKS—NOTICE TO EMPLOYE—CUSTOM OF CONDUCTING BUSINESS.
   Where a borrower from a bank presented collaterals to the assistant cashier, who was authorized to represent the bank in the transaction, and was directed by the latter, in accordance with custom, to take such collaterals to the note teller, who had charge of the collaterals to be checked up, notice to the teller in regard to the rights of a third person in one of the securities pledged was notice to the bank.

Appeal from the Circuit Court of the United States for the Northwestern Division of the Northern District of Illinois.

The appeal and cross appeal in these cases bring under consideration the respective rights of the parties to a certificate of sale of real estate by a master in chancery under a decree of foreclosure of a mortgage or trust deed. The original bill in the case was brought by the cross appellant, Edwin A. Potter, receiver of the National Bank of Illinois at Chicago, for the purpose of subjecting to sale certain personal property, including the certificate in

question, alleged to be held by the bank as collateral security for a debt of E. S. Dreyer & Co. to the bank. The appellant, Andrew R. Zeis, was allowed to intervene and file a cross bill, whereby he claimed that, to the extent of two thousand dollars and accrued interest, the certificate belonged to him, in priority to the rights of the bank. The receiver, who alone was made defendant to the cross bill, answered, asserting ownership of the entire certificate. The finding of the master was in favor of Zeis, but the circuit court gave judgment awarding to each party an interest, but allowing to neither a priority. The facts are undisputed, and, as reported by the master, were, in substance, these: On July 13, 1889, E. S. Dreyer & Co. held and owned a promissory note for $3,000, secured by a trust deed of real estate, duly recorded, and on that day took of the owners of the property a second note for $2,000, money loaned, payable two years after date, with six per cent. interest, each semiannual installment of which was evidenced by a separate note, and all secured by a trust deed of the same property, which deed was duly recorded. These notes were made payable to an employé, but belonged to the firm of E. S. Dreyer & Co., who, within a few days after their execution, sold and caused them to be indorsed by the payee to the appellant, Zeis, who paid therefor $2,000 and the accrued interest; Dreyer and another member of the firm then representing, and Zeis believing and acting upon the representation, that the trust deed securing the notes was a first lien or mortgage on the premises described. The interest notes, as they became due, Zeis collected at the office of E. S. Dreyer & Co.; and in 1891, when the principal note became due, E. S. Dreyer & Co. extended the time of payment for two years, and delivered to Zeis four interest notes, evidencing the interest for the extended period, again telling him that his was a first mortgage. These interest notes were collected, as the first, at the office of E. S. Dreyer & Co., and again in 1893 another extension for two years was made, as before, and the interest notes therefor were handed to Zeis by E. S. Dreyer & Co., and, as they became due, were paid to Zeis at their office. The $3,000 note and mortgage, which meanwhile they had sold and transferred to a third party, and which on June 23, 1894, had become due, three days later were repurchased by E. S. Dreyer & Co., and were held and owned by them until August 22d ensuing, when, without the knowledge or consent of Zeis, they caused suit to be brought in the superior court of Cook county to foreclose both trust deeds. On July 16, 1895, nearly a year after the bringing of the foreclosure suit, Zeis, having gone to the office of E. S. Dreyer & Co. at their request, was told by Dreyer that the mortgage debtor did not pay interest or taxes, and they wanted to foreclose in his favor; that they would attend to it without bothering him, and get his money,—repeating that the security was a first mortgage and good. Zeis, not having had anything to do with, and knowing nothing about, foreclosures, then left the $2,000 note and trust deed with the firm. A few weeks thereafter Dreyer returned the papers to him. A week later Dreyer again took the papers, "for the court to look over once more"; and Zeis, having received them again from E. S. Dreyer & Co. two weeks later, has since had possession of them. He was shown, meanwhile, by one of the firm, the exhibit marks on the note and deed, and told that that showed the foreclosure of the property; and that, he testified, was all he knew. He was not told that a foreclosure suit had already been brought, nor that the suit was to foreclose two deeds; and he did not know of the first note and deed until 1897, after the failures of the National Bank of Illinois and of E. S. Dreyer & Co. The mortgaged premises under the decree of foreclosure so obtained were sold on February 29, 1896, for $6,750, to E. S. Dreyer & Co., to whom on the same day the master executed the certificate in question. On May 29, 1896, E. S. Dreyer & Co. borrowed of the National Bank of Illinois $100,000 for the purpose of reducing an overdraft on their checking account with that bank, giving at the time as collateral security for the loan, which was applied in the manner proposed, the certificate of purchase. The certificate was at the time in an envelope on which was indorsed in the handwriting of Berger, one of the firm of E. S. Dreyer & Co., and who was conducting the transaction, the following: "Eugene Prager, $4,750, due June 1, 1897. Master's Certificate." Prager was the owner of the mortgaged property. This envelope, with a bunch of other collateral, was

delivered with a list thereof by Berger to Moll, the assistant cashier of the bank. Moll glanced over the list, and directed Berger to take the same to Greenshields, the bill clerk or note teller of the bank, to be checked up. Berger thereupon went to Greenshields, who, according to custom when Berger presented collateral, checked up the list. Coming to the item set down in the list as "Master's Certificate, $6,740," Greenshield observed on the envelope the figures "$4,750," and called Berger's attention to the apparent mistake. Berger answered that it was not a mistake; that there was somebody else interested in the certificate to the amount of $2,000, which did not belong to E. S. Dreyer & Co., whose interest only, amounting to $4,750, he could pledge. Whether Zeis was then named as the one interested in the certificate is left in uncertainty; the testimony of Berger being that he believed he named him, but "would not be positive." On July 13, 1896, Zeis received of E. S. Dreyer & Co. the installment of interest which he supposed to have accrued and become due on the $2,000, and the payment was then indorsed by E. S. Dreyer & Co., upon the note. On December 21, 1896, the National Bank of Illinois and E. S. Dreyer & Co. suspended business, receivers were appointed, and in January following, by reason of rumors concerning the dealings of Dreyer & Co. in second mortgages, Zeis became for the first time suspicious of his own security, and on investigation first learned of the $3,000 mortgage, of the foreclosure of the two in one proceeding, of the sale of the property, the certificate of purchase, and the transfer thereof to the bank.

Amos C. Miller, for Andrew R. Zeis.

John D. Hood, for Edwin A. Potter.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN. District Judge.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

To the extent that the certificate of sale represented the $2,000 mortgage, there can be no doubt that Zeis had the right to assert an interest prior to that of E. S. Dreyer & Co., by whose false representation he was induced to purchase the note in the belief that it was secured by a first mortgage. It is urged that, the $3,000 mortgage being of record, he was bound to take notice of it, and that his situation is the result of his own negligence. As against innocent purchasers buying without notice of his rights, the proposition would be unanswerable, but equity will not permit it to be invoked in favor of the willful wrongdoer. It is not for E. S. Dreyer & Co. to say that Zeis may not complain of the deceit which they practiced upon him, because if he had gone to the records "a slight examination would have disclosed the prior mortgage." Upon the facts stated, it may be said that Zeis had authorized Dreyer & Co. to procure a foreclosure of his mortgage, but he did not thereby sanction the procedure by which the two mortgages were foreclosed together, and merged in one decree in the name of another, representing Dreyer & Co.; and when he learned what had been done it was his privilege either to hold Dreyer & Co. liable for a conversion, or to repudiate the entire transaction and proceed to foreclose his mortgage, asserting equitable priority over Dreyer & Co. as holders of the other mortgage, or to assert an interest of like priority in the certificate. By taking the latter course he doubtless must be said to have ratified the foreclosure proceedings, including the sale under the decree, and

the issue of the master's certificate of sale to the purchaser. In other words, for the purposes of the case, Dreyer & Co. must be regarded as having become the rightful holders of the title to the certificate, subject to the equity of Zeis; and from that starting point it must be determined whether the rights of Zeis were lost or impaired by the assignment of the certificate by Dreyer & Co. to the bank. The contention of the receiver is that by force of the transfer Zeis lost all interest. The court below decided that he had lost the right of priority, and adjudged that he and the receiver, without priority in either over the other, were owners of the certificate in proportions stated, and in the same proportions entitled to have and to hold as tenants in common the premises described.

A certificate of decretal or execution sale of real estate, it is clear, is not negotiable in the sense of the law merchant, though for certain purposes it has been held that a certificate of sale under a decree foreclosing a mortgage is in effect a mortgage during the period allowed for redemption. Wedgbury v. Cassell, 164 Ill. 622, 45 N. E. 978; Stephens v. Insurance Co., 43 Ill. 327. A statute of Illinois (Hurd's Rev. St. c. 77, § 29) makes such certificates assignable by indorsement, and declares the assignee "entitled to the same benefits therefrom in every respect that the person therein named would have been if the same had not been assigned"; and while, as insisted on behalf of the appellant, the supreme court of the state has held in a number of cases that by force of the statute an assignee takes such a certificate "subject to all equities to which it was subject in the hands of the assignor" (Roberts v. Clelland, 82 Ill. 541; Haworth v. Taylor, 108 Ill. 287; Chytraus v. Smith, 141 Ill. 231, 30 N. E. 450; Bruschke v. Wright, 166 Ill. 183, 46 N. E. 813), it is pointed out, on the contrary, that these cases disclose controversies between the mortgagor or his privies, on the one hand, and mortgagees or holders of certificates, on the other, and therefore do not affect the rule declared in other cases, that the purchaser of a mortgage, for value and without notice, "takes it free from secret or latent equities or interests of third persons in the mortgage itself" (Young Men's Christian Ass'n Gymnasium Co. v. Rockford Nat. Bank, 179 Ill. 599, 54 N. E. 297; Humble v. Curtis, 160 Ill. 193, 43 N. E. 749; Olds v. Cummings, 31 Ill. 188). This is a distinction which has been recognized as applicable to negotiable instruments assigned after maturity. In paragraph 726b of Daniel on Negotiable Instruments, it is said:

> "The indorsee of overdue negotiable paper is not subject, it has been held, to equities which may have intervened between remote indorsers and indorsees, but only to those which exist, at the time of the indorsement to him, between the principal parties and the original holder, and between himself and his own indorser. Hill v. Shields, 81 N. C. 250. But, if there be an equity attaching to the bill or note itself, it has been held in England that it may be asserted against an indorsee after maturity by a third party who claimed the right to follow the bill. In re European Bank, Ex parte Commercial Bank, 5 Ch. App. 358; 1 Ames, Bills, 891; Chalm. Dig. Bills & N. 140. And, if the equity be a claim to some right in the instrument directly attached to it, we perceive no good reason why it may not be asserted against an indorsee after maturity by any party whatsoever."

In a subjoined note it is said:

"But see, contra, Crosby v. Tanner, 40 Iowa, 136; Bank v. Everman, 52 Miss. 500; Duke v. Clark, 58 Miss. 466. Compare Warren v. Haight, 65 N. Y. 171."

See, also, Tied. Com. Paper, § 295, and note.

The reason generally given for the distinction is thus stated in Silverman v. Bullock, 98 Ill. 10:

"Persons dealing in such securities can without difficulty inquire of the makers if any defense exists against them, but more than that it is not practicable to do. Of course, it would not be possible to discover, even by the utmost diligence, all persons that might have equitable rights in the subject-matter of the assignment, and the adoption of a rule that would let in latent equities to prevail against the assignee would be to ensnare dealers in such securities."

In respect to this, while the present case does not require a definite expression of opinion, it is deemed proper to suggest that the purchaser of overdue or nonnegotiable paper, if required to inquire of the makers whether they have any defense, may equally well be required to inquire into the rights of remote indorsers or others whose names appear on the paper. The payee and each successive indorsee, though he has parted with possession and title, may yet have an interest which, as against all but innocent purchasers for value and without notice, equity would protect; and, if convenience of inquiry is equivalent to notice of the rights of the maker, why not of any other, who, by reason of his name being on the paper, or by other means, the proposed purchaser is notified that he once had, and therefore may yet have, an interest? The maker often signs for accommodation, and the apparent indorser may be in fact the principal. The reasonable rule would seem to be that the purchasers of such paper should take subject to the equities of all who appear or are known to have had an interest in it. We need not, however, go to that extent now. In this case the bank was informed that there was an outstanding interest of $2,000, and that the holders of the certificate had a right to pledge only the remainder. Knowing this much, the bank was bound to inquire of the owner into the character and extent of that interest. The probability is that the name of the owner was given,—at least, it would have been given if asked; and, indeed, it is probable that, if the particulars had been asked of Berger, they would have been frankly stated. The bank was put upon inquiry. On the inquiry made it learned of an outstanding interest, and, not having gone further, it must be held to have had notice of what by proper effort it would have learned. It would have learned that the equity of Zeis was superior to all rights of E. S. Dreyer & Co.

It is urged, on the authority of Mechem, Ag. (1889) § 729, citing Congar v. Railway Co., 24 Wis. 157, and Bridge Co. v. Baker, 75 Ill. 140, that notice to the note teller, Greenshields, was not notice to the bank. It is not denied that Moll, the assistant cashier, to whom Berger presented the list of collaterals, had full power to represent the bank in the transaction; but, instead of taking the labor and responsibility himself, he simply "glanced over it,"—whether the *bundle* or list, or both, is uncertain,—and, according to custom,

directed Berger to go to the teller, "who had charge of the collaterals," to check them up, to see that everything on the list was delivered. To hold that the knowledge of the teller in this instance, acquired as it was in the very transaction committed in the usual way to his charge, should not be binding on the bank, would be to establish for such institutions an effective but most unreasonable and unfair method of evading just and wholesome responsibility under the law. It is hardly to be doubted that the teller communicated to Moll the information which he obtained. No proof to the contrary was offered. Besides, it is to be observed that the certificate of sale was presented to Moll himself with the same indorsement upon it which proved sufficient to put the teller upon inquiry; and, if Moll had been careful to observe, he doubtless would have made the same inquiry. If the duty to investigate was his alone, it was negligence on his part, attributable to the bank, that he did not recognize the significance of the notice put under his eyes.

The decree below is reversed, with direction to enter a decree which shall declare the interest of the appellant in the certificate of sale and in the property therein described to be prior and superior to all rights of the receiver.

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## METZGAR et ux. v. McCOY.

(Circuit Court, D. Pennsylvania. January 19, 1901.)

No. 30.

1. SUIT TO QUIET TITLE—TITLE OF PLAINTIFF.
   Where the plaintiff has only been in possession of real estate for a short time, and acquired title thereto by conveyance during the suit, or after an adverse judgment was obtained in ejectment against his grantor by the present defendant, and nothing is suggested in plaintiff's bill to quiet title which was not available as a defense in the ejectment suit, a demurrer will be sustained thereto.
2. SAME—ADEQUATE REMEDY AT LAW.
   Act March 8, 1889 (P. L. 11), as amended by Act May 25, 1893 (P. L. 131), authorizing the person in possession of real estate to obtain a rule on an adverse claimant to commence ejectment within six months, and empowering the court entering the rule to enter final judgment if such action is not commenced, provides a remedy at law which prevents the plaintiffs in possession from maintaining a suit to quiet title.

In Equity. Sur demurrer to bill.

J. M. Stoner, for complainants.

John M. Buchanan and Hice & Hice, for respondent.

ACHESON, Circuit Judge. Under the jurisdiction and practice in equity, independently of statute, to maintain a bill quia timet to remove a cloud upon the title to real estate, or a bill of peace, the plaintiff must show a clear legal title, as well as possession. Alexander v. Pendleton, 8 Cranch, 462, 3 L. Ed. 624; Orton v. Smith, 18 How. 263, 15 L. Ed. 393; Frost v. Spitley, 121 U. S. 552, 556, 7 Sup. Ct. 1129, 30 L. Ed. 1010. The bill here shows possession of brief duration in the plaintiffs, but falls far short of showing such a clear title

in them as would justify the interference of a court of equity. The plaintiffs' title has never been established at law. On the contrary, it appears that, in an action of ejectment in a court of competent jurisdiction brought by this defendant against parties in possession of the land under whom the present plaintiffs claim, there was a verdict for the plaintiff therein, and a judgment in his favor. Thus, in the only trial at law concerning this land which has taken place, the verdict and judgment were against the title which the plaintiffs in this bill set up as the foundation of the relief sought by them. These plaintiffs took a conveyance from the defendants in that ejectment either pendente lite or after the adverse judgment was rendered. Clearly, the plaintiffs stand in the shoes of the defendants in the ejectment, and such possession of the land as they had when they filed their bill was at the mere sufferance of this defendant, who had a right to a writ of habere facias possessionem. Nothing is suggested in the bill against the defendant's title which was not available as a defense in the action of ejectment. The judgment at law cannot be annulled or defeated by a court of equity upon the showing of this bill. Moreover, in any view that could be taken of the title of the plaintiffs, they are not remediless at law. Under the Pennsylvania act of March 8, 1889 (P. L. 11), as amended by the act of May 25, 1893 (P. L. 131), a party in possession of land upon application to the proper court of common pleas may obtain a rule upon a person not in possession who claims title to bring an action of ejectment within six months from the service of the rule, and on failure to comply with the rule the court is empowered and required to enter a final and conclusive judgment as between the parties. There must be judgment for the defendant upon the demurrer. Let a proper decree be drawn.

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## McGUIRE v. PENSACOLA CITY CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1901.)

No. 957.

1. Bill in Equity—Averments—Remedy at Law—Ejectment.

Where the averments of a bill in equity to recover real estate show that the complainant has a legal title, and that the defendants are in possession of the same by force, the remedy is by an action at law of ejectment; hence the bill was properly dismissed.

2. Same—Multiplicity of Suits—Dismissal.

An action to recover real estate, brought by bill in equity to prevent a multiplicity of suits, will be dismissed where the defendants can be joined in one action at law.

3. Same—Jury Trial.

The aid of equity in the federal court cannot be invoked to prevent a multiplicity of suits in an action to recover real estate where the legal title is in complainant, since each defendant is entitled to a trial by jury, under Const. U. S. Amend. 7.

4. Same—Fraud—Conspiracy—Violence.

Where the complainant in a bill in equity to recover real estate, having title, though out of possession, alleges that defendants obtained possession by conspiracy, fraud, and violence, and by void judgments of the state court, a court of equity will not take jurisdiction, since such wrongs can be remedied in an action at law.

5. SAME—QUIET TITLE.

A complainant, not in possession, but having legal title to realty, cannot invoke the aid of equity in the federal court to remove cloud from title against defendants who are in possession.

6. SAME—DISMISSAL BY COURT.

Where an adequate remedy at law exists, the court of equity will dismiss a bill on its own motion; hence a specified form of objection to the court's jurisdiction is not required.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

This is a suit in equity involving the right, title, and possession of a one-fourth undivided interest in 262½ acres of land in the city of Pensacola, Escambia county, Fla. The bill is filed by Florida McGuire against the Pensacola City Company and 47 other defendants. Two of the defendants—the Pensacola City Company and the Pensacola & Atlantic Railroad Company—are corporations chartered under the laws of Florida. The other defendants are all citizens of Florida, with the exception of Charles H. Edgar and Henry Knowles, who are citizens of the state of New York, and Clarence Knowles, who is a citizen of Georgia. It is alleged in the bill that the land in question was granted by the Spanish crown, in 1806, to Gabriel Rivas, who died intestate in 1822. The averments then show that the complainant is a descendant of Gabriel Rivas, and an heir at law of a one-fourth undivided interest in the lands. The lands remained in the constructive possession of the heirs of Gabriel Rivas until the year 1869, when Albert V. Caro, one of his heirs, in behalf of himself and the other heirs, took actual possession of the land; and it is alleged that he still lives on a portion of the tract. He is not made a party to the suit. The land has on it a number of houses and other improvements, with orchards and gardens, and its value exceeds $50,000. It is alleged that the Pensacola Company, acting through one William C. Cooke, in company with about 50 men, forcibly entered on the lands, and proceeded to cut down the trees, open and lay out streets, and then left the lands; that said Cooke, with about 50 men, in July, 1870, again took possession of the land, and undertook to construct a fence thereon; and that Albert V. Caro broke down the fence, and regained possession of the land. It is alleged that by judicial proceedings in the state courts of Florida the defendants obtained possession of the lands; that the judgments rendered by said state courts are void by reason of the fact that the judge rendering the judgment was connected with the corporation which was plaintiff, and was connected by affinity with some of the parties to the suit. It is not alleged that Florida McGuire, the complainant, was a party to these suits. Fraudulent combinations and conspiracies between the defendants are alleged. It is not alleged that the complainant is in possession of the land. It is alleged that a receiver appointed by the state court has taken possession of the land, or a part of it, and has compelled tenants thereon to attorn to him, and has forcibly and fraudulently driven off other tenants from the property, and converted it to his own use for the benefit of the Pensacola City Company and the other defendants; and that other defendants, who are named, are "among the present possessors of said tract, or a portion thereof, all claiming under the Pensacola City Company." In the thirtieth paragraph of the bill it is alleged that while the complainant, through her agents, was in possession of the land and its improvements, the defendants "illegally wrested possession of the lands from the said heirs," excepting that portion of the land which is in possession of Albert V. Caro. The prayer is for an injunction to restrain the defendants from disposing of or interfering with the lands, or from cutting any streets or trees on the lands, or committing any trespass thereon; that a receiver may be appointed to take possession of the land and collect the rents; that an account may be taken as to rents and profits; that the title to said property may be quieted, and that it be decreed what interest and title the complainant has in the lands; and that the said tract be ascertained to belong to the complainant, and be decreed to her, together with the rents and profits. The defendants demurred to the bill because the complainant has not made such a case as entitles her in a court of equity to any discovery or

relief from or against these defendants touching the matters contained in the bill, or any of such matters. The court sustained the demurrer, and dismissed the bill, and the complainant appealed to this court, and assigns the decree as error.

Louis P. Paquet, Simeon Belden, and Wolfe & Reese, for appellant. Wm. A. Blount and A. C. Blount, Jr., for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Suits in equity cannot be sustained in either of the courts of the United States where a plain, adequate, and complete remedy may be had at law. Rev. St. U. S. § 723. This section of the judiciary act of 1789 was merely declaratory of existing law. The averments of the bill show that the complainant has the legal title to the land claimed, and that defendants have obtained possession by force, and are now in possession. This makes a plain case for an action of ejectment. If these averments are true,—and on demurrer they are presumed to be true,—the appellant would be entitled to recover the land in ejectment. Under the seventh amendment to the constitution the defendants in possession have the constitutional right to a trial by jury. No statute of the state of Florida is cited as conferring equity jurisdiction on state courts in cases like this, and such statutes, if enacted, would not control the equity jurisdiction of the federal courts in a case where to enforce the statute would deprive a party of trial by jury. Scott v. Neely, 140 U. S. 106, 111, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804. We do not understand the learned counsel for the appellants as disputing these propositions, but their contention is that the bill contains averments that take the case out of the influence of these well-settled rules.

First, it is claimed that the court has jurisdiction to prevent a multiplicity of suits. The federal courts, of course, have jurisdiction in equity, in proper cases, to prevent a multiplicity of suits. But there is nothing alleged in the bill to confer jurisdiction on that account. If the defendants are trespassers, having obtained possession by force and violence, as alleged, they may all be joined as defendants in one action of ejectment. Greer v. Mezes, 24 How. 268, 277, 16 L. Ed. 661; Jackson v. Woods, 5 Johns. 278; Rowland v. Ladiga's Heirs, 21 Ala. 9. But, even if a number of suits were required to settle the controversy as to the lands, each defendant would have the right to submit his claim of title and right to possession to a jury. Doggett v. Hart, 5 Fla. 215; Hughes v. Hannah, 39 Fla. 365, 22 South. 613; Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873.

It is claimed that the court has jurisdiction in equity "to inquire into allegations of conspiracy, fraud, and violence." The fact that the defendants conspired to obtain possession of the land, or committed frauds and violence to obtain possession, the complainant having the legal title and the right to possession, does not confer jurisdiction in equity of a suit to recover the lands. These wrongs on the part of the defendants do not prevent the plaintiff from recovering the lands

at law in ejectment. Such averments in a bill to recover real estate and its rents, brought by a plaintiff out of possession, and having the legal title against defendants in possession, do not confer jurisdiction in equity. Smyth v. Banking Co., 141 U. S. 656, 660, 661, 12 Sup. Ct. 113, 35 L. Ed. 891. The averments that the defendants hold the lands under void judgments are without effect as conferring jurisdiction, because the judgments could as well be held void at law. Smythe v. Banking Co. (C. C.) 34 Fed. 825; Lewis v. Cocks, 23 Wall. 466, 469, 23 L. Ed. 70.

The third contention of the appellant is that the court has jurisdiction "to quiet title from cloud now resting on it by acts of defendants." It is well settled that a plaintiff not in possession, having the legal title, cannot maintain a bill against defendants who are in possession to remove cloud from title. Orton v. Smith, 18 How. 263, 15 L. Ed. 393; Frost v. Spitley, 121 U. S. 552, 556, 7 Sup. Ct. 1129, 30 L. Ed. 1010; 17 Enc. Pl. & Prac. 306; 5 Notes U. S. Rep. 572.

Objection is made to the form of the demurrer interposed by the defendants. This question is immaterial. In Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70, the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel, but the court sua sponte directed the dismissal of the bill. "It is the universal practice of courts of equity," said Mr. Justice Swayne, "to dismiss the bill if it be grounded upon a mere legal title. In such case the adverse party has a constitutional right to a trial by jury." The decree of the circuit court should be amended so as to make the dismissal without prejudice to the rights of the plaintiff to sue at law as she is advised, and, as so amended, it is affirmed.

## EDWARD P. ALLIS CO. v. WITHLACOOCHEE LUMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1901.)

No. 980.

EQUITY—PLEADING—AMENDMENT—DISCRETIONARY RULING.

Under equity rule 35, providing that if a demurrer be allowed the court may, in its discretion, on motion of the plaintiff, allow him to amend his bill on such terms as it deems reasonable, the question of amendment is largely in the discretion of the court; and where demurrers were sustained to plaintiff's entire bill on May 31, 1899, and motion for leave to amend was not filed until September 7, 1899, and the bill, with amendments embodied, was not lodged with the clerk until January 6, 1900, there was no abuse of discretion in refusing leave to amend, though the amendment might have been a proper one, and the refusal was on the ground that it was improper, and also that it was precluded by delay.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

Herbert L. Anderson, for appellant.

Edmund F. Dunne and Eugene O'Dunne, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This bill in equity was filed in the circuit court of the Fifth judicial district of the state of Florida, and

it is conceded that the case was properly removed to the circuit court of the United States for the Southern district of Florida. The suit was brought by the Edward P. Allis Company, a corporation organized under the laws of Wisconsin, against the Withlacoochee Lumber Company, a corporation under the laws of New Jersey, and eight other defendants, one of whom was a citizen of the state of Florida, residing in the Southern district. After the case was duly removed to the United States circuit court several of the defendants filed separate demurrers to the bill. Among those who demurred were the Withlacoochee Lumber Company, Henry S. Paul, and M. A. Shaw. The grounds of their separate demurrers were, in brief, that the bill was multifarious, that there was a misjoinder of parties defendant, that the bill was without equity, and that the contract set up in the bill was void under the Florida statute of frauds. The court sustained all of the demurrers. It is conceded in argument in this court that the bill was multifarious, and it is therefore admitted that the demurrers on that ground were properly sustained. The only assignments of error, therefore, left for consideration are those relating to the refusal of the court to allow the bill to be amended. To present the question clearly, the dates of the several orders, motions, and decrees should be stated. On May 31, 1899, the demurrers were fully heard and sustained upon each and every ground of the demurrers, and the demurring defendants allowed to recover costs, but the bill was not dismissed. It does not appear that at this time the complainant asked leave to amend the bill. No suggestion as to an amendment appears in the record until September 7, 1899, when a motion was filed for leave to amend the original bill by dismissing it as to several of the defendants, and by making certain changes in the bill stated in the motion. It is not until January 6, 1900, that the bill with the amendments formally embodied in it is lodged with the clerk of the court, to be filed if allowed on the hearing. On March 29, 1900, the counsel for the complainant made application to have the motion for leave to amend set down for hearing. The hearing was set for April 16, 1900. Afterwards, on May 10, 1900, the circuit court made an order refusing to allow the amendment, and dismissed the bill without prejudice. The learned judge in refusing the amendment called attention to the fact that the demurrer to the bill had been sustained May 31, 1899, and that the amendment offered was not presented for filing until January 6, 1900; that the bill was sworn to, while the offered amendment was unsworn, and that the allegations of the unsworn amendment differed materially from the averments of the sworn bill; and that the allegations of the amended bill, when considered in connection with the allegations of the original sworn bill, do not entitle the complainant to the relief prayed for. It is not necessary, we think, for us to consider these suggestions of the circuit court.

Formerly the strict practice in equity did not allow the amendment of a bill after demurrer to the whole bill had been sustained. The sustaining of such demurrer put the case out of court, and it was ended. 1 Daniell, Ch. Pl. & Prac. (4th Ed.) 597. This strict rule seems to have been somewhat relaxed in modern equity practice, but

it would not be useful to pursue the subject, as there is a written rule that governs the practice in the federal courts. Equity rule 35 provides that if the demurrer be allowed "the court may in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable." This rule does not confer on the complainant, after a demurrer is sustained to the entire bill, the right to amend. Bank v. Carpenter, 101 U. S. 567, 25 L. Ed. 815. The question of the amendment is left in the discretion of the court,—a discretion that should always be exercised to promote the ends of justice. In U. S. v. Atherton, 102 U. S. 372, 26 L. Ed. 213, Mr. Justice Miller, delivering the opinion of the court, said:

"The right to amend after a demurrer has been sustained must rest largely, if not wholly, in the discretion of the court; and, while we are not prepared to hold that in no case will its action in the matter be reviewed here, we have no hesitation in saying that the abuse of this discretion must be made plain, to authorize us to do so."

If we concede the complainant's contention that the amendment was one proper to be allowed, we could not review and reverse the decree, if we could do so in any event, unless it was made plain that the court below had abused its discretion. The rule quoted contemplates that the bill should be amended "upon the motion of the plaintiff." This motion should be made with reasonable promptness. Some of the cases lay down the rule so strictly "that the application to amend must be made as soon as the necessity of the amendment is discovered." Rodgers v. Rodgers, 1 Paige, 424. Here the complainant allowed several months to elapse before moving to amend, and as many more before formally presenting the proposed amendment. No evidence had been taken in the case. The bill was dismissed without prejudice, and the complainant could have filed a new bill asserting all rights that it proposed to assert by the amended bill. We find nothing in the case to indicate that there has been an abuse of the discretion by the court in refusing to allow the amendment. The decree of the circuit court is affirmed.

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## ROSS v. CITY OF PORTLAND et al.

(Circuit Court, D. Oregon. January 16, 1901.)

No. 2,650.

1. RES JUDICATA.

Judgment against complainant in a suit to enjoin sale of property on an assessment is a bar to a second suit for the same purpose, the validity of the assessment being attacked in both suits, though in the second suit it is attacked on a new ground.

2. TAXATION—VALIDITY OF ASSESSMENT—LACHES.

After an assessment has been levied for seven years, it is too late to question its validity by suit to enjoin a threatened sale thereunder, though the sale is under a new process; the process being made necessary by the restraint, at suit of complainant, of the sale attempted more than seven years before, and being but a mere continuation of what was then begun.

E. B. Seabrook, Wm. A. Munly, and John K. Kollock, for plaintiff.

J. M. Long, for defendants.

BELLINGER, District Judge. This is a suit to enjoin the city of Portland from selling certain lots upon which the Marquam Theater Building is situated, on an assessment for the improvement of Sixth street, upon the ground that the charter requiring the cost of such improvement to be assessed upon the abutting lots without reference to benefits is oppressive and arbitrary, and therefore in violation of the fourteenth amendment to the constitution of the United States, prohibiting any state from taking property without due process of law. The plaintiff prays for a preliminary order restraining the threatened sale pending a final determination in the cause. The improvement in question was made, and the assessment complained of levied, in 1893. Under this assessment a levy was made at the time, and the property advertised for sale. Thereupon complainant's grantor, with others similarly situated, brought a suit in the state court to restrain the proposed sale, upon various grounds of objection to the validity of the proceedings, but not including the objection now made. Upon the final hearing in the state supreme court, the attorneys for complainant attempted, for the first time, to raise this question; but inasmuch as it was not assigned as error on the appeal, and did not otherwise appear in the record, the court refused to consider it. The supreme court of the United States, in Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, decides, in effect, that a rule of assessment that arbitrarily places the burden of an improvement upon the abutting property by the front foot of such property, without any provision for a proper inquiry as to the special benefits accruing from the improvement, is a taking of property without due process of law, and that in such a case, where it cannot be seen or known (the assessment being arbitrary, and no inquiry having been made to that end) that benefits have resulted to the abutting property, the complainant is not required to tender any amount as a condition to relief. Assuming that this decision applies in a case like this,—a thing that does not admit of question,—nevertheless the application for a preliminary injunction must be denied, because of the former adjudication of the same matter between the city and complainant's grantor, and because of complainant's laches in bringing this suit. Where a party has a valid defense to an action, but fails to make it, he is concluded by the judgment rendered; and this rule applies "not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time." 1 Herm. Estop. 548. The point or particular question upon which the decision in the former case was rendered does not affect the conclusiveness of the adjudication, where the claim or demand is the same. In the leading case of Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195, the action was upon certain county bonds, void as against the county, in the hands of parties who did not acquire them before maturity for value. It was held that the plaintiff was not estopped by a judgment against him in another action upon other bonds of the same issue, where he had not proved that he had given such value. Here the second action was upon a different claim or

demand, and so being, and the point or question actually litigated not being the same, there was no estoppel. It is, of course, not questioned but that, if the second action had been upon the same bonds as those involved in the former action, the plaintiff would have been precluded, notwithstanding the fact that the point or question in litigation—the question of purchase for value before maturity—had not before been litigated. As to the former recovery in that case the court says:

"It is a finality as to the claim or demand in controversy, concluding parties, and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment."

In all cases where the claim or demand is the same the party is estopped, without reference to the identity of the point or question brought forward in the two cases in support of such claim. In this case the former suit was to prevent the identical injury now complained of, and the ultimate question—the validity of the assessment—was then, as now, attacked. The new point in the case does not affect the finality of the former adjudication. It is not open to a party to prosecute as many suits for the same demand as he may have points to urge in its support. The rule of res judicata ought to be applied with strictness, especially in cases like this, where the two suits are brought in different jurisdictions.

I am furthermore of the opinion that, where the alleged illegal assessment has been levied for a period of seven years, it is too late to question its validity in equity. It is said as to this that the threatened sale is a new sale. But the new sale is under a process made necessary by the restraint, at the suit of complainant's grantor, of the sale attempted more than seven years ago, and is a mere continuation of what was then begun. The application for a preliminary restraining order is denied.

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## WESTERN UNION TEL. CO. et al. v. AMERICAN BELL TEL. CO.

(Circuit Court, D. Massachusetts. December 21, 1900.)

No. 949.

1. REFERENCE—EFFECT OF FINDINGS.

Where by consent of parties a case is referred to a master to hear and decide the issues and report his findings both of fact and of law, such findings are to be taken as presumptively correct, and will not be disturbed unless for manifest error in the consideration given to the evidence, or in the application of the law.

2. CONTRACTS—CONSTRUCTION—EVIDENCE TO EXPLAIN MEANING OF LANGUAGE USED.

Where the language of a written contract is capable of two interpretations, and doubt exists as to its true meaning, evidence of previous negotiations and of surrounding facts and circumstances relating to the subject-matter of the contract is admissible in order to reach an inter-

pretation in accordance with the understanding of the parties at the time the contract was made.

3. SAME—CONSTRUCTION—RENTALS OR ROYALTIES FROM TELEPHONES.

Plaintiffs and defendant, each of whom owned patents relating to telephones, which were in litigation between them, made a settlement, and entered into a contract by which defendant was granted an exclusive license to use all the patents of plaintiffs, and agreed to pay them upon all telephones used in the United States under license from it, "express or implied, unless expressly excepted, a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid, in accordance with the provisions of this contract, from licenses or leases for speaking telephones, exclusive of call bells, batteries, wires, and other appliances, or services furnished or performed." The contract stated the then recognized "standard" annual rentals or royalties for each telephone, which was subject to commissions, and provided the commissions which might be paid therefrom, and the minimum rentals which might be charged, without a special agreement of the parties. It required defendant to keep accounts of the number of telephones manufactured, licensed, and put out for use, and of the rentals received and commissions paid, and provided that, where exchanges were conducted by defendant or other corporations in which it was interested, the usual rentals on the telephones used should be "rated as paid," within the meaning of the contract. Subsequently defendant adopted the plan of selling a perpetual license to use its instruments in a certain territory to a local company, taking in payment stock of the company; and in such cases the company paid the usual rentals on the telephones used, less the usual commissions. *Held*, that the term "rentals or royalties," used in the contract, did not include the general profits which defendant might make from the monopoly given by its patents, either by conducting exchanges itself, or from licenses granted to others therefor, but was intended to cover only rentals from instruments, as specified and defined in the contract, which by the recognized custom were rented, and not sold, and that defendant was not entitled to any portion of the stock received from the sale of such licenses.

In Equity. On exceptions to master's report.

John F. Dillon, Josiah H. Benton, Jr., and Rush Taggart, for complainants.

Richard Olney, John C. Gray, and Charles H. Swan, for defendant.

COLT, Circuit Judge. Under a contract dated November 10, 1879, the defendant, then known as the National Bell Telephone Company, agreed to pay to the plaintiffs, represented by the Western Union Telegraph Company, 20 per cent. of all rentals or royalties received from licenses for telephones in the United States. The Bell Company issued licenses to sundry corporations, and received, in addition to the annual rentals for telephones, 35 per cent. of the capital stock of these corporations. The plaintiffs claim that this stock was "rentals or royalties," within the meaning of the contract, and that they are entitled to 20 per cent. of the stock and the dividends declared thereon. The defendant maintains that the "rentals or royalties" mentioned in the contract are the standard annual rentals, less commissions, and nothing more; that it had the exclusive right under the contract to carry on the exchange business and to receive the profits, or to license another corporation to carry it on, receiving from such licensee a share of the profits; that this stock, in other words, merely represents the outcome of the mode adopted for realizing its share of the profits of the exchange business. The case was

referred to a master, who found in favor of the defendant. The present hearing was had on the plaintiffs' exceptions to the master's report. The order of reference was as follows:

"And now, to wit, May 28, 1886, upon agreement of parties filed, it is ordered that the above-named cause be referred to Hon. John Lowell, as master, to hear the parties and report the facts, with such part of the testimony as either party shall request, and his rulings on any question of law arising in the case."

The report was filed August 11, 1891. On November 29, 1897, the exceptions were filed; the time for filing having been extended by agreement of parties. The master made certain findings of fact and rulings of law.

Where parties consent to the reference of a case to a master to hear and decide the issues and report his findings, both of fact and of law, such findings are to be taken as presumptively correct, and will not be disturbed unless for manifest error in the consideration given to the evidence, or in the application of the law. Kimberly v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 355, 32 L. Ed. 764; Davis v. Schwartz, 155 U. S. 631, 636, 637, 15 Sup. Ct. 237, 39 L. Ed. 289; Crawford v. Neal, 144 U. S. 585, 596, 12 Sup. Ct. 759, 36 L. Ed. 552; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 812, 36 L. Ed. 649; Schwartz v. Duss (C. C. A.) 103 Fed. 561, 565.

The plaintiffs have confined their oral and printed arguments mainly to the discussion of the fundamental question on which the case turns. This question is raised by several exceptions, which differ in form of statement. As bearing on the main question, the exception to the ruling of the master admitting evidence of the previous negotiations between the parties to the contract has also been discussed. I shall limit the consideration of the exceptions to these two questions.

Article 1 of the contract declares:

The defendant "shall pay to the" plaintiffs "upon all telephones used in the United States, under any license from the" defendant, "express or implied, unless expressly excepted, a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid in accordance with the provisions of this contract, from licenses or leases for speaking telephones, exclusive of call bells, batteries, wires, and other appliances, or services furnished or performed."

The controversy turns upon the interpretation of the words "rentals or royalties" in this provision. The defendant contended before the master that these words had reference to the standard annual rentals for telephones, and did not include profits derived from the exchange business. In support of this contention the defendant relied—First, upon the contract; and, second, upon evidence of the previous course of business, the negotiations and correspondence between the parties, and prior drafts of the contract. The master, against the objection of the plaintiffs, admitted this evidence, not to vary the terms of the contract, but to explain the sense in which the language was used. If the contract had been limited to the above provision in article 1, with the words "or rated as paid in accordance with the provisions of this contract" omitted, it might have been argued with much force that the meaning of "rentals or

royalties" is plain and admits of but one interpretation, and that it covers everything in the nature of rental or royalty which was received from any license for telephones by the Bell Company. But, reading the whole of this provision in connection with the provisions which follow, the most that the plaintiffs can fairly claim is that the case presents a contract which is capable of two interpretations. This being true, it was clearly proper for the master to admit evidence of previous negotiations and surrounding facts and circumstances relating to the subject-matter of the contract, in order to reach an interpretation of the language used in accordance with the understanding of the parties at the time the contract was entered into. That such evidence is admissible where a contract is capable of two interpretations and a doubt exists as to the true meaning is well established. Nash v. Towne, 5 Wall. 689, 699, 18 L. Ed. 527; Canal Co. v. Hill, 15 Wall. 94, 100, 21 L. Ed. 64; Moran v. Prather, 23 Wall. 492, 501, 23 L. Ed. 121; Reed v. Insurance Co., 95 U. S. 23, 30, 24 L. Ed. 348; Brawley v. U. S., 96 U. S. 168, 173, 24 L. Ed. 622; Merriam v. U. S., 107 U. S. 437, 441, 2 Sup. Ct. 536, 27 L. Ed. 530; Railway Co. v. Jurey, 111 U. S. 584, 592, 4 Sup. Ct. 566, 28 L. Ed. 527; Knox Co. v. Ninth Nat. Bank, 147 U. S. 91, 99, 13 Sup. Ct. 267, 37 L. Ed. 93; Sargent v. Adams, 3 Gray, 72; Stoops v. Smith, 100 Mass. 63, 66; Fuller v. Miller, 105 Mass. 103; Keller v. Webb, 125 Mass. 88, 89; Bassett v. Rogers, 162 Mass. 47, 51, 37 N. E. 772; Machine Co. v. Graffam, 156 Mass. 415, 31 N. E. 485.

Upon the fundamental question in the case,—whether "rentals or royalties," in article 1, include exchange profits, or refer only to standard annual rentals for telephones,—the master ruled substantially as follows: The "rentals and royalties" which are to be divided between the parties are certain annual sums, which are definitely fixed in the contract, with a certain latitude for increase or diminution. The word "royalty," in this contract, is used interchangeably with "rental," and cannot be construed to mean anything other than rental. The exclusive right to do an exchange business was left with the defendant, and this cannot be construed as anything less than the right to the profits of the business, whether carried on alone or jointly with others. The previous Ormes contract made by the parties to this suit was the basis of the present contract. The Ormes contract contemplates that the defendant, in any one of several contingencies, will carry on exchanges, or authorize them to be carried on, and that it will then pay one dollar (with a minimum of $^{75}/_{100}$) for each telephone to the plaintiffs, and nothing more. The meaning of the contract of November 10, 1879, appears to be the same. The defendant might have obtained larger rentals for its telephones used in some, or perhaps in all, of the exchanges in question, if it had chosen to charge them. They would, however, have varied with each exchange according to the size of the city, and other circumstances which would affect the probability of profit to the exchange company. The contract contemplates a regular standard rental, as the rental or royalty in which the plaintiffs are to share, substantially alike for each class of business, and not to vary with the value of the use in particular cases. By the

contract the defendant clearly had the exclusive right to carry on the exchange business alone or jointly with others, and to receive its profits, paying to the plaintiffs 20 per cent. of the stated rentals. The defendant considered that it was selling its exclusive right to carry on the business, and that, in whatever way the value of this right was realized, it was the exclusive owner of it. To the rulings of the master the twenty-eighth exception fairly presents the vital question in the case:

"Because the master rules and finds that by the contract of November 10, 1879, the defendant 'clearly had the exclusive right to carry on the exchange business alone or jointly with others, and to receive its profits, paying to the plaintiffs twenty per cent. of the stated rentals,' and that when it did not carry on such business alone, but licensed another corporation to carry it on, receiving for such license a share of the profits, without putting into the business anything but the license to use the telephones, such shares of the profits are not to be considered as rentals or royalties from licenses or leases for telephones, twenty per cent. of which is by the terms of the contract to be paid to the plaintiffs, whereas the master should have found and ruled that such share of the profits is 'rental or royalty' for the use of telephones, within the meaning of the contract, and that the plaintiffs are entitled by the terms of the contract to twenty per cent. thereof."

To this exception may be added the twentieth:

"Because the master found that the 'rentals and royalties,' twenty per cent. of which the contract of November 10, 1879, required to be paid by the defendant to the plaintiffs, 'are certain annual sums, which are definitely fixed in the contract, with a certain latitude for increase or diminution,' and that the word 'royalty,' as used in the contract, 'is used interchangeably with 'rental,' and cannot be construed to mean anything other than 'rental,' whereas the master should have found that the word 'royalty,' as used in said contract, means whatever compensation or return the defendant company might receive for the use of the telephone patents, whether in the specific form of rental or in any other form."

Previous to November, 1879, the plaintiffs and defendant were rivals and competitors in the business of telephonic communication in this country. Together they controlled the entire business. Each party claimed the right of exclusive control under its own patents, and as a result they were engaged in a long and expensive litigation. The Western Union Company also controlled, to a large extent, the business of telegraphic communication in the United States, and it was important to protect that interest. During the progress of the litigation the counsel for the Western Union Company advised his client that Bell was the first inventor of the telephone. This led to negotiations between the parties which terminated in the contract of November 10, 1879. The negotiations extended over a period of months, and were conducted by principals and counsel of acknowledged skill and experience, who recognized the importance and magnitude of the interests involved. The contract was the outcome of numerous drafts, with amendments, alterations, and concessions on both sides. It covers 28 printed pages of the record. It is elaborate in its provisions, minute in detail, and drawn with the greatest care and deliberation. It defines the contract meaning of "telephone," "rentals or royalties," "standard rates" of rentals under licenses in the United States, and "profit" on telephones sold for export. It deals with what constituted the telephone business in

all its complex ramifications, as then carried on by the plaintiffs and defendant. It transfers, for a consideration, that business to the defendant, and secures to the plaintiffs the telegraph business. By making an absolute and complete transfer of the entire business to the defendant, and providing a simple method of accounting, in the form of a "royalty or bonus" to be paid on each telephone instrument licensed at home or sold abroad, the parties found a satisfactory solution of the most important question in the complex and difficult problem of the adjustment of their affairs. There has been no change in the telephone business or in the manner of conducting it since the date of the contract, except in two particulars: (1) A large increase in the exchange business, and consequently in the profits derived therefrom; and (2) in the general adoption by the defendant of the plan of granting permanent or perpetual exclusive licenses in place of exclusive licenses for a limited time,—generally five years,—with the privilege of taking the plant at cost at the end of that time, as a mode of realizing profits from the exchange business.

The first Bell patent was granted in 1876, and the defendant began business the following year. It first leased telephone instruments directly to customers at annual rentals, but soon adopted the plan of allotting specified territory to individuals or companies who were to furnish customers with telephones supplied by the defendant at a fixed "annual rental." These "agents" were paid by a commission on the rentals. They were to construct and furnish lines, retaining such profits as they might realize. As the business developed it was found that the exchange system afforded an important and profitable use for telephones. Recognizing this, the defendant began to make licenses for a limited term (generally five years) to local companies, who were to build exchanges and to retain all the profits of the exchange business, reserving, however, to itself the right to take the plant at a fair valuation, not exceeding actual cost, at the end of the term. Previous to November 10, 1879, the defendant made 185 territorial contracts. Some were for private lines, but the larger number were for exchanges. By these contracts the defendant gave a license to use telephones for district or exchange purposes in a certain territory at the regular rental fixed from time to time, less certain commissions, and further agreed not to license any other persons to use telephones for such purposes in such territory. The licensee agreed to pay the rentals to build and equip telephone lines, and to establish exchanges and district systems sufficient for the wants of the community within said territory. Upon the termination of the agreement the defendant might take possession of the property and purchase the same at a fair valuation, to be determined by arbitration or otherwise, not exceeding actual cost. Included in the 185 contracts there were three special contracts,—the New York contract, the Philadelphia contract, and the Ormes contract. By the first two, which are similar in terms, the defendant agreed to transfer the exclusive right to use and rent telephones at the annual rental of $10, less commissions, and the licensees agreed to pay the rentals, and in addition a certain por-

tion of their capital stock. These contracts are significant, as showing that in two important instances the defendant had adopted the practice, where permanent licenses were given, of receiving shares of stock from its licensees in addition to annual rentals. There is evidence that the plaintiffs had knowledge of these contracts. It was never suggested that this stock was "rental," or in lieu of "rental." The third special contract deserves notice, as it was the basis of the contract in suit. This was a tripartite agreement between the plaintiffs, the defendant, and one Ormes, by which the plaintiffs withdrew from the telephone business in a large territory, and received $1 on each telephone instrument used in exchanges or on connecting lines, and, subject to this payment, all the profits of the business belonged to the defendant or its licensee, Ormes. The defendant granted to Ormes an exclusive license to carry on the exchange business in seven states. It was to receive the regular rentals for telephones, less certain commissions. The licensee was to establish exchanges, and the defendant was to grant to each exchange the exclusive right to the business of its district. The defendant reserved the right to establish an exchange in any place where none had been established within 15 months, and to connect exchanges. At the end of 10 years, if no agreement for a continuance of the contract was made, the defendant would pay the value of the exchanges as determined, without consideration for telephone franchises. The plaintiffs were to receive from Ormes "a bonus of one dollar per annum" (with a minimum of 75 cents) "on each telephone rented or used by him." This bonus was also to be paid by the defendant on telephones in any exchange or on any connecting line established by it. After the license terminated, if the business was carried on by the defendant, the bonus of $1 was to continue to be paid to the plaintiffs by the defendant. It is very significant that the contract in suit follows the general lines of the Ormes contract. At the date of the contract in suit the defendant owned exchanges established in Boston, Lowell, Worcester, and Chicago. When the defendant owned the exchange, it charged itself the annual rentals, precisely as it did to strangers. Before November 10, 1879, the defendant carried on the exchange business in three ways: By itself, as in Boston and Chicago; by short-time licenses, under which it received a regular rental of $10, less commissions, on each telephone instrument, with the right to buy the plant at cost at the expiration of the license; by perpetual licenses in two cases, under which the defendant received the regular annual rental of $10 on each telephone instrument, and a share in the licensees' capital stock.

The course of business of the plaintiffs, and the contracts they made, show the same recognized distinction between "rental of telephones" and profits of the exchange business. Three of the plaintiffs, by a contract entered into December 22, 1877, were associated together in the telephone business. The American Speaking Telephone Company owned what were known as the "Western Union Patents," and received schedule annual rentals for telephones put out. The Gold & Stock Telegraph Company leased the instruments,

built the lines, and established exchanges. The Western Union Company also established exchanges. On March 13, 1879, the committee on "telephone rentals" of the American Speaking Telephone Company voted to approve "a new list of rentals." Then follows a schedule beginning as follows:

| | Jan. 1, 1879. Rental Per Annum, Including Commission. |
|---|---|
| Single Duplex Telephone............................... | $10 00 |
| In combination with another telephone or for interior use | 5 00 |

The course of business is stated in the deposition by Mr. Taylor, auditor of the Gold & Stock Telegraph Company:

"Int. 34. I understand when the Gold & Stock or the Western Union furnished telephones, under those and similar contracts, to any of the customers where they built lines,—the American Speaking received a certain sum per year on each telephone, according to the schedules already put in,—and that the rest of the money paid by the purchaser went to the Gold & Stock or the Western Union, respectively; they paying the expenses of the lines, maintenance, and so forth. Was that the regular course of business? Ans. That is substantially correct."

On July 17, 1879, the executive committee of the Gold & Stock Telegraph Company voted as follows:

"That this company waive any right it may have as against the Western Union Company to the exclusive control and profits of the business of telephone exchanges as a species of private lines under the contract between the Western Union Telegraph Company and this company, * * * and, in consideration of the profits accruing to this company for the rental of telephones for the greater part of such exchanges, do hereby consent and approve their establishment, purchase, ownership, and operation by the Western Union Telegraph Company."

It thus appears that the distinction between "rental of telephones" and "profits of the business of telephone exchanges" was as well known and established in the telephone business as carried on by the plaintiffs as by the defendant. It was a universal distinction, which entered into every contract, and it will be seen that the accounting under the contract in suit is founded upon this same distinction.

The previous negotiations between the parties also throw light upon this general scheme of the contract. They were begun by the advice of Mr. Gifford, counsel for the plaintiffs during the progress of a suit brought by the defendant against Dowd, which was defended by the Western Union Company. Mr. Gifford states in his testimony:

"A very vigorous defense was made by the Western Union Company, and testimony of great length and at great expense was taken in support of the answer. After the testimony was closed, or substantially closed, on both sides, I was convinced that Bell was the first inventor of the telephone, and that the defendant Dowd had infringed said Bell's patent by the use of telephones in which carbon transmitters and microphones were elements, and that none of the defenses which had been set up could prevail against him; and I advised the Western Union Company to that effect, and that the best policy for them was to make some settlement with the complainants."

The negotiations which followed Mr. Gifford's advice show—First, that the plan looking to the formation of a company in which there

should be a division of stock, and as a consequence a division of all profits, exchange or otherwise, failed, after months of effort; and, second, that the "new basis" of a royalty or bonus of 20 per cent. of the annual rentals of all telephones, which was finally adopted, was furnished by the Ormes contract of August 26, 1879, which was made while the negotiations were pending, and after the plan of a division of stock in a new company had proved unsuccessful. Mr. Forbes, the president of the defendant company, states in his testimony:

"During the entire spring of 1879 negotiations were in progress for a settlement of the contest between the Western Union Telegraph Company and its associates and the National Bell Telephone Company, and those negotiations for a number of months (during the entire spring of that year, I should say) looked to the formation of a company in which a division of stock should be made, part to each contestant. Those negotiations continued until the midsummer of 1879, when it was found that no agreement could be reached upon any such basis as that."

Mr. Forbes further testifies:

"At the time the negotiations failed to make a settlement on the plan of a division of stock, the question of the patents was referred to counsel, Mr. Gifford and Mr. Chauncey Smith, to see if they could reach any conclusion as to their merits, which we could use as a basis for settlement; and while they were engaged upon that work in the summer of 1879 (I should say in August, 1879) a man named Ormes, who held a license from the Bell Telephone Company to operate their patents in the seven seaboard states (the seven Southern states along the seaboard), made an arrangement, subject to our approval, with the Western Union, to pay them one dollar a year upon each telephone that he used in that territory; they agreeing to withdraw wholly from that field. * * * About the time that the Ormes negotiation had been concluded, Mr. Chauncey Smith and I met Dr. Green and Mr. Gifford, the counsel for the Western Union Telegraph Company, at Dr. Green's office in New York, and there was a general discussion of the situation between the parties, in the course of which this settlement (which was, by the way, for ten years) with Ormes for the seven seaboard states was mentioned; and the suggestion was made whether that would not be a good basis for a settlement for the rest of the country, to which Mr. Gifford immediately expressed his opinion that it would, and it led to a discussion as to the possibility of coming to an agreement upon substantially similar terms for the entire country. That is the 'new basis' that Dr. Green refers to. He was not prepared to act upon that at that time. He had to bring the suggestion to the attention of his associates, and I came back to Boston. That was the basis which was referred to in his correspondence, and which led to the renewal of negotiations, and finally to the conclusion of the November 10th contract."

On September 1, 1879, Dr. Green, president of the Western Union Company, wrote to Mr. Forbes:

"I sent telegrams, and had everyone on the lookout for Dr. White, whom I learned was somewhere in the White Mountains with his family, but did not hear from him till Friday morning, when he turned up at Newport. He stopped for a few minutes on Saturday, and when I presented the new basis to his consideration he appeared unfavorably impressed with it, and thought it too much a surrender. I told him I did not so consider it, and he finally promised to think it over and return here Tuesday morning. If this basis be entertained, there are incidental questions that will need to be disposed of, as part of it."

On September 3d Dr. Green again wrote to Mr. Forbes:

"After an all-day's conference with our telephonic committee yesterday, * * * we reached the conclusion that, if the other matters referred to can

be satisfactorily adjusted, we would assent to a settlement on the basis of a royalty or bonus for our patent rights and good will in the business,—the royalty to be twenty per cent. of the annual rentals of all telephones, less commissions paid for placing them, which bonus shall not be less than one dollar per telephone per annum, except for telephones used in houses, and for reduced rates under pressure of competition, as provided in the Ormes contract, in which cases we shall receive a royalty or bonus of not less than seventy-five cents each per annum."

On September 13th Dr. Green wrote to Mr. Forbes with respect to a draft agreement:

"Your first stipulation is: 'The party of the second part is to pay to the party of the first part twenty per cent. of all annual rentals received from telephones, and also of all proceeds of sales of telephones, commissions on rentals, or proceeds paid to agents being first deducted.' * * * With all this, I have been unable to see how we can be secured in the percentage of revenue from the business that we bargained for without stipulating for a minimum on each instrument, or a minimum rental below which they shall not be placed without our consent. I agree that it will be more your interest to maintain larger returns for the instruments used than ours. And it was that that made me hastily and inconsiderately yield the point at one time; but there are so many ways in which you may get large returns otherwise than by rentals that our several executive committees, all of which have had sessions since, strenuously object to putting the whole matter out of our hands, with no security as to what may accrue to us under the operation of the contract. And, the more I have studied the subject, the more I am satisfied that we must insist upon it. If experience in the business should demonstrate that a larger revenue could be derived from rentals at three dollars per annum than at six dollars per annum, we should be more ready to consent to it than your party, because on your side it would bring no corresponding reduction in the manufacturing account. I can see no reason, therefore, why you should not assent to a minimum price at which telephones should be rented, unless the price be reduced by the consent of both parties. * * * The stipulation to pay twenty per cent. of the legal expenses in defending the patent rights is substantially as agreed."

The basis of settlement which was satisfactory to Dr. Green and those he represented, as appears by his letter of September 3d, is the same as we find in the contract subsequently made. That basis, as stated by him, was a "royalty or bonus"; "the royalty to be twenty per cent. of the annual rentals of all telephones, less commissions paid for placing them." The reference in this letter to the Ormes contract shows its close connection with the contract in suit. This whole correspondence makes the meaning of the contract clear and unmistakable, if any doubt can possibly arise after carefully reading its provisions. It is also significant that in several of the earlier drafts of the contract there are words or expressions which might afford some basis for the plaintiffs' claim. But all expressions of this character were stricken out, and do not appear in the contract as finally agreed upon. The main provisions of the contract are as follows:

By article 1:

(1) The defendant "shall pay to the" plaintiffs "upon all telephones used in the United States, under any license from the" defendant, "express or implied, unless expressly excepted, a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid in accordance with the provisions of this contract, from licenses or leases for speaking telephones (exclusive of call bells, batteries, wires, and other appliances, or services furnished or performed). The rentals or royalties upon which said royalty or bonus to

be paid to the" plaintiffs "is to be reckoned shall, for that purpose, be ascertained by deducting from the gross rental or royalty received or rated as hereinafter declared, the commissions and allowances herein provided for. (2) The royalty or bonus to be paid on telephones made in the United States solely for export, and not licensed for use in the United States, shall be twenty per cent. of the net profit actually derived by the" defendant "in their manufacture and sale above the cost of such manufacture, not including any part of the general expense of the" defendant "as part of such cost, and not including in the manufacturer's profit any enhancement of price fairly due to the fact that the" defendant "holds or in any way controls a monopoly of the use of such telephones in any foreign country other than Canada, if such case shall exist: provided, however, that, where the" defendant "shall be in any way interested in the purchase or use of such telephones in such foreign country, it shall be at the option of the" plaintiffs "to require an accounting for all telephones so exported as if sold at a fixed profit of thirty-three and one third per cent. upon the cost of manufacture. (3) Allowance shall be made for rentals or royalties which cannot be collected, and for usual and reasonable deadhead or free privileges."

Article 2 declares:

"Concerning the sum which is to be taken as the gross rental or royalty for the purpose of the preceding article, it is declared and agreed: (1) The word 'telephone,' as used in this contract, refers to an instrument for electrically transmitting or receiving articulate speech, and is understood to mean either a transmitting instrument incapable of use as a receiver, a receiving instrument incapable of use as a transmitter, or an instrument capable of being used both as a transmitter and receiver. (2) Ten dollars per annum for each telephone where only one is used at a terminal or station, and fifteen dollars per annum for a pair of telephones composed of an instrument used for sending and another instrument used for receiving, used at one terminal or station, are recognized as the present standard rates of gross rentals or royalties; and the" defendant "may change them, subject to the qualifications of sections 4 and 5 of this article, but not otherwise. (3) Telephones used on exchanges or lines owned in whole or part by the" defendant, "or by auxiliary corporations or organizations in which it is interested, or rented together with lines owned in whole or in part by it, or by auxiliary corporations or organizations in which it is interested, shall be rated as paying to said" defendant "the said recognized standard rates, or such other rates as may hereafter be established in accordance with this contract for like uses by parties other than the" defendant, "or auxiliary corporations or organizations in which it is interested, less the commissions and allowances provided for by this contract; but, whenever the" defendant "is or shall be interested with others in the ownership of such exchanges or lines, the annual rental or royalty actually charged to and received from the owners thereof for the use of the telephones, if greater than the rates established as aforesaid, shall be taken to be the gross rental for the purpose of ascertaining the stipulated bonus or royalty. (4) No reduction from the said present recognized standard rates which shall be made on telephones used on exchanges or lines owned in whole or in part by the" defendant, "or by auxiliary corporations or organizations in which it is interested, or rented together with lines owned in whole or in part by it, or by auxiliary corporations or organizations in which it is interested, shall operate to reduce said royalty or bonus to be paid to the" plaintiffs "below \$1.00 per annum for each terminal single telephone, and \$1.80 per annum for each terminal pair, unless such reduction be made with the consent of the" plaintiffs, "or as provided in the following section."

By article 3 the following commissions and allowances are to be made from the gross rentals:

"On telephones used in district or exchange systems owned in whole or in part by the" defendant, "or by auxiliary corporations or organizations in which it is interested, an allowance or commission of thirty per cent. On telephones taken by the" plaintiffs "for private lines," "or used by the" defendant "on its own lines, or put out by it, by its own officers or servants, for

any use other than on district or exchange systems in which it is interested as aforesaid, twenty-five per cent."

On all other telephones the rate actually paid, not exceeding 40 per cent.

By article 4:

The plaintiffs "shall bear and pay twenty per cent., and the" defendant "eighty per cent., of all reasonable legal expenses incurred in ascertaining, investigating, and determining, and in prosecuting and defending rights which the" defendant "may have, claim, or wish to acquire pertaining to telephones, or the right to use telephones, or to inventions used in telephones, and concerning patent rights which it or others may claim respecting the same, including expenses in suits and in proceedings in the patent office relating to such rights, or to the collection of rentals or royalties on telephones."

By article 5:

The plaintiffs grant to the defendant, "as far as they, or either of them, have the legal power so to do, an exclusive license during the full terms for which patents thereon have been or may be granted, to make, to use, and to license others to make and to use in speaking telephones, call bells, and switches, and other appliances for use on telephonic lines, any inventions or improvements therein which it, or those whom it represents, as aforesaid, now own or control, in whole or in part, by contract or otherwise, under which it or they have the authority to grant such license, and whether already patented or not, and which the" defendant "shall not otherwise have the right to use; reserving, however, to the" plaintiffs, and those they represent, "the right to use said inventions in switches, call bells, and appliances other than telephones in connection with the telephones which they are or may become entitled to use under this contract. Instruments or apparatus made under this license shall be deemed to be licensed only for the uses above named, and not for any other purpose." The plaintiffs further agree "to acquire any further inventions adapted to be used in connection with telephones which it may have the right to so acquire under existing contracts with George M. Phelps and Thomas A. Edison, and to license the" defendant "under the same for use in telephones or on telephone lines; the" defendant "agreeing to pay to said" plaintiffs "in reimbursements whatever the said" plaintiffs, or those they represent, "may be required to pay therefor." "If" the plaintiffs "shall hereafter acquire ownership or control as aforesaid of other inventions adapted to be used in connection with telephones, the" defendant "shall have the right or license to use the same for telephonic purposes, and shall be bound to pay to the" plaintiffs "the cost thereof, or a due and proportionate part of said cost. Such right or license shall be exclusive for telephonic purposes during the whole period of this contract, and shall continue, but shall not be exclusive after its expiration."

By article 6 the plaintiffs "agree to withdraw from the manufacture, rental, and use of telephones" except as excepted in the contract.

By article 12 "the right to all uses of the telephone on wires of a district or exchange system is to remain exclusively with" the defendant, with a temporary exception not now important.

By article 13 "the right to connect telephonic district or exchange systems for the purpose of personal conversation between persons at the instruments, and the right to use telephones on all lines not forming a part of a telephonic district or exchange system for such personal conversation (except so far as licenses for private lines are to be granted to the" plaintiffs "under article 14), are to remain exclusively with the" defendant "and those licensed by it for the purpose. But such connecting and other lines are not to be used for the transmission of general business messages, market quotations,

or news for sale or publication in competition with the business of the Western Union Telegraph Company, or with that of the Gold and Stock Telegraph Company," etc.

By article 14 the defendant agrees to license the plaintiffs to use telephones for transmitting telegraph messages, and for use on private lines, which were defined to be lines each consisting of a single circuit on which the telephones were to be used for the individual and private business of the lessees, and not for other business nor for a consideration or toll. The defendant was to turn over to the Western Union Company, as far as possible, all messages which were to be transmitted by telegraph, for a commission of 15 per cent. The parties agreed that the contract should be a settlement of all suits.

By article 18 the defendant agreed to keep accounts of "the number of telephones manufactured, licensed, and put out for use in the United States, and also of the rentals received and commissions or allowances paid or allowed as" in the contract "provided, and of the number manufactured and sold in foreign countries, and the amount received therefor," and to render accounts and pay balances quarterly. The contract ran for a period of 17 years from its date.

The true interpretation of this contract becomes more clear and certain the more we study the subject-matter with which it deals, and the course of business in relation thereto. The telephone business is founded on a patented instrument known as the "speaking telephone." A telephone, unlike most patented things, is capable of several uses. It may be used on private lines to connect two houses or two offices, or it may be used in an exchange system, or to connect several exchange systems. "A telephone exchange is an arrangement for putting up and maintaining wires, poles, and switch boards within a given area, with a central office, and the necessary operators to enable the individual hirers of telephones within that area to converse with each other." In the case of a private line, the customer is furnished with (1) a telephone instrument and (2) auxiliary apparatus and services in the form of call bells, batteries, and care of instruments and apparatus. In the case of an exchange system, the customer is also furnished with the exchange service and its accompanying features, which include connection with the exchange and all subscribers, telephone operators, etc. It is necessary to keep in mind that "telephone," according to the course of business, and in this contract, refers only to the instrument itself, apart from wires, batteries, call bells, switch boards, and other apparatus and appliances with which it is connected in its practical and commercial use. Again, we must not forget that it is a marked and universal peculiarity in the telephone business, as conducted in the United States, that the instruments are always rented, and never sold. Another special feature is that the telephone is capable of several different uses. It is the uses made of the telephone which comprise a large part of the telephone business, and constitute its commercial value. It may be said that the telephone business proper begins with a rented instrument; an instrument which is subject to an annual rental; a standard annual rental. No matter which one of the several commercial uses it is put to, the annual rental is an

inseparable accompaniment. Every telephone instrument put out in the United States has, figuratively speaking, written across its face, "This telephone is not sold, but is leased at the standard annual rental." It follows from this method of doing business that the rentals derived from telephones have always been known and recognized as something entirely separate and distinct from the profits derived from the telephone business. The amount which the customer pays was always divided into two parts,—rental of telephone and the income or profits of the business, largely the exchange business. Rental of telephones was a certain, definite, and fixed quantity, subject only to variation in the commission allowed; while the profits of the business, though they might be many times greater, were variable, uncertain, and, in a measure, speculative, because dependent on the kind of use, locality, business management, and other conditions. The owner of the telephone patent sometimes carried on the exchange business, but more often granted this privilege to others in license contracts to use and rent telephones. But, in whatever way the exchange business was conducted, the annual rental always followed each telephone instrument as a permanent and inseparable fixture.

A reading of the contract clearly shows that the accounting contemplated by this defendant to these plaintiffs for telephones leased in the United States is strictly confined to rental of telephones, and does not extend to profits derived from the employment of the telephone in various ways. It is an accounting for the rental of a thing, a chattel, a telephone instrument stripped of all the apparatus and appliances which are necessary to its successful and profitable use. It is also immaterial what patents are embodied in its physical structure, whether the plaintiffs', the defendant's, or both, or neither, provided it is a speaking telephone. It is a share of the annual rental of this thing, and nothing more, for which the defendant must account. The contract provides for a complete transfer (with unimportant or temporary exceptions) by the plaintiffs to the defendant of their entire interest in the telephone business, and their abandonment of the business in all its branches. The plaintiffs "agree to withdraw from the manufacture, rental, and use of telephones." They grant to the defendant an exclusive license of their telephone patents, and agree to give it the benefit of any further inventions used in connection with telephones which they may acquire. The telephones put out by the plaintiffs and all telephone exchanges become the property of the defendant. The contract contemplates that the defendant shall lease all telephones put out for use in the United States, and sell all telephones which are exported. It expressly provides that the use of telephones in district or exchange systems, or to connect district or exchange systems, shall "remain exclusively" with the defendant. From the scheme of the contract it is manifest that it creates no partnership or joint estate between the parties. Such a plan had been suggested and abandoned. Nor does it create a trust estate to be managed by the defendant. The entire telephone monopoly and business become the absolute property of the defendant. The plaintiffs are entitled to no accounting concerning

the profits of the business. They are simply entitled to an account of the number of telephone instruments leased in the United States or sold for export; and they are to be paid, in quarterly payments, 20 per cent. of the annual rentals on telephones leased at home and 20 per cent. of the manufacturer's profits on telephones sold abroad. The monopoly profits on telephones sold for export are expressly excepted in the contract.

As the plaintiffs rely upon the "fundamental covenant" contained in the first section of article 1, and especially on the words "rentals or royalties," it is important to point out what this provision means in the contract. It provides that the defendant shall pay "a royalty or bonus of twenty per cent. of all rentals or royalties actually received or rated as paid in accordance with the provisions of this contract from licenses or leases for speaking telephones (exclusive of call bells, batteries, wires, and other appliances, or services furnished or performed)." It then declares that the "rentals or royalties" shall be ascertained by deducting from the gross rental or royalty received or rated "the commissions and allowances herein provided for." To ascertain the meaning of this provision in this contract, and the accounting called for under it, it is only necessary to point out: First, the contract meaning of "telephone"; second, the contract meaning of "rentals or royalties actually received or rated as paid" "from licenses or leases for speaking telephones"; third, the contract meaning of "commissions or allowances." If the contract makes the meaning of these words or phrases clear and unmistakable, no doubt can arise as to its true interpretation.

First. Article 1 excludes from the contract meaning of telephones "call bells, batteries, wires, and other appliances, and services furnished or performed." The thing which each license transfers for the use of the licensee is the instrument used by a party in speaking or listening, and not the combination of apparatus and appliances by which persons remote from each other talk together. This is made certain by section 1 of article 2, which declares that "the word 'telephone,' as used in this contract, refers to an instrument for electrically transmitting or receiving articulate speech, and is understood to mean either a transmitting instrument incapable of use as a receiver, a receiving instrument incapable of use as a transmitter, or an instrument capable of being used both as a transmitter and receiver."

Second. Article 2 defines the meaning of "rentals or royalties actually received or rated as paid." It begins: "Concerning the sum which is to be taken as the gross rental or royalty for the purposes of the preceding article." After giving the definition of "telephone" it proceeds: "(2) Ten dollars per annum for each telephone where only one is used at a terminal or station, and fifteen dollars per annum for a pair of telephones composed of an instrument used for sending and another instrument used for receiving, used at one terminal or station, are recognized as the present standard rates of gross rentals or royalties." The contract meaning of "rentals or royalties" is thus defined as the standard annual rentals which had always been known in the telephone business. Section 3 of

the same article then explains what is meant by rentals or royalties "rated as paid." The defendant might directly own telephone lines or exchanges, or, through auxiliary corporations or otherwise, might be indirectly interested therein, and in such cases might not license or lease the telephones employed on such lines or exchanges, or might not actually receive any rentals or royalties therefrom. It was therefore stipulated that such telephones should be "rated" as paying at the regular standard rates. This was also in accordance with the established course of business. The important question in the case is the meaning of "rentals or royalties" in article 1, and, without specially referring to all the provisions of the contract which help to show what sums these words were intended to cover, I shall here adopt, substantially, the analysis of the defendant's counsel as an accurate statement: "Rentals or royalties" in this contract are sums accruing "from licenses or leases for speaking telephones," according to an existing course of business recognized and referred to in the contract; sums which, according to such course of business and by the explicit provisions of section 2, are to accrue annually; sums for which there are "present standard rates"; sums fixed in accordance with such "present standard rates" at $10 per annum for a single telephone, and $15 for a pair; sums which might be larger at the defendant's pleasure, but smaller only with the plaintiffs' consent or after arbitration; sums to be "rated" as paid, when, by reason of the defendant's interest in a license or lease, they are not actually received; sums which may be lower than the standard rates in the cases of certain exceptional classes of telephones particularly described; sums reducible at the defendant's pleasure after the expiration of certain patents, unless the defendant's monopoly of speaking telephones is preserved through other patents; sums of which (with any commissions and allowances paid or allowed) the defendant is to keep and render proper accounts.

Third. By article 3, "commissions and allowances" on telephones are declared to be 30 per cent. in some cases, 25 per cent. in other cases, or amounts actually paid, not to exceed 40 per cent. Near the end of the contract we find article 18, which makes certain the scope and nature of the accounting. It declares that the defendant shall keep in regular books "accounts of the number of telephones manufactured, licensed, and put out for use in the United States, and also of the rentals received and commissions or allowances paid or allowed as herein provided, and of the number manufactured and sold in foreign countries, and the amount received therefor." The accounts shall be open for inspection quarterly, and all accounts shall be settled quarterly.

Taking the contract as a whole, and without the aid of extrinsic evidence, the intention of the parties, the basis and plan of the agreement, and the nature of the accounting seem clear, unmistakable, and certain. As the telephone business was then conducted, it is doubtful if any substantial controversy could have arisen as to the meaning of the written instrument. And the real question in this case, as it seems to me, is whether the court will now adopt a construction of the contract at variance with its plain meaning,

because the defendant has since changed its course of business in one important respect, and has undertaken to realize its share of exchange profits through the form of a perpetual exclusive license. Should not the court look to the substance rather than the form? Should it seek to give effect to the form unless it comes within the provisions of the contract? If the meaning of "rentals or royalties" is fixed in the contract, the meaning remains unchanged, and the new method adopted in its license contracts becomes merely the form in which the defendant undertook to do a certain thing. That it might have done the same thing in another way cannot be disputed. And it may be observed in this connection that the amount of profits, whether great or small, coming to the defendant by reason of making this change in the form of its licenses, is of no consequence. Such profits are outside of any obligation or accounting imposed upon the defendant by the contract.

The plaintiffs' main argument is based upon the hypothesis that we are to interpret the first section of article 1 as if it stood alone, and ignore the following provisions of the contract, as well as the recognized course of business, although in this section we find the significant words "rated as paid," which immediately direct attention to the primary principle on which the accounting rests. Upon this assumption the argument is forcible. There are also some branches of their argument which cannot be controverted, but which are inapplicable to the contract in suit. It is true that the only consideration given for this stock was perpetual exclusive licenses for certain localities, and that, leaving out the other provisions of the contract, this stock might fairly be considered as "rentals or royalties actually received" "for speaking telephones." But that is not this case. In the case presented we must be governed by the contract definition of "rentals or royalties" which follows article 1, made doubly clear by the previous course of business as carried on by both the plaintiffs and defendant. The plaintiffs were not to receive 20 per cent. of "rentals or royalties" from licenses, considered as a general proposition apart from the other provisions of the contract, but they were to receive 20 per cent. of the "rentals or royalties" contemplated by the contract, and understood by the parties at the time it was made. It is also said that "rentals or royalties" include the entire profits of the combined patents; but this is a direct contradiction of the whole scheme of the contract and of its provisions. The plaintiffs were not to share in the general profits of the defendant's monopoly or business. Whether those profits were due to the combined patents or not has nothing to do with the accounting called for by the contract. The plaintiffs were entitled to 20 per cent. of "all rentals or royalties" defined by the contract as the standard annual rentals of certain instruments called "speaking telephones." As to what patents are embodied in these instruments, to what particular use these instruments are put, or what profits the defendant may receive from such use, the plaintiffs have no concern. The provisions in the contract respecting the use of the telephone in exchanges or otherwise are simply the means and regulations employed to subject every telephone instrument

leased by the defendant to the payment of a standard annual rental.

It is true that the license contracts of the defendant made prior to the contract in suit were exclusive contracts to rent and use telephones for particular localities, and that the license contracts made subsequent to the contract in suit, and for which stock was received in addition to annual rentals, were exclusive licenses to rent and use telephones, and that the only difference between the two classes of contracts is that the former were for short terms, with the privilege of taking the plant at cost upon their termination, and the latter were permanent or perpetual licenses. But this circumstance does not solve the question at issue in the plaintiffs' favor, because its solution does not depend upon the form of the license, but upon the meaning of "rentals or royalties" in the contract in suit. Further, we are to inquire, in this connection, the purpose of the defendant in changing the form of its license. By this change the defendant considered it was selling its exclusive right to carry on the exchange business, which was its own property under the contract. Instead of carrying on this business itself and taking all the profits, which it had the right to do under the contract, it adopted the method of selling this privilege for a consideration, in the form of stock in the licensee's company, by the grant of a perpetual exclusive license.

Admitting that the right of the defendant to authorize others to do an exclusive exchange business came from the combined patents secured by the contract of November 10, 1879, still that contract confers no right upon the plaintiffs to a share in the profits of the combined patents further than 20 per cent. of the standard rentals of telephone instruments. The contract says nothing about the combined patents, or the results of the combined patents, or rights growing out of the use of the combined patents, or the profits of the combined patents. It deals with the standard rental of a thing termed a "speaking telephone," and it leaves the rest of the telephone business to the defendant. Again, it is not denied that the defendant, by selling the perpetual exclusive right to an exchange business, might have increased the "rentals or royalties" instead of taking stock in the licensed companies, but it was under no obligation so to do, because the exchange business was its own property, and was known and recognized as something distinct from rentals of telephones. If the exchange business belonged to the defendant, and it had the right to carry it on and receive its profits, only accounting to the plaintiffs for a share of the standard rentals of the telephones used therein, it cannot be said that because the defendant sells this right to others, by making licenses permanent as well as exclusive, it thereby converts the profits received into "rentals or royalties," within the meaning of the contract. Such a construction cannot be adopted without doing violence to the plain intention of the parties as expressed in the contract.

Importance is attached to the circumstance that "royalties" is added to the word "rentals" in the contract. But this has no material significance—First, because the meaning of "rentals or royalties" is defined in the contract; second, because, in dealing with patent rights, "royalty" is perhaps a more common and better term

than "rental"; third, because the two words are apparently used interchangeably in the contract; fourth, because to interpret "royalty" as meaning something more than "rental," and to include exchange profits, would be to overturn the basis upon which these parties were finally enabled to reach an agreement after months of negotiations. Attention is also called to the fact that the plaintiffs are to pay one-fifth of certain expenses. An inspection of this provision shows that such contribution is limited to patent rights, and does not extend to the general business. As the plaintiffs receive a one-fifth share of the rental of a patented instrument, the proposition seems readily to have been agreed to by them to pay their proportional part of the expenses incident to investigating, prosecuting, and defending "rights" pertaining to telephones.

There are some general considerations which the plaintiffs urge should have some weight in the determination of the question presented. Reference is made to the large profits coming to the defendant from the adoption after the contract of a comparatively new method respecting its leases, and the relatively small amount received by the plaintiffs. It is also said that, in justice and equity, the defendant should have increased the standard rentals by the amount of this stock, because of the contribution made by the plaintiffs to the combined patents,—the source of all profits. But these and other like considerations cannot lead the court to place an interpretation upon a contract which is repugnant to its clear and plain provisions.

With respect to the general question of the inadequacy of the consideration received by the plaintiffs under the contract as now interpreted, it is well to bear in mind that the original Bell patent was the primary patent which lies at the foundation of the telephone business, and that before the contract was made the counsel for the plaintiffs had advised his clients that "Bell was the first inventor of the telephone." Exceptions overruled, and the master's report confirmed.

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## AHERN v. NEWTON & B. ST. RY. CO.

(Circuit Court, D. Massachusetts. December 13, 1900.)

No. 1,435.

PRELIMINARY INJUNCTIONS—RESTRAINING ENFORCEMENT OF STATUTE.

A preliminary injunction will not be granted to restrain the enforcement of a statute regulating fares on street railroads at suit of a stockholder in such a company, notwithstanding there is a serious doubt of the constitutionality of the act, where it is not shown that either the company or its stockholders will suffer irreparable injury, or what amount of loss they will sustain, by a compliance with the act until final hearing.

In Equity. On motion for preliminary injunction.

Proctor & Warren, for complainant.

Powers, Hall & Jones, for defendant.

Hosea M. Knowlton, Atty. Gen., for the State.

COLT, Circuit Judge. The plaintiff has not shown that either the stockholders or the railway corporation will suffer irreparable injury before a final hearing can be had in this case. The act in question requires street-railway companies to transport scholars of the public schools to and from the school houses and their homes at one-half the regular fare charged other passengers. There is no evidence as to the amount of injury which the railway company suffers, or is likely to suffer, from a compliance with this law. This is a sufficient reason for refusing, at this stage of the case, a preliminary injunction.

Upon its face, the statute seems open to the objection of unreasonably reducing the rates charged by railroad companies, and to the further objection of discriminating in favor of a particular class in the community. An act open to either of these objections has been held by the supreme court to be in violation of the fourteenth amendment to the constitution of the United States. Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Railway Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Railway Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. Notwithstanding I have grave doubts of the constitutionality of the act, as an important constitutional question is raised, and as the plaintiff has not clearly brought himself within the rules respecting the granting of preliminary injunctions, I think the case should stand over for full argument upon final hearing. Motion for preliminary injunction denied.

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## INTERSTATE COMMERCE COMMISSION v. SOUTHERN RY. CO. et al.

### SAME v. SOUTHERN RY. CO.

(Circuit Court, N. D. Alabama, S. D. November 3, 1900.)

Nos. 85 and 86.

1. CARRIERS—REGULATION OF RATES—CIRCUMSTANCES AND CONDITIONS—COMPETITION.

Among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights, which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies, and the welfare of the community, which is to receive and consume the commodities, are to be considered. Case cited: Texas & P. Ry. Co. v. Interstate Commerce Commission, 16 Sup. Ct. 666, 162 U. S. 233, 234, 40 L. Ed. 940.

2. SAME.

That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of congress in the passage of the act to regulate commerce, has been held by many of the circuit courts. Case cited: Interstate Commerce Com-

mission v. Alabama Midland Ry. Co., 18 Sup. Ct. 50, 168 U. S. 164, 42 L. Ed. 424.

3. SAME.

**All competition, provided it possesses the attribute of producing a substantial and material effect upon traffic and rate making, is proper, under the statute, to be taken into consideration. The fact that the competition is wholly between carriers who are subject to the act is not material.**

4. SAME—PRACTICE.

A carrier defendant is entitled to have its defense considered in the first instance, at least, by the commission, upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. Case cited: Railroad Co. v. Behlmer, 20 Sup. Ct. 209, 175 U. S. 675, 676, 44 L. Ed. 319.

5. SAME.

Where the interstate commerce commission refuses to weigh the evidence in regard to competition, merely because the competition is wholly between carriers who are subject to the act, the proper practice in this court is to dismiss the petition filed to enforce the order of the commission, and remand the case to the commission, without prejudice to the right of any party in interest to apply to the commission to proceed, upon the evidence already introduced before it, or upon such evidence as it may allow to be introduced, to hear and determine the matter in controversy in conformity to law. Case cited: Railroad Co. v. Behlmer, 20 Sup. Ct. 209, 175 U. S. 676, 44 L. Ed. 320.

(Syllabus by the Court.)

L. A. Shaver, for complainant.
Ed. Baxter, for defendants.

BRUCE, District Judge. The controversy in case No. 85 was commenced on the 5th day of March, 1895, when E. D. McClelen, mayor of the city of Piedmont, Ala., and certain grocers and general merchants, doing business at said city, filed a petition before the interstate commerce commission, under the act to regulate commerce passed February 4, 1887, as amended, praying for an order commanding the defendants to said petition to cease and desist from doing certain acts, which said petitioners claimed to be in violation of the statute referred to. The parties complained of were the Southern Railway Company, the Pennsylvania Railroad Company, the Cumberland Valley Railroad Company, the Baltimore & Ohio Railroad Company, the Norfolk & Western Railroad Company, and F. J. Kimball and Henry Fink, receivers thereof, and the Baltimore, Chesapeake & Richmond Steamboat Company. It was averred that the defendants to said petition were common carriers, engaged in the interstate transportation of property by continuous carriage or shipment over various lines or routes, wholly by railroad, between points in the states of New York, Pennsylvania, Maryland, Virginia, and Tennessee and points in the state of Alabama, and as such common carriers were subject to the provisions of the statute above referred to.

The principal subject of complaint was that said defendants have established certain specified rates for the transportation from Baltimore, Md., to Piedmont and Anniston, Ala., on the first six classes of property covered by the Southern Railway & Steamship Association classification, which are lower to Anniston than to Piedmont; that rates via the defendants' lines from New York and Philadelphia are similar in relation to those applying from Baltimore to Pied-

mont and Anniston; that Piedmont is on the direct line to Anniston when traffic from either New York, Philadelphia, or Baltimore is routed via the Norfolk & Western Railroad and the Western Division of the Southern Railway; that said rates from New York, Philadelphia, and Baltimore to Piedmont "are unreasonable and unjust in comparison with the above described rates established and charged by defendants for carrying like traffic from New York, Baltimore, or Philadelphia to Anniston, and they subject complainants and others doing business at Piedmont, and in the surrounding territory, to unjust discrimination, and undue and unreasonable preference and disadvantage, in favor of, and to the undue preference of, merchants and dealers in and about Anniston; that such rates are greater for the transportation of like kind of property for the shorter distances from New York, Philadelphia, or Baltimore to Piedmont than for the longer distances over the same line, in the same direction, from New York, Philadelphia, or Baltimore to Anniston, and in violation of the provisions of section 4 of the act to regulate commerce."

A separate answer was filed by each of the defendants to said petition, except the Baltimore, Chesapeake & Richmond Steamboat Company, whose answer was included in that of the Southern Railway Company. The answer of the Southern Railway Company to said petition admits that it is a common carrier, engaged in interstate transportation of property by continuous carriage or shipment, wholly by rail. It admits having established rates for the transportation from Baltimore to Piedmont and Anniston, respectively, of property covered by the Southern Railway & Steamship Association classification. It denies that the rates to Piedmont are unreasonable and unjust in comparison with the rates to Anniston, and avers that rates charged from Baltimore and other Eastern cities are made as the result or sequence of active competition between the Georgia Pacific Railway, the East Tennessee, Virginia & Georgia Railway, and the Louisville & Nashville Railroad Company, with their several connections, prior to the 1st of August, 1894, when the East Tennessee, Virginia & Georgia road was purchased by the Southern Railway Company; that the rates from Baltimore and other Eastern cities to Piedmont are higher than from those points to Anniston, for the reason that the competition to Piedmont is not such as necessitates as low rates as to Anniston; that Piedmont is reached only by the East & West Railroad and the Southern Railway, and that at no time has the competition from the East to that point between the East & West Road and its own been as strong and active as between the lines centering at Anniston. It admits that the rates are greater for the transportation of like kind of property for the shorter distance from New York, Philadelphia, or Baltimore to Piedmont than for the longer distance over the same line, in the same direction, from said cities to Anniston; but it denies that this is a violation of the act to regulate commerce, because the circumstances and conditions are not substantially similar. The answer of the Norfolk & Western Railroad Company to said petition denies that the rates to Piedmont are unreasonable and unjust in comparison with the rates to Anniston.

The controversy in case No. 86 was also commenced on the 5th day of March, 1895, when the said E. D. McClelen, mayor as aforesaid, and said grocers and general merchants doing business at Piedmont, filed another petition before said commission, under said act to regulate commerce as amended, praying for an order commanding the defendants to said last-mentioned petition to cease and desist from doing certain other acts, which said petitioners claimed to be in violation of the statute referred to. The parties complained of were the Southern Railway Company, the Chattanooga, Rome & Columbus Railroad Company, and Eugene E. Jones, the receiver thereof, and the East & West Railroad Company. It was averred that the defendants to said petition were common carriers, engaged in the interstate transportation of property by continuous carriage or shipment over various lines or routes, wholly by railroad, between points in the state of Tennessee and points in the state of Alabama, and as such common carriers were subject to the provisions of the statute above referred to. The principal subject of complaint in said petition was that the roads of the defendants the Southern Railway Company and the Chattanooga, Rome & Columbus Railroad Company are used in the transportation of traffic from Chattanooga to both Piedmont and Anniston, the Southern Railway Company having a line of its own to both points, and the Chattanooga, Rome & Columbus Railroad Company having a route to Anniston in connection with the Southern Railway Company, and a route to Piedmont in connection with the East & West Railroad Company; that the distance from Chattanooga to Piedmont is 119 miles by the Southern Railway, and 122 miles by the line of the Chattanooga, Rome & Columbus and East & West Railroad Companies; that the distance from Chattanooga to Anniston is 143 miles by the Southern Railway, and 142 miles by the Chattanooga, Rome & Columbus Railroad and the Southern Railway; that traffic over the line of the Southern Railway between Chattanooga and Piedmont is carried over a less distance than traffic from Chattanooga to Anniston by any existing route between those points; that the defendants have established certain specified rates for the transportation from Chattanooga, Tenn., to Piedmont, Ala., and Anniston, Ala., of property embraced in the several classes of freight set forth in the Southern Railway & Steamship Association classification; that the said rates on classes 5, 6, A, B, C, D, E, H, and F are unreasonably and unjustly higher from Chattanooga to Piedmont than from Chattanooga to Anniston, and subject complainants and others doing business at Piedmont and in the surrounding territory to unjust discrimination and undue and unreasonable prejudice and disadvantage in favor of, and to the undue preference of, merchants and dealers in and about Anniston; that said rates are greater for the transportation, under substantially similar circumstances and conditions, of like kind of property by the defendant the Southern Railway Company for the shorter distance from Chattanooga to Piedmont than for the longer distance over the same line, in the same direction, from Chattanooga to Anniston, and in violation of the provisions of section 4 of the act to regulate commerce. Said petitions were heard together by the commission, and testi-

mony was taken before the commission on the foregoing issues. On June 6, 1896, the commission decided the cases, and filed a report and opinion, in which it sets forth its findings of fact and conclusions in reference to the issues involved in each of said cases.

In case No. 85 the commission issued an order requiring the defendants in that case to desist, on or before a date named, from charging any greater compensation in the aggregate for the transportation of freight articles from New York, in the state of New York, Philadelphia, in the state of Pennsylvania, or Baltimore, in the state of Maryland, for the shorter distance over their respective lines to Piedmont, in the state of Alabama, than for the longer distance over the same line, in the same direction, to Anniston, in the state of Alabama, the shorter being included within the longer distance. In case No. 86 the commission issued an order requiring the defendant the Southern Railway Company to desist, on or before a date named, from charging any greater compensation in the aggregate for the transportation of freight articles from Chattanooga, in the state of Tennessee, for the shorter distance, to Piedmont, in the state of Alabama, than for a longer distance over the same line, in the same direction, to Anniston, in the state of Alabama, the shorter being included within the longer distance. Said orders not having been obeyed, the commission filed separate petitions in this court to enforce compliance with said orders, respectively. The defendants to said last-mentioned petitions answered them, respectively, and traversed all matters of equity alleged against them. The two cases were heard together in this court. The testimony taken before the commission was used on the hearing in this court, and additional testimony was taken by each of the parties after the cases got to this court. The cases were argued orally and upon printed briefs. The questions which arise on these records involve the consideration of several provisions of the act to regulate commerce, referred to above.

It is conceded that the defendants in both cases in this court are common carriers, engaged in the transportation of interstate passengers and property wholly by railroad to Piedmont and Anniston, respectively, in the state of Alabama, and that as such common carriers, in respect to such transportation, they were and are subject to the provisions of said act. It is conceded that, when the cases were heard before the commission, the rates on freight from Baltimore, New York, Philadelphia, and Chattanooga, respectively, were lower to Anniston than to Piedmont on all of the classes. It is conceded that Anniston is a junction point of the Southern Railway and the Louisville & Nashville Railroad; that Piedmont is a junction point of the Southern Railway and the East & West Railroad; that Piedmont is on the direct line to Anniston, when traffic from New York, Philadelphia, or Baltimore is routed via the Norfolk & Western Railroad and the Southern Railway; and that Anniston is the more distant point by 15 miles, in a southwesterly direction, than Piedmont. It is conceded that the Southern Railway has a line of its own from Chattanooga to Piedmont, and that in shipments from Chattanooga, via the Southern Railway, Anniston is the more distant point by 15 miles. It is conceded that in both cases the shipments

to Piedmont and Anniston, respectively, are over the same lines, and in the same direction; that the shorter distance to Piedmont is included within the longer distance to Anniston; and that defendants charge a greater compensation in the aggregate for the shorter distance to Piedmont than for the longer distance to Anniston. In other words, it is conceded that both cases fall within the fourth section of the commerce act, provided the transportation in controversy is done under substantially similar circumstances and conditions to Piedmont as to Anniston.

The commission did not consider whether the rates to Piedmont and Anniston, respectively, were just and reasonable, because it deemed it unnecessary to do so. The reason for this conclusion was stated by the commission as follows:

"There is no charge in either complaint that the rates in question to Piedmont are excessive, or are unreasonable in themselves, but the complaint, in substance, is that they are unreasonable and unjust, as compared with the rates to Anniston, in that they give the latter city an undue preference or advantage, and subject the former to an undue prejudice or disadvantage, in territory in which they meet in active competition."

The commission did not consider whether the disparity in rates between Piedmont and Anniston constituted an unjust discrimination against Piedmont under the second section, or an undue preference of Anniston under the third section, of the act. The reason for this conclusion was stated by the commission as follows:

"The exaction, without lawful excuse, of a greater compensation, in the aggregate, for the shorter than for the longer haul, over the same line, in the same direction, the shorter being included in the longer, which is forbidden by section 4 of the act to regulate commerce, is only a form of unjust discrimination or undue preference to which, it seems, congress desired to call particular attention, because of its prevalence in certain sections of the country. Both complaints allege violation of this provision of the law, and the proof, so far as rates are concerned, relates to this species of discrimination."

When it approached the fourth section of the act, the commission declined to weigh the evidence before it as to the existence of competition at Anniston, except so far as to enable it to determine that the evidence established that the competition at Anniston relied upon by the carriers was alone engendered by the presence there of other carriers, who were subject to the commerce law. Upon this point the commission said:

"The defendants claim that the greater charges for the shorter distances to Piedmont, as shown in these cases, are justified by the competition of another railroad carrier, subject to the act to regulate commerce. Under the construction by the commission of the fourth section, or 'long and short haul clause,' of the statute, in its former rulings, this claim cannot be admitted, except upon application to the commission for exemption from the rule, because the competition under which the defendants would justify the lower rate to Anniston, the longer haul, than to Piedmont, the shorter haul, arises with a competitor, the Louisville & Nashville Railroad Company, which is an interstate carrier by rail, and amenable to the act to regulate commerce. The element of competition, and all matters relative thereto, may be presented to the commission for determination upon application of defendants for relief from the operation of the fourth section of the act, under the proviso to said act. The decision herein is in no wise to be construed to pre-

clude the defendant from making such application under the provisions of the act."

In the case of Railroad Co. v. Behlmer, decided by the supreme court since these cases were argued in this court, the supreme court said:

"This determination of the commission to restrict its examination of the evidence solely to the extent necessary to enable it to ascertain the source and inherent character, and not the materiality, and substantiality, of the competition, and therefore to exclude wholly from view the latter considerations, was predicated on the conclusion that, as a matter of law, no competition, however great might be its influence on carriage and rate making, could be by the carrier taken into consideration, of his own motion, in determining whether a lesser sum would be charged for the longer than for the shorter haul, if such competition arose from the sources, or was wholly of the character, which it was found by the commission the proof established the competition relied on to be. That is to say, the commission concluded, as a matter of law, that it was unnecessary to weigh the facts for the purpose of determining the materiality and extent of the competition, because, however strongly the proof might demonstrate its potency upon the traffic and rates, nevertheless it would be without efficacy to give rise to such substantial dissimilarity as would justify the carrier, of his own motion, to charge a lesser rate for the longer than for the shorter haul. While this was held to be the law, at the same time it was decided that the character of competition which, from its very nature, was decided to be inadequate to create such legal dissimilarity in the conditions as to justify the carrier, of his own motion, charging a lesser sum for the longer than for the shorter haul, nevertheless might authorize the commission to sanction the lesser charge if the facts were presented to the commission, and its previous sanction to making such charge was obtained. Therefore the right of the carrier to prefer to the commission a request for authority to make the charge complained of, predicated upon the very grounds which were held insufficient to permit the carrier to do so on his own motion, was fully reserved. The ruling was, then, this: That some kinds of competition, however material and substantial in their operation, were yet inadequate, for the purpose of creating dissimilarity in circumstance and condition, and to justify the independent action of the carrier, although the identical conditions of competition might be sufficient to produce such dissimilarity as to justify the commission, on application made to it for such purpose, to authorize the carrier to charge less for a longer than was exacted for a shorter distance." Railroad Co. v. Behlmer, 175 U. S. 654, 655, 20 Sup. Ct. 211, 44 L. Ed. 311.

The construction of the fourth section of the act to regulate commerce, and the question whether competition which materially operated on traffic and rates was a proper subject to be considered by a carrier in charging a greater rate for the shorter than was asked for the longer distance, on account of the dissimilarity of circumstance and condition produced by such competition, was, after elaborate argument and great consideration, passed upon by the supreme court in Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 671, 40 L. Ed. 943. In that case the court said that:

"Among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights, which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered." 162 U. S. 233, 234, 16 Sup. Ct. 671, 40 L. Ed. 943.

The fourth section was again construed by the supreme court in Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 18 Sup. Ct. 48, 42 L. Ed. 422. In that case the court said:

"That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of congress in the passage of the act to regulate commerce, has been held by many of the circuit courts." 168 U. S. 164, 18 Sup. Ct. 50, 42 L. Ed. 424.

In the same case the court also said:

"We are unable to suppose that congress intended by the fourth section and the proviso thereto to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the commission shall authorize them so to do." 168 U. S. 169, 18 Sup. Ct. 50, 42 L. Ed. 424.

The fourth section was again construed by the supreme court in Railroad Co. v. Behlmer, 175 U. S. 648, 20 Sup. Ct. 216, 44 L. Ed. 317; and the court, after referring to its decision in the two last preceding cases, said:

"It is then settled that the construction given in this cause by the interstate commerce commission and the circuit court of appeals to the fourth section of the act to regulate commerce was erroneous, and hence that both the interstate commerce commission and the court of appeals mistakenly considered, as a matter of law, that competition, however material, arising from carriers who are subject to the act to regulate commerce, could not be taken into consideration." 175 U. S. 669, 20 Sup. Ct. 217, 44 L. Ed. 317.

In the same case the court further said:

"What was decided in the previous cases was that under the fourth section of the act substantial competition, which materially affected transportation and rates, might, under the statute, be competent to produce dissimilarity of circumstances and conditions, to be taken into consideration by the carriers in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind of competition could be considered, and not another kind, but that all competition, provided it possessed the attribute of producing a substantial and material effect upon traffic and rate making, was proper, under the statute, to be taken into consideration." 175 U. S. 670, 671, 20 Sup. Ct. 219, 44 L. Ed. 319.

In the same case the court quoted from its opinion in Texas & P. Ry. Co. v. Interstate Commerce Commission, as follows:

"The defendant is entitled to have its defense considered in the first instance, at least, by the commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded." 175 U. S. 675, 676, 20 Sup. Ct. 219, 44 L. Ed. 320.

In the case last cited (i. e. the Behlmer Case) the supreme court, while holding that the commission had erred in failing to consider and give weight to the proof in the record affecting the question before it, refused to weigh the evidence, as a matter of first impression, and remanded the case to the circuit court, with instructions to modify its decree setting aside the order of the commission with costs, by providing that the dismissal be without prejudice to the right of any party in interest to apply to the commission to proceed upon evidence already introduced before it, or upon such evidence which it might allow to be introduced, to hear and determine the matter of controversy in conformity to law. 175 U. S. 676, 20 Sup. Ct. 219, 44 L. Ed. 320.

It seems that the cases now before this court clearly fall within the rule laid down by the supreme court in the Behlmer Case, and that the petition in each of said cases should be dismissed, with costs, but that such dismissal should be without prejudice to the right of any party in interest to apply to the commission to proceed upon the evidence already introduced before it, or upon such evidence and any additional evidence which it may allow to be introduced, to hear and determine the matter of controversy in conformity to law; and orders will be prepared accordingly.

## FISHER v. LEFFERTS.

(Circuit Court, E. D. Pennsylvania. January 18, 1901.)

No. 301.

1. JUDICIAL SALE—RULE TO SET ASIDE—COLLATERAL ATTACK.
Where a receiver of a national bank obtains a judgment in the circuit court, and afterwards sells that and other judgments under an order of the circuit court, and marks the judgment to the use of the purchaser, who has execution issued thereon, a rule to set aside the sale, which is in form an attack on the decree ordering such sale, cannot be maintained by the judgment debtor in the action in which the judgment was rendered, since it is a collateral attack on the order of sale.

2. SAME.
Where a receiver of a national bank obtains a judgment, and sells it, and marks it to the use of the purchaser, by order of the circuit court, the judgment debtor, who confessedly owes the money, cannot maintain a rule to set the sale aside, since the order of sale and execution will protect him in paying the money to the use plaintiff.

Rule to Set Aside Sale of Judgment.

George D. Codman, for plaintiff.
John Lefferts, for defendant.

J. B. McPHERSON, District Judge. This case arises upon the following facts: In May, 1891, B. F. Fisher, the legal plaintiff in this suit, was appointed receiver of the Spring Garden National Bank, and entered upon the duties of his appointment. Not long afterwards an assessment was made by the comptroller of the currency to enforce the additional liability of the shareholders under the act of congress, and this suit was brought to recover the assessment due from the defendant. A judgment was recovered in June, 1892, for the full amount of the claim, but, for some reason that does not appear, it was never paid. In April, 1899, the receiver presented a petition to the circuit court, asking leave to sell this judgment, with many other uncollected claims, such as notes, judgments, stocks, and bonds belonging to the bank, and the court thereupon entered a decree giving the power to sell. Sale was accordingly made, this judgment being included, and the receiver's return was duly confirmed by the court. The judgment was marked by the receiver to the use of the purchaser, Alexander Balfour, and not long afterwards the use plaintiff issued execution and levied upon the defendant's property.

This rule was then obtained to set aside the sale that had been made under the decree of the circuit court, the proceedings upon which the decree is founded appearing of record at No. 25, April sessions, 1899.

There are two reasons why this rule must be discharged. In the first place, in its present form, the petition is a collateral attack upon the decree ordering the sale, and therefore cannot be entertained. The proper procedure would have been to present a petition to the circuit court in the case wherein the decree was made, thus directly attacking the decree, and making the receiver a party to the proceeding. He has had no notice of this rule, and no opportunity to defend the validity of a decree that was made upon his application.

But, even if the petition were before the court in the proper proceeding, I should dismiss it because, in my opinion, the petitioner has no standing to raise the question whether or not the sale was good. That the sale was invalid, he cites In re Earle (C. C.) 96 Fed. 678, as a decisive authority. But the first point to be considered is his own relation to the controversy. Confessedly, he owes the money to some one, and I think it is no affair of his whether the legal plaintiff or the use plaintiff should receive it. The defendant is no doubt interested to see that he is protected in making payment, but it need scarcely be said that if he pays in obedience to an execution, and in accordance with an unreversed decree of a court of record, he is in no danger of being obliged to pay a second time. Whether the use plaintiff is entitled to retain the money against a demand by the receiver does not concern the defendant.

The rule is discharged, the petition dismissed, and the order of July 27, 1900, staying execution, is set aside.

## SADLER v. PEOPLES.

(Circuit Court, E. D. Pennsylvania. January 2, 1901.)

No. 33.

TRIAL—QUESTIONS FOR COURT—CONSTRUCTION OF ORDINANCE.

Where an ordinance introduced in evidence, and which has a bearing on a question in issue, is not clear in its meaning, it is error to submit the case to the jury without a construction of such ordinance by the court.

On Motion for New Trial.

C. J. Hepburn, for plaintiff.

J. Martin, for defendant.

DALLAS, Circuit Judge. Several questions of much interest have been raised in this case, and have been very ably argued by counsel. I, however, do not deem it necessary at this time to refer to all of them, or to discuss any of them at length. For the present purpose, it will suffice to state the conclusions I have reached on the points upon which the defendant particularly relies in support of his motion for new trial.

1. I am still of the opinion which I expressed upon the trial respecting the plaintiff's right to recover for the loss of his bargain. I think that, under the circumstances of this case, he would be, upon competent evidence of the amount of such loss, entitled to compensation therefor. But I instructed the jury, in effect, that, in addition thereto, he should also be awarded the amount of the expenses he incurred in having the title examined, etc. In doing this I inadvertently fell into an error which injuriously affected the defendant, and which I think should be corrected, notwithstanding the fact that my attention was not called to the matter at the time, by exception or otherwise.

2. I doubted the sufficiency of the evidence respecting the plaintiff's qualification to testify as an expert, but solved that doubt by allowing him to so testify. I now think that the court's discretion in this regard was not judiciously exercised.

3. Error was committed in submitting to the jury, without construction by the court, the ordinance of the borough of Yardley, "adopted by council, February 10, 1896." The meaning of this ordinance is, as to the point in question, not perfectly clear, but, as I now understand it, its effect was to grant to E. W. Maloney & Co. the privilege of placing poles and stringing wires, and to operate the electric plant to which it refers, for a term of five years; provided that, if the plant should cease to be operated within that term, then and thereupon the grant would become null and void. The defendant's motion for a new trial is granted.

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## CHOATE v. HOOGSTRAAT et al.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1901.)

No. 662.

1. PAYMENT—NECESSITY OF PLEADING.

Evidence of payment is only admissible under a plea of payment which should be specific as to the amount paid. An allegation in an answer that defendant turned over to plaintiffs certain lumber, of a stated value, which was accepted in settlement and in full accord and satisfaction of another's debt, is not a plea of payment which authorizes the defendant to go into a general accounting, and to prove the value of the lumber so turned over, in order to show that the debt had been paid independently of the alleged accord and satisfaction.

2. TRUST—CONTRACT CREATING—LIABILITY OF TRUSTEE.

Plaintiffs had manufactured a quantity of lumber for a lumber company under a contract that it should be delivered for shipment, as required by the company. Being behind in its payments, plaintiffs refused to make further deliveries without payment, and defendant entered into a contract by which he agreed to take charge of future deliveries, and pay the proceeds thereof to plaintiffs to apply on their claim. *Held*, that he occupied the position of a trustee under such agreement, and could not sell lumber delivered to him thereunder to a corporation of which he was president, and refuse to account for the proceeds on the ground that such corporation held some claim against plaintiffs or their debtor.

3. STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER—CONSIDERATION.

A letter written by defendant to plaintiffs, in which he agreed to become responsible for the payment of a sum due plaintiffs on certain

lumber sold by them to a third party if plaintiffs would deliver such lumber to the purchaser to enable him to fill his contracts, expresses a sufficient consideration to take it out of the statute of frauds of Wisconsin, which requires the writing to express a consideration.

4. SAME—ORIGINAL OR COLLATERAL PROMISE.

Plaintiffs had manufactured a quantity of lumber for a lumber company, a portion of which still remained in their possession. A part of the price of such portion had been paid, and, the remainder being past due, plaintiffs refused to make any further deliveries to the company for shipment until it was paid. Defendant, who was president of a corporation which held an unrecorded mortgage on the lumber, given by the company, and also a member of a firm which was indorser on notes of the company, stated to plaintiffs orally that, if they would deliver the lumber, he would "go good" for what the company was shipping until he gave them further notice. *Held*, that under the Wisconsin rule that, "where the party promising has for his object some benefit and advantage accruing to himself, and on that consideration makes the promise," a finding by the jury, under instructions properly stating such rule, that defendant's promise was an original promise, which bound him to payment of the value of the lumber delivered in reliance thereon, would not be disturbed.

5. SAME—KNOWLEDGE OF PROMISE.

It is not essential to the validity of a promise to pay, which is in fact an original promise, based on a consideration of benefit to the promisor, although the payment will incidentally discharge the debt of another, that the promisee should have knowledge of the real consideration when the promise is made and acted upon.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

On October 17, 1893, the defendants in error, who were the plaintiffs below, and the firm of Brown & Robbins, contracted with the Fair Lumber Company, a corporation, by which the former sold to the latter, and agreed to manufacture for it, the lumber of certain specified grades contained in and to be manufactured from pine timber upon certain specified lands in the state of Michigan, at prices stated in the contract, namely, $10.50 per 1,000 feet for the lumber; the prices for the shingle and lath depending upon the grade specified. Four dollars per 1,000 feet was to be paid under the contract on the 5th day of each month for all lumber put in pile during the previous month, and the remaining $6.50 per 1,000 feet was to be paid on the 5th day of each month for all the lumber loaded and shipped during the preceding month; the lath and shingle shipped during that period to be paid for in full at that date. The manufacture of the lumber was to be completed on or before April 1, 1894, and the Fair Lumber Company agreed to make final settlement for the lumber, lath, and shingle manufactured under the contract on November 1, 1894. Brown & Robbins, on October 25, 1894, transferred their interest in the contract to the defendants in error, who thus became the sole owners of the interest of the parties of the first part therein. The lumber was manufactured and piled, as provided, on or before April 1, 1894, and prior to November 1, 1894, the Fair Lumber Company had paid the $4 per 1,000 feet specified in the contract. The lumber was to be and was piled in the yards of Brown & Robbins, at Robbins, Mich., and was to be and to remain in their possession, and to be delivered upon demand of the Fair Lumber Company at its planing mill, or upon cars for shipment. The lumber was to be insured by the Fair Lumber Company, loss payable to the other parties to the contract as their interest should appear, and the policies delivered to them. The contract provided further: "If, when said stock is reduced to one million feet, or thereabouts, and the parties of the first part feel themselves insecure, they may demand security before said lumber is shipped; or, in case of financial failure of said second party, the lumber remaining unshipped shall revert to said first party as their own to the amount in full of their claim." On November 9, 1894, the Fair Lumber

Company was owing about $4,000 for lumber delivered to it in October preceding and about $27,600 for the lumber then in the possession of the defendants in error. The latter had forbidden further shipments of lumber without payment or security for the debt due them upon the lumber. Thereupon, on that day, the Fair Lumber Company settled for the balance due for the October shipments, partly in cash and partly by acceptances, which were afterwards paid; and with respect to the balance of $27,600 the president of the Fair Lumber Company at Robbins, Mich., suggested to the defendants in error that they should all go to Oshkosh, where Mr. Leander Choate, the plaintiff in error, resided, and make some arrangement by which shipments would be permitted, and the delivery of the lumber continued upon Mr. Choate's becoming security for the Fair Lumber Company. The parties accordingly proceeded to Oshkosh, and met with Mr. Choate. The latter was president of the Oshkosh Log & Lumber Company, which was a creditor of the Fair Lumber Company to the amount of from ten to twelve thousand dollars. He was also a member of the firm of Bray & Choate, which firm was indorser upon the paper of the Fair Lumber Company to the amount of from six to seven thousand dollars. The Oshkosh Log & Lumber Company had also a bill of sale, never placed upon file, of the factory plank in the stock manufactured by the defendants in error. On September 13, 1894, the Fair Lumber Company had sold to the Williamson & Libbey Lumber Company, of Oshkosh, all of the factory plank in this stock of lumber, of which fact Choate had been informed prior to the interview of November 9, 1894. At this interview Mr. Choate declined to go security for the debt of the Fair Lumber Company, stating that Fair had misrepresented his indebtedness, and that the lumber company was owing him enough. Then, according to the testimony for the defendants in error, they said to him that, if he would not go security, they would stop Fair from shipping, to which he replied, "If you do, you will bust the poor fellow," and one of the defendants in error answered, "If we don't stop him, he will bust us," and that Mr. Choate replied that he was in a hurry to attend a funeral; that he had not made up his mind just then about going on this paper, but said, "I will write you, and until that time I will go good for what they are shipping." This part of the conversation was denied by Mr. Choate. The defendants in error claim that they, upon the faith of Mr. Choate's promise, permitted the Fair Lumber Company to ship the lumber until the 13th day of November, 1894, the date of a letter received from Mr. Choate. The amount of lumber so shipped, with interest, amounted to $1,922.72, part of the verdict in this cause. Mr. Choate testified, somewhat obscurely, that by the bill of sale, which was not produced, the Fair Lumber Company turned over to the Oshkosh Log & Lumber Company, of which he was president, the factory plank in the stock manufactured by the defendants in error; that he could not say that his company received all the proceeds of the factory plank shipped during November, but might have got a little something. On November 13, 1894, Mr. Choate wrote to the defendants in error the following letter:

"Gentlemen: I have just been talking with Mr. Fair, but have come to no settlement yet. I told him I should write you to that effect. He wanted me to write you that, if you would let him ship what few orders he had, he would stop shipping. It would hurt his trade if it should be reported that he had been stopped from shipping. I will become responsible for the $6.50, the amount of your claim on factory plank.

"Yours sincerely, Leander Choate."

The defendants in error claimed that they accepted the written agreement, and permitted shipments between the 14th and the 20th of November to the amount, with interest, of $839.08; also part of the verdict. On the 20th day of November an agreement in writing was perfected between all the parties, by which Fair agreed to transfer his stock and procure the election of Choate and Daly as directors of the Fair Lumber Company, and to place the general management of its business in the hands of Mr. Choate, who agreed to take the management and turn over to the defendants in error all moneys arising from the sale of the stock at Robbins as fast as received by him, until their

claim against the Fair Lumber Company was paid in full, if the moneys received from the sale of the stock should prove sufficient therefor. The defendants in error agreed to waive the strict terms of the contract of the 17th of October, 1893, and agreed that Mr. Choate should have the necessary time to realize from the stock of lumber, and that the time of the payment of the amount due them November 1, 1894, under the contract, should be extended, and payment should be made monthly for all lumber disposed of during the previous month, and the full amount of receipts for the lumber should go to them until their debt was satisfied. Under this latter arrangement Mr. Choate remitted to the defendants in error from time to time the proceeds of sales and shipments, except the sum of $243.59, for lumber sold by him to the Oshkosh Log & Lumber Company, claiming that that company refused to pay the amount under some claim of offset against the Fair Lumber Company, or the defendants in error. In May, 1895, Mr. Choate declined to act further under that contract, and turned over to the defendants in error the lumber then on hand. They received it from Choate, and afterwards sold it. The suit was brought to recover (1) upon the alleged oral promise of Choate of November 9, 1894, for the property claimed to have been delivered on the faith of that promise; (2) upon the written promise of November 13, 1894, for the property claimed to have been delivered under that promise; (3) to recover the sum of $243.59 under the written contract of November 20, 1894. The defendant below denied (1) the alleged promise of November 9, 1894, and also charged that such alleged agreement was void under the statute of frauds; (2) nonacceptance by the defendants in error of the promise contained in the letter of November 13, 1894, and a denial that it was ever acted upon, or that the writing expressed any consideration as required by the statute of frauds; (3) as to the sum of $243.59 for lumber sold by him to the Oshkosh Log & Lumber Company, he denies that he had received that amount from the company, and charges that the defendants in error here and the Fair Lumber Company were both indebted to the Oshkosh Log & Lumber Company in a sum in excess of such bill of lumber, and that that company retained the sum, and refused to pay the same. He lastly alleges "that after the making of the agreement of November 20, 1894, and about May 18, 1895, and in final settlement thereof, he turned back to the said plaintiffs, and they accepted, about $19,232.70 worth of lumber, then in the yards of the plaintiffs, in settlement and payment of their claim and demand against the Fair Lumber Company, and that the said lumber was by them accepted and retained by the said plaintiffs, and was in settlement and payment of all claims and demands due from the Fair Lumber Company to them; and that the said lumber was then and there reasonably worth the sum of $19,232.70, which was more than there was then due or owing on the contract between the plaintiffs and the Fair Lumber Company, and that the said contract and all demands and claims arising thereunder were thereby duly settled, and accord and satisfaction thereof had."

At the trial, evidence was taken pro and con upon the subject of the making of the alleged oral promise of November 9, 1894, of the acceptance of the written promise of November 13, 1894, and touching the transactions under the contract of November 20, 1894. The defendant sought to show the total shipments of lumber from the beginning of shipments under the contract down to and including the turning over of the balance of the lumber on May 18, 1895, which included shipments made by the defendant Choate, for the purpose of proving that the debt of the Fair Lumber Company to the defendants in error had been fully paid. This evidence was excluded by the court, and its ruling is the subject of an exception. The court charged the jury with respect to the item of $243.59 that it represented lumber sold by Mr. Choate under the contract of November 20, 1894, to the Oshkosh Log & Lumber Company, of which he (Mr. Choate) was president, and for which amount he had failed to respond to the plaintiffs below, alleging that the Oshkosh Log & Lumber Company refused to pay him that amount under claim of offset against the plaintiffs below, or the Fair Lumber Company; that Mr. Choate, with reference to that transaction, occupied the position of a trustee to the plaintiffs and that he had no right to withhold that amount. With reference to the alleged verbal promise of November 9th the court

charged as follows: "It is the law of this state, derived from ancient law in the statute of frauds, as it is called, that a promise made to answer for the debt, default, or miscarriage of another party is void, cannot be enforced, except it conform to the statute, be in writing, and express a consideration. Therefore this promise, or alleged promise, made on the 9th of November, gave the plaintiffs no right, if it was a mere guaranty,—a mere promise to answer for the debt of another. You will ascertain, gentlemen, whether any such promise was made in fact. Mr. Hoogstraat and Mr. Joyce testified that after their meeting in the office of the Fair Lumber Company, and while they were leaving the building, on some preliminary remarks by them that they would have to stop shipments, Mr. Choate said we would 'bust the boys,' or 'bust the Fair Lumber Company,' and they said, 'If we do not do it, it will bust us;' and that Mr. Choate then said, in substance, 'I will go good for the lumber they are shipping if you will let the shipments go on.' This was denied by the defendant. The plaintiffs must first establish by the preponderance of the testimony that such a promise was made. I think the only additional testimony was that of the bookkeeper, who was in the office only, so that substantially upon that point it is the testimony of Mr. Hoogstraat and Mr. Joyce on the one side and Mr. Choate on the other. Now the fact that there are two witnesses on the one side and but one on the other is not of itself necessarily the preponderance of the testimony. You have the right to consider the appearance of the witnesses, the reasonableness of the story, and all the circumstances, and determine for yourselves on the testimony which is the more credible testimony; and wherever you find the preponderance to be, you should determine accordingly by your verdict. If you find that the promise was not made, then, of course, you have nothing further to do with that question, and reject it from consideration. But, if you find the promise was made, then you must ascertain whether it is a promise within the prohibition of this statute of frauds; whether it is a promise to guaranty the amount,—to answer for the debt or default of another; and, if it is clearly such a promise, then it is of no effect, and entitled to no consideration. You are, however, to consider all the circumstances in this case for the purpose of ascertaining whether or not it is such a promise, for you are further instructed, gentlemen, that if you find from the preponderance of the evidence that the plaintiffs intended at the time of that promise on the 9th of November to prevent the Fair Lumber Company from shipping out lumber, and so informed the defendant, and then, in order to induce the plaintiffs to permit such shipments, and by reason of an interest in having the shipments go on, he promised to 'go good' for what the Fair Lumber Company were shipping; and you further believe that the plaintiffs understood the promise to be so intended and made because of an interest, and not gratuitously, and that the plaintiffs, relying on such promise, took no further action to prevent such shipments, but permitted the same to go on,—such promise by the defendant, under the undisputed facts in this case of his relations to the Oshkosh Log & Lumber Company and the Fair Lumber Company, would be an original undertaking on his part, and valid in the law as an original promise, and not a promise to answer for the debt, default, or miscarriage of another." The court, upon this question, further instructed the jury: "The fact that Mr. Choate had an interest in the lumber, or in the dealings of the Fair Lumber Company, through a bill of sale or chattel mortgage, whether it was actually put to use or not, and the fact that he was interested as a creditor to a large amount, would make a foundation for such a promise as an original undertaking; but these facts alone would not make a promise good, because it must be understood by these plaintiffs in taking the promise that it was so made because of an interest he had. They must understand it is not made simply out of a desire to help the Fair Lumber Company. If so made, or if so understood by the parties, that Mr. Choate had an actual interest in obtaining the shipments to be made, and that he made the promise on the strength of that, and for the purpose of causing the shipments to be made, then it is an original undertaking, and does not come within the statute. * * * That is the test upon which you will determine whether it is an original undertaking or a mere promise to answer for the debt of another." With respect to the claim under the letter of

November 13th and its acceptance, the court charged the jury as follows: "You are instructed that this letter contained a sufficient statement of the consideration within the requirements of law to make it a valid promise; and if you find that the plaintiffs intended to accept and did accept the promise contained in this letter by their failure to forbid shipments in reliance thereon, and that the defendant understood and had reason to understand from the conduct of the plaintiffs that such promise was so accepted and acted upon by them for the shipments of factory plank from November 14th to November 20th, inclusive, you should find for the plaintiffs for the amount so shipped. In determining this question of acceptance, you should take into consideration the conduct of the parties throughout. You should take into consideration, for such value as you may find it to afford, the fact that the plaintiffs, immediately after the receipt of the letter, or soon after the receipt of the letter, went with their attorney to see Mr. Fair, the president of the Fair Lumber Company, and followed that up by going to Oshkosh, and there entered into the agreement of November 20th, by which the defendant was thereafter to take charge of the business of the Fair Lumber Company. Consider all those circumstances in connection with the situation of the plaintiffs; that meantime they had made no change in their conduct in relation to the shipments of lumber, but permitted the shipments to go on; and ascertain what was the real understanding of the parties,—whether the letter of November 13th was accepted or not, and so understood by both parties. Unless it was accepted, and so understood, or unless the parties had reason to understand that it was accepted, then it is of no avail to the plaintiffs in this case. There must be an acceptance, as well as a making of the promise." To reverse a verdict in favor of the plaintiffs below, this writ of error is sued out, the questions considered being properly assigned for error.

A. E. Thompson, for plaintiff in error.

W. H. Timlin, for defendants in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after the foregoing statement, delivered the opinion of the court.

We are of opinion that the court below properly excluded the evidence offered for the purpose of showing that the debt of the Fair Lumber Company to the defendants in error had been fully paid, and this because no plea of payment had been made. The plea was one of accord and satisfaction,—that the defendants in error in May, 1895, in final settlement of the agreement of November 20, 1894, received from the plaintiff in error and accepted $19,232.70 worth of lumber in settlement and payment of their claim and demand against the Fair Lumber Company. The evidence failed to sustain this plea, the evidence of Mr. Choate showing no accord and satisfaction, but that the lumber remaining unsold in May, 1895, was merely turned over to the defendants in error; nothing being said about price, or of its being in satisfaction of any claim. The attempt was made by an estimate of the value of the lumber so turned over and by means of a general accounting to show that the debt of the Fair Lumber Company to the defendants in error had been paid, but, in the absence of any plea to that effect, the evidence was clearly improper. Such a plea should be specific as to the amount paid. Shipman v. State, 43 Wis. 381. Here the receiving of the lumber from Choate, the trustee, because he refused to further continue in the sale of it, with no agreement as to its value, or the application of its value to the debt of the Fair Lumber Company, did not make

the value of it payment to that amount upon the debt of the Fair Lumber Company. Only when the defendants in error should dispose of that lumber could they be charged therewith, and then only the sale being fair, for the amount received. So, also, we think the court correct in charging the jury that the plaintiff in error was liable for the sum of $243.59, the lumber sold to the Oshkosh Log & Lumber Company, of which he was president. This amount had not been paid to Mr. Choate under some claim of the lumber company, as he stated, that it had some offset or defense as against the defendants in error or the Fair Lumber Company. The lumber was placed in the possession of Mr. Choate as trustee for the defendants in error. He obligated himself to turn over to them the proceeds. He was a trustee, and could not sell lumber to a company of which he was president, and assert any sort of a claim on the part of that company against the defendants in error or the Fair Lumber Company.

With regard to the question of the acceptance of the agreement of November 13, 1894, we think the matter was properly and fairly submitted to the jury. The question of acceptance is one of fact to be determined in the light of the surrounding circumstances; and, having been properly submitted, we are concluded by the verdict of the jury. We cannot doubt that the agreement expresses a consideration. It is, in legal effect, that the plaintiff in error would become responsible for the $6.50 per 1,000 feet, the amount of the claim of the defendants in error on factory plank, if they would allow Mr. Fair to ship lumber to fill the orders he then had. Assuming this letter to be a collateral agreement to answer for the debt of another, we think there is a sufficient statement of consideration to meet the requirements of the statute of frauds.

The question of most difficulty in this case arises upon the oral promise of November 9, 1894, found by the jury to have been made, to the effect that, if the defendants in error would permit the Fair Lumber Company to continue shipping, he (Choate) would, until he wrote them, as he promised to do, "go good for what they are shipping." The validity of this agreement depends upon the question whether it is a collateral agreement to answer for the debt of another, or whether it is an original agreement upon a new and sufficient consideration; the extinguishment in whole or in part of the original debt by the performance of the new agreement being merely an incident. Much subtlety has been indulged by the courts from an early date in the construction placed upon the statute of frauds. It would be difficult, if not impossible, to reconcile the various decisions of the courts. It is, perhaps, unfortunate that we have gotten away from the strict letter of the statute. We are glad to note the present tendency of the courts to get more in harmony with the spirit and the purpose of the law. It would serve no useful purpose to enter upon a review of the many and possibly discordant decisions. It is sufficient to state the rule, as we understand it to be, now held by the supreme court of the state of Wisconsin, whose law we are considering, and of other states which are in accord with that holding, and of the supreme court of the United States. In Hoile v.

Bailey, 58 Wis. 434, 17 N. W. 322, and in Weisel v. Spence, 59 Wis. 301, 18 N. W. 165, the court reviews the previous decisions in that state, and furnishes, as a test to determine whether a promise is original or collateral, the following rule: "In all these cases founded on a new and original consideration of benefit to the defendant or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to a recovery;" and "where the party promising has for his object some benefit and advantage accruing to himself, and on that consideration makes the promise, this distinguishes the case of an original undertaking from one within the statute." The latter rule is in substance declared by the supreme court of Massachusetts in Curtis v. Brown, 5 Cush. 491. "It is not enough," says the court, "that the plaintiff has relinquished an advantage or given up a lien in consequence of the defendant's promise, if that advantage has not also inured to the benefit of the defendant, so as, in effect, to make it a purchase by the defendant of the plaintiff. * * * Where the plaintiff, in consideration of the promise, has relinquished some lien, benefit, or advantage for securing or recovering his debt, and where, by means of such relinquishment, the same interest or advantage has inured to the benefit of the defendant," an oral promise is binding. "In such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly; and the substance of the contract is the purchase by the defendant of the plaintiff of the lien, right, or benefit in question." In White v. Rintoul, 108 N. Y. 222, 15 N. E. 318, the court states that the rule in Leonard v. Vredenburgh, 8 Johns. 29, that a new and original consideration moving between parties to the new promise took it out of the statute, was "dangerously broad, and capable of grave misapprehension," and that the rule of the state of New York now was that, "when the primary debt subsists, and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor." In Emerson v. Slater, 22 How. 28, 16 L. Ed. 360, the supreme court of the United States declared that, "whenever the main purpose and object of the promise is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." And in Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826, the court observes that "there is a marked difference between a promise which, without any interest in the subject-matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of third party, is also and mainly for the benefit of the promisor." We need not inquire whether these cases in the supreme court of the United States are fully in accord

with the advanced rule declared by the supreme court of Wisconsin and Massachusetts and the court of appeals of the state of New York; nor need we suggest that logically and rationally damage to the promisee should be as effective as benefit to the promisor in determining whether a promise is original or collateral. It is enough to say that the question was submitted to the jury by the court below under the more advanced rule referred to, and certainly the plaintiff in error has no ground for complaint. The court distinctly told the jury that the facts that Choate had an interest in the lumber through a bill of sale, and that he was interested as a creditor, would not alone make his promise good, "because it must be understood by these plaintiffs in taking the promise that it was so made because of an interest he had. They must understand that it is not made simply out of a desire to help the Fair Lumber Company. If so made, or if so understood by the parties, that Mr. Choate had an actual interest in obtaining the shipments to be made, and that he made the promise on the strength of that, and for the purpose of causing the shipments to be made, then it is an original undertaking, and does not come within the statute." We are inclined to the opinion that the court went beyond the rule in declaring that the promisee must understand that the promise was not made simply out of a desire to help the debtor. We read no such requirement in the rule as stated. The fact must exist that the promise is made with a view to benefit the promisor, and because of his interest in the subject-matter, but we do not find that it is essential that the promisee should know of the interest and object of the promisor if the interest and purpose in fact existed; but this error—if error there was—was favorable to the plaintiff in error, and he cannot be heard to complain of it.

We cannot say, as a matter of law, that this promise was collateral. The situation was this: The defendants in error were in possession of the stock of lumber on account of which the Fair Lumber Company had paid $4.50 per 1,000 feet, and owed under their contract $6.50 per 1,000 feet in addition. That debt was due. The defendants in error could not be compelled to part with possession of that property until the whole debt was discharged, and they had refused to make delivery because of nonpayment of the debt. At this time the company of which Mr. Choate was president had a bill of sale of this lumber from the Fair Lumber Company. It had not been placed on record, and therefore was not effective as against a third party, but it was potential as between the Fair Lumber Company and Mr. Choate and his lumber company. He or his company was the legal owner of this lumber, subject to the claim and possessory lien of the defendants in error, and, as against the Fair Lumber Company, had the legal title to the lumber, and the right of possession for the purpose for which it was transferred. Notwithstanding the lumber had been sold to the Williamson & Libbey Company, and the bill of sale to Mr. Choate's company was ineffectual as against that purchase, still, as against the Fair Lumber Company, it gave Mr. Choate's company the right to the possession of the proceeds of the sale. Mr. Choate was also a member of the firm of Bray &

Choate, which firm was indorser to the amount of $7,000 on paper of the Fair Lumber Company. Under these circumstances he orally agreed with the defendants in error that, if they would permit shipments of the lumber by the Fair Lumber Company, and waive their lien upon or possessory right to that lumber, he would, until such time as he should write the defendants of his final conclusion, "go good for what they are shipping." It will be observed that he did not promise to pay the debt of the Fair Lumber Company, amounting to $27,600; nor did he promise to pay only the amount of $6.50 per 1,000 feet for such lumber as should be shipped under the oral agreement. He did promise to "go good" for such lumber as should be shipped under that agreement, and that promise we understand to be an agreement to be responsible to and to pay the defendants in error the value of such lumber as they should permit to be shipped under that agreement, and that irrespective of the debt of the Fair Lumber Company upon that quantum of lumber, and irrespective of the total indebtedness. It is at least doubtful whether this promise, if so properly construed, is not an original promise; whether it had relation to the debt of the Fair Lumber Company to the defendants in error; and whether it was not a promise for the payment of the value of the lumber shipped, without reference to any debt from another. Chandler v. Davidson, 6 Blackf. 367; Lessel v. Zillmer, 105 Wis. 334, 81 N. W. 403. Nor are we able to say, as matter of law, under the circumstances stated, and in view of Mr. Choate's evidence with regard to the receipt of the proceeds of the lumber by his company, that his promise was not made upon "a new consideration moving to the promisor, and beneficial to him," and that his "leading object" was not to benefit himself. These were questions proper to be submitted to the jury, and were so submitted under instructions most beneficial to the plaintiff in error, and we cannot disturb the verdict. The judgment is affirmed.

## ASH v. PRUNIER.

(Circuit Court of Appeals, Second Circuit. January 4, 1901.)

No. 47.

1. SEDUCTION OF HUSBAND—DAMAGES—EVIDENCE.
   To show the relations that existed between husband and wife, as bearing on the question of damages in action for seduction of the husband, letters written by him to her before and after he became acquainted with defendant, tending to prove the affectionate feeling entertained by him for her before defendant intervened, and the subsequent alienation of feeling, are admissible.

2. SAME.
   For the same purpose, and also to prove the mental suffering of plaintiff, an element of damages, it is competent to show manifestations of remorse by him in interviews with her, and of grief by her after the intimacy between him and defendant began.

3. SAME—EVIDENCE OF SEDUCTION.
   Evidence that plaintiff's husband was in possession of large sums of money while living in defendant's house, and that they came from defendant, is relevant in an action for seduction of the husband, as bearing

upon the question whether he and the defendant were living in the relation of lover and mistress, and whether he was the seducer, or she was enticing him by her favors.

4. SAME—BAR TO ACTION.
It is no bar to an action for seduction of plaintiff's husband that, after the making of an order for temporary alimony in a proceeding by her for a divorce, an agreement, with which the proceeding terminated, was made by them in substitution of the order, by which he promised to allow her a stated sum per week, and she agreed to accept it.

5. WRIT OF ERROR—REVIEW OF DAMAGES.
There being no error in the instructions on damages, the question whether the verdict was for excessive damages, and refusal of motion for new trial on that ground, cannot be reviewed on writ of error.

In Error to the Circuit Court of the United States for the Southern District of New York.

A. H. Hummell, for plaintiff in error.

Jonathan C. Ross, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury in an action brought to recover damages for the seduction of the plaintiff's husband.

The evidence upon the trial tended to show the following facts: The plaintiff and her husband had lived happily together from the time of their marriage in the spring of 1894 until the winter of 1896. In October, 1896, the husband met the defendant, who at that time was living with one Campbell as his mistress. Soon after, Campbell died, and the defendant became possessed of considerable pecuniary means. After Campbell's death, and in December, 1896, the husband accompanied the defendant to Washington, and from that time until the time of the trial he lived with her, ostensibly as her professional nurse, the greater part of the time. She supported him, and bestowed upon him considerable sums of money, and they maintained carnal intercourse. After the husband became intimate with the defendant an estrangement between him and the plaintiff ensued, culminating in a separation.

The trial judge instructed the jury, in substance, that the burden was upon the plaintiff to satisfy them by a clear preponderance of evidence that the husband was the seduced, and not the seducer; that the defendant set in motion the arts and devices which resulted in seducing the husband from his allegiance to the wife; and that she was the willful cause of the alienation.

Nearly all the assignments of error are based upon exceptions to the rejection of evidence upon the trial against the objections of the defendant. Many of these exceptions do not merit discussion, for the reason that no specific grounds of objection were stated. Insurance Co. v. Miller, 8 C. C. A. 612, 60 Fed. 254, 19 U. S. App. 588; Equipment Co. v. Blair, 25 C. C. A. 216, 79 Fed. 896, 51 U. S. App. 82. Others are trivial, as relating to the order of proof, or because the reception of the evidence was otherwise discretionary with the trial judge, or because the evidence could not have been prejudicial,

in any sense, to the defendant. Most of them were not pressed upon the argument, and we shall notice only those which have some color of merit.

A number of letters written to the plaintiff by her husband after marriage, some of them before he became acquainted with the defendant, and some of them afterwards, were produced upon the trial. They were offered and received in evidence solely for the purpose of showing the relations that existed between the husband and wife at the time they were written. Extracts only were read. It does not appear that any of the contents were read to the jury, not bearing upon the state of the relations. "In actions of criminal conversation, it being material to ascertain upon what terms the husband and wife lived together before the seduction, their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence." 1 Greenl. Ev. § 102. It is likewise material to ascertain the terms on which they lived together after the seduction, and their correspondence and declarations at that period of their relations are equally original evidence. The state of their relations before and after the seduction is important in estimating the consequent damages. The evidence which was introduced tended to prove the affectionate feeling entertained by the husband for the plaintiff before the defendant intervened, and the subsequent alienation of feeling, and, within the uniform rule of the authorities, was clearly admissible. Com. v. Trefethen, 157 Mass. 190, 31 N. E. 961; Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485; Horner v. Yance, 93 Wis. 352, 67 N. W. 720; Rudd v. Rounds, 64 Vt. 432, 25 Atl. 438.

Evidence was introduced for the plaintiff showing manifestations of remorse by the husband in some of his interviews with his wife, and manifestations of grief upon her part. These occasions were after the intimacy between him and the defendant had begun. The evidence was competent as falling within the same category as the letters of the plaintiff's husband. It was also competent as tending to prove the mental suffering of the plaintiff inflicted by the misconduct of the defendant,—an element of damages which is always proper to be considered in actions for seduction.

Evidence was introduced for the plaintiff tending to show that the husband was at different times in the possession of large sums of money while living in the house of the defendant after Campbell's death. In view of the other testimony, tending to show that the money was derived from the defendant, the evidence was relevant. It had a legitimate bearing upon the issues whether the husband and the defendant were living in the relation of lover and mistress, and whether he was the seducer, or she was enticing him by her favors.

Error is assigned of the rulings of the court in respect to the effect of an agreement of separation between the plaintiff and her husband. According to the testimony of the plaintiff, there had never been such an agreement. In 1898 proceedings for a divorce were instituted in the county court of Chittenden county, Vt., by the plaintiff against her husband, and an order for temporary alimony was made by the court. Thereafter the plaintiff and her husband made an agreement

in substitution of the order, by which he promised to allow her a stated sum per week, and she agreed to accept the amount. The proceeding seems to have terminated with that agreement. It was insisted for the defendant that the agreement was a bar to the action, and the trial judge was requested to instruct the jury to that effect. The agreement was manifestly not a bar to the action.

Error is assigned of the refusal of the trial judge to give certain instructions to the jury. The instructions refused, which are referred to in the brief of the plaintiff in error, were as follows:

"That the fact that Prunier's employment with the defendant required him to reside in the defendant's residence, even if the plaintiff objected to such residence, does not make the defendant liable, and the verdict should be for the defendant." "That the defendant owed no duty to the plaintiff to in any manner compel Prunier either to support his wife or live with her, and, even if the jury believed that the defendant took no further action to compel Prunier to live with her or support her, she is not liable to the plaintiff on that account, and the verdict should be for the defendant."

Except for the concluding phrase, each of these requests embodied correct legal propositions, and we might be called upon to consider whether they should not have been granted, if the trial judge, in his instructions to the jury, had not made it plain to them that the defendant was not liable unless they found that she was the willful cause of the alienation, and set in motion the arts and devices which resulted in seducing the husband from his allegiance to his wife. But it would have been manifest error to have granted the instruction in the form asked, because, if the jury had found the propositions of fact in favor of the defendant, it would not have followed that she was entitled to a verdict.

There being no error in the instructions of the court upon the question of damages, this court cannot, upon a writ of error, entertain the question whether the verdict was for excessive damages, to review the refusal of the motion to grant a new trial upon that ground. Railroad Co. v. Fraloff, 100 U. S. 23, 31, 25 L. Ed. 531; Steamship Co. v. Anderson, 1 C. C. A. 529, 50 Fed. 462, 1 U. S. App. 176. Nothing is open to re-examination upon a writ of error except the rulings of the court in the progress of the trial, and duly presented by a bill of exceptions. Insurance Co. v. Folsom, 18 Wall. 249, 21 L. Ed. 827. As we find no error in the record, the judgment is affirmed.

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## NEW YORK, S. & W. R. CO. v. MOORE.

(Circuit Court of Appeals, Second Circuit. January 8, 1901.)

No. 31.

1. RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

One driving onto a railroad track just in front of a rapidly approaching train cannot be held guilty of contributory negligence as matter of law, it being impossible, because of obstructions, to see the train till the team was on the track, though he did not stop his team to listen; he having approached at a walk, and testified that as he approached the track he was listening for a train, and did not discover it until he was on the track, and that his horses, though afraid of cars, did not act as though they heard anything of the train.

2. SAME—NEGLIGENCE.

Where, by reason of obstructions, a train approaching a crossing cannot be seen by one driving till on the track, the fact that no gateman or warning signals are maintained at the crossing may be considered on the question of the railroad company's negligence.

3. PHOTOGRAPHS—PROOF OF ACCURACY.

The accuracy of photographs introduced in evidence may be proved by testimony other than that of the photographer producing them.

In Error to the Circuit Court of the United States for the Southern District of New York.

Leopold Wallach, for plaintiff in error.

G. A. Clement, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges

WALLACE, Circuit Judge. Of the assignments of error those most deserving consideration are the ones which raise the question whether, by reason of the contributory negligence of the plaintiff, the defendant was entitled to have a verdict directed in its behalf.

The action was brought to recover for injuries received by the plaintiff while crossing the railroad track of the defendant at its intersection with a highway in the village of Unionville, Orange county, N. Y. The plaintiff was proceeding along the highway from the west in a milk wagon, driving a pair of horses. His wagon was struck while crossing the track by a train of the defendant approaching from the south, and which was making for the railroad station, about 900 feet away. The railroad at that crossing runs north and south, intersecting the highway at a right angle, but at a short distance from the crossing at the south curves sharply to the eastward. Approaching the crossing from the west the view of the railroad to the southward is obstructed for a considerable distance. The highway ascends as it nears the crossing. Near the track, obstructing the view southerly, is a building known as a "feed store," and between the feed store and the railway track there is a switch track. At the time of the accident a box car was standing at the west side of the crossing on the switch track. The accident took place about 9 o'clock in the forenoon of a clear day.

Testimony was introduced in behalf of the plaintiff tending to show that the train was running much faster than usual; that its speed was 35 or 40 miles an hour; and that no whistle was sounded or other signal given of its approach. Several witnesses testified that in approaching the crossing from the direction in which the plaintiff was driving the railroad was hidden from view for a distance of 20 rods or further, and that a train coming from the south could not be seen until the horses were practically upon the track. Dr. Dennie testified as follows:

"If I am driving east, the view from the crossing of approaching trains on the railroad south of the crossing is obstructed in the center of the street, and I cannot see the train until I get there, nearly or about on the railroad track. I am speaking of the locality generally, independent of the box car."

Dr. Nugent testified as follows:

"I have occasion to go over the crossing, and did have at that time, several times a day. The view of that crossing, in approaching it, is obscured all the

way down from the corporation limits, half a mile perhaps. I watch the crossing very closely for self-preservation; and I think, with my carriage, when my horses' feet are two or three feet west of the west track, I can get a sight by looking that way, and I watch, because I do not want to be hurt. I could not say with reference to a car upon the switch. That would obstruct the view a little more."

The father of the plaintiff, who visited the scene shortly after the accident, testified as follows:

"I took an observation carefully to satisfy myself at that time,—to see what chance the boy had for his life, if any. That is the purpose I went for, and I looked, and that team had to be upon the track to see the train coming, with that car there. They had to be right on the track."

Mr. Clark, a farmer who saw the accident, testified:

"With the car upon that switch, in driving up from the west, the view would be further obstructed, and, under these circumstances, a person would have to be full on the track before a view could be had of the track and approaching train from the south."

According to the testimony of the plaintiff himself, he knew that the train was due at about the time he proposed crossing the track. He testified that he looked and listened as he approached; that he looked at his watch, probably 20 rods back, and found it was then 12 minutes past the usual time of the train; that his horses were on the walk at that time; that they were still on the walk when they reached the ascent, and walked up the incline; and that while proceeding up the incline he was listening for the train. He testified that his horses were afraid of the cars, one of them especially, and that they did not act as though they heard anything of the train; that they were "not the least bit scared as they walked up." He testified that the car on the branch switch was not over two or three feet from the highway, and that his horses were full upon the track when he discovered the train. The fireman upon the locomotive, a witness for the defendant, testified that when the train came around the curve he was in a position so that he could see the horses stepping upon the track, and the locomotive was at that time perhaps 60 or 70 feet away. The engineer of the locomotive, a witness for the defendant, testified that the fireman called his attention to the fact that there was something on the track, and he saw the team about 10 feet away.

Much testimony was offered for the defendant, of a very persuasive character, to the effect that an approaching train from the south could have been seen by a person coming from the west for a considerable distance after reaching a point 20 feet west of the west rail of the main track, and from that point easterly the rail of the main track could have been seen for a distance of 1,000 feet, even with a car upon the siding, as indicated by some of the testimony.

It seems too plain to require extended discussion that the trial judge did not err in refusing to direct a verdict for the defendant. He acted upon the well-settled rule that when the evidence is conflicting, and there are different inferences which may be drawn by different minds, the question of the contributory negligence of the injured party is one for the jury. If the jury believed the testimony on behalf of the plaintiff, the approaching train, because of

the obstructions in the way, could not have been seen by him until his horses were practically upon the track, when it was too late to escape a collision, and he could only discover its approach by his sense of hearing. If his testimony was true, he used all his faculties diligently, and did everything that any prudent man would have been likely to do while crossing the track, unless he should have stopped his horses to listen more perfectly. His testimony may be incredible, and it may seen unaccountable that he did not hear the noise of the approaching train; but the jury was at liberty to credit his narrative, and to weigh among the probabilities in its favor the exertion of that impulse of self-preservation which, in the case of a sober and prudent man, is always to be presumed. In approaching a railroad crossing the injured party is not to be deemed guilty of contributory negligence because he did not exercise the greatest degree of diligence which he could have exercised, but only if he fails to exercise such care as a prudent man approaching such a place would. Whether he ought to stop in a given case is a question for the jury to decide, in view of the circumstances developed.

The trial judge correctly stated the law in his instructions to the jury in these terms:

"When a traveler is approaching the track of a railroad, especially where there are obstructing buildings in the vicinity which interfere with his view, his duty is to proceed cautiously, to look, to listen, and, if the circumstances of the case require it, to stop, in order that he may listen more carefully before continuing his course."

In the recent case of Judson v. Railroad Co., 158 N. Y. 597, 53 N. E. 514, the court stated this to be the rule in the courts of nearly all the states in the Union. See, also, Improvement Co. v. Stead, 95 U. S. 161–168, 24 L. Ed. 403. It was for the jury to apply the instructions to the particular facts, and if they erred in finding that under the circumstances it was necessary for the plaintiff to stop in order to listen more attentively, because a prudent man would have supposed that the approaching train could be seasonably heard without doing so, the error is not one which it is within the province of an appellate court to correct.

The assignments of error in respect to the admission or rejection of evidence upon the trial are without merit. The accuracy of the photograph of the crossing introduced in behalf of the plaintiff was sufficiently established by other testimony, and it was not necessary to prove it by the photographer who produced it. The evidence that no gateman or warning signals were maintained at the crossing was admissible, in view of the peculiarly dangerous character of the crossing, and were facts which the jury were entitled to take into consideration in determining whether the defendant was negligent. Railroad Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485.

The exception was not well taken which is made the subject of the twelfth assignment of error. The question put to the witness Carr was a leading one, and was apparently excluded for that reason.

We find no error in the record, and the judgment is therefore affirmed, with costs.

## LAFAYETTE BRIDGE CO. v. CITY OF STREATOR.

(Circuit Court, N. D. Illinois, N. D. April 7, 1900.)

No. 25,096.

1. TRUST COMBINATIONS—HOW DETERMINED.
   Whether plaintiff is a trust or combination, within the Illinois anti-trust act of 1891, so that under its provisions one buying from it is not liable for the price, must be determined in a direct proceeding, and not collaterally in an action by it for the price; the statute being silent as to the method to be pursued.
2. FEDERAL COURTS—PRACTICE.
   Rev. St. § 914, providing that the practice and mode of proceeding in federal courts shall conform to that in like causes in the courts of the state in which such federal courts are held, does not require a federal court to allow the defense that plaintiff is a trust or combination, within the Illinois anti-trust act of 1891, so that defendant, buying from it, is not liable for the price, to be set up in an action for the price, without a prior determination in a direct proceeding of plaintiff's status, though such a defense was set up in an action in the state court, without the right to do so being questioned or considered.[1]
3. PLEADING—DEMURRER.
   Demurrer to replication will be carried back to the plea, though a demurrer to the plea has already been overruled by another judge of co-ordinate jurisdiction, where practically the decision of each subsequent step in the litigation depends on a fundamental proposition, in regard to which the court is convinced that the prior ruling was erroneous.
4. ESTOPPEL.
   A city sued on a contract under which plaintiff built for it a bridge is estopped to set up that plaintiff and certain aldermen of defendant formed a conspiracy to prevent competitive bidding when the contract was secured, or that the bidding was on different plans, or that plaintiff committed bribery in securing the contract, where, after appropriation by ordinance for erection of the bridge, there was a suit by taxpayers to enjoin defendant from constructing it, which, after full hearing on the merits, was dismissed for want of equity, and pending the suit the contract was made, at which time defendant made a request, with which plaintiff complied, that it appear and assist defendant in the defense; and the construction was not proceeded with till after termination of the suit, and defendant had asserted it had established the validity of the contract, and had demanded that plaintiff fulfill the contract, and thereafter defendant instituted proceedings to condemn property for the bridge, which were contested on the ground that the contract was invalid, and plaintiff, at defendant's request, assisted in the proceedings, and judgment was rendered therein sustaining the proceedings, the validity of the contract, and defendant's right to proceed with the execution thereof.

Haywood & Burnett and Brewer & Strawn, for plaintiff.
Reeves & Boyes, for defendant.

KOHLSAAT, District Judge. The declaration in this case consists of the common counts and of special counts in assumpsit upon a contract between the parties, in pursuance of which plaintiff built for defendant a bridge. Defendant filed the general issue and eight special pleas. The second, third, fourth, fifth, and sixth pleas aver that the contract in question is void under the Illinois statutes of

[1] Following state practice, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.

1891 and 1893 relating to trusts, pools, and combines. The seventh plea avers that plaintiff and certain aldermen of defendant formed a conspiracy to prevent competitive bidding at the time plaintiff secured the contract in question, and that therefore such contract is void. The eighth plea avers that the contract is void for the reason that the bidding at the time said contract was let was upon different plans. And the ninth plea avers that the contract is void because of bribery committed by plaintiff in securing the same. To these last eight special pleas, special demurrers were filed; the chief contention being as to pleas numbered 2, 3, 4, 5, and 6, which set up the anti-trust statutes of Illinois, which statutes, plaintiff insisted by its demurrers, were unconstitutional, as embracing class legislation. The argument on the special demurrers was had before another nisi prius judge, the question of the constitutionality of said anti-trust statutes being practically the only one raised. The demurrers were overruled on May 27, 1899, and the plaintiff given leave to reply double to the several pleas. Thereupon plaintiff filed numerous replications. Issue was joined on all of these, except the first, second, fifth, eighth, eleventh, and sixteenth. The first replication goes to all the pleas, and avers, in substance, that defendant is estopped to deny the validity of the contract sued on, for the reason that after defendant, by its common council, had passed an ordinance making an appropriation for the erection of the bridge in question, two separate suits were commenced by taxpayers and citizens of defendant, seeking to enjoin the defendant from constructing said bridge; that after full hearing upon the merits the said suits were dismissed for want of equity; that pending said suits the agreement set forth in the declaration was entered into between plaintiff and defendant, at which time defendant informed plaintiff of the pendency of said suits, and requested plaintiff to appear by counsel therein, and to assist defendant in the defense of the same, with which request plaintiff complied; that it was not until after the termination of said suits as aforesaid, and upon the assertion of defendant that said suits had firmly established the validity of the agreement between plaintiff and defendant, and upon the demand of defendant that plaintiff should proceed to fulfill and comply with said agreement and construct said bridge, and not before, that plaintiff proceeded with the construction of said bridge. Said first replication further avers that subsequently the defendant, by its common council, passed an ordinance directing its attorney to commence legal proceedings for the purpose of condemning private property which would be taken or damaged in and about the construction of the bridge in question and the approaches thereto; that said proceedings were contested by the persons interested in said property sought to be condemned, and also by persons opposing the erection of said bridge, in which proceedings it was claimed by said contestants that the contract between plaintiff and defendant herein sued on was invalid; that defendant informed plaintiff of said proceedings and said contest, and requested plaintiff to assist defendant in the prosecution of said litigation, with which request plaintiff complied; that thereafter such proceedings were had in said suit that by the judgment of the supreme court

of the state, on appeal, the said condemnation proceedings were sustained, and the validity of the contract in suit herein, and the right of defendant to proceed with the execution thereof, confirmed and established, by reason whereof plaintiff insists that defendant is estopped to deny the validity of the contract in suit.

The second, fifth, eighth, eleventh, and fifteenth replications go to the second, third, fourth, fifth, and sixth pleas, respectively, and, in substance, aver that plaintiff, in its business, is within the exception to the anti-trust statute of 1891 which is provided by the act of 1897. Defendant demurs to these replications on the ground that the act of 1897 is but an amendment of the first section of the act of 1891; that said amendment constitutes class legislation, and is therefore void; and that a void amendment cannot in any manner affect a valid statute. Plaintiff, on the other hand, denies that the act of 1897 is an amendment of the act of 1891, but contends that it is in law a repeal and re-enactment of said section 1, in which view it would vitiate the entire act of 1891. Both parties are in accord in the contention that the exception provided by the statute of 1897 constitutes class legislation.

The defendant is, in this suit, attempting to avail itself in a collateral proceeding of a defense based on a fact which should be determined in a direct proceeding. In other words, before a defendant can evade the payment of the purchase price of commodities, actually received, on the ground that the seller is a trust or combination in restraint of trade, in contravention of the statute, there should be an adjudication of a competent tribunal, in a direct proceeding instituted for that purpose, determining that such seller is a trust or combination in the sense contemplated by the statute. This is in accord with the ordinary rules of statutory construction. The practical working of any other rule could not fail to emphasize the justice and necessity of so holding in cases similar to the one at bar. It cannot be insisted that the decision in one case would be binding or even persuasive in any other case. Each suit to recover purchase money, in which the statute is pleaded by way of defense, would call for a separate and distinct determination of the legal status of the plaintiff, thereby making the claim for purchase money merely an incidental issue. This would be true even if the amount involved were but five dollars, and the case were before a justice of the peace. The result would depend upon the varying conditions of each case as affected by the skill of lawyers, the bias of jurors, and other attendant circumstances. This would inevitably lead to such confusion as would force federal courts to so construe the statutes as to protect the due and regular administration of justice from unconscionable prolixity and irreconcilable adjudications. In the case of Ford v. Association, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298, the supreme court of Illinois permitted the defendant to interpose this defense in a collateral proceeding. The point last above stated does not appear to have been considered by that court. The only contention was as to whether or not the statute of 1891 constituted a valid defense to that action. But the Illinois statute is silent as to the method to be pursued in determining whether a corporation seeking to enforce a claim comes

within the prohibition of the act, nor has there been any long-established usage in the premises. Section 914 of the Revised Statutes, as construed by the federal courts, does not apply to the facts of this case. Federal courts place such construction upon matters of law of a general nature, as opposed to those based upon state statutes or long-established custom or usage, as to them may, under the particular circumstances of any given case, seem best calculated to accomplish the ends of justice. The question here is simply one affecting the manner of applying a remedy or rule of law, and does not go to the subject-matter or availability of the right sought to be enforced. This view of the availability of the defense set up in said last-mentioned pleas was not presented to the court on the argument of the demurrer to said pleas. The entire argument was in relation to the constitutionality of the statutes relied on, it being practically conceded that if the statutes were valid the defense could be made in the manner herein sought. The ordinary rule of pleading is that a demurrer will be carried back to the first fault, but there is a common exception, to the effect that, where a demurrer has once been passed upon, a demurrer to a subsequent pleading will not be carried back so as to interfere with the previous ruling of the court. I recognize the fact that a motive of courtesy would cause this latter rule to be more strictly adhered to where the prior ruling was made by another judge of co-ordinate jurisdiction. However, I deem it but reasonable that the interests of litigants should be considered in questions of this kind, and that where practically the decision of each subsequent step in the litigation would be dependent upon a fundamental proposition, in regard to which the court is convinced that the prior ruling was erroneous, a question of comity or courtesy between different members of the bench should not outweigh obvious considerations of convenience and dispatch of the public business. In view of this conception of the scope of both the statutes of 1891 and 1893, it becomes unnecessary in the case at bar to pass upon the constitutionality of either. For the reasons above given, the order of May 27, 1899, overruling the demurrers to the second, third, fourth, fifth, and sixth pleas, will be vacated, and the demurrers to the second, fifth, eighth, eleventh, and fifteenth replications will be carried back and sustained to said pleas, upon the ground that said statutes cannot be availed of in a collateral proceeding until a determination has been had in a direct proceeding establishing the fact that plaintiff is a trust or combination in contravention of the statute. This leaves for disposition the demurrer to the first replication, as applied to the seventh, eighth, and ninth pleas. As to this replication, I am of the opinion that it sets up matter which, if proved as fully as averred, will constitute estoppel in pais, as against the matters of defense set up in the said last-mentioned pleas. For this reason the demurrer to the first replication will be overruled.

## HAUSS v. LAKE ERIE & W. R. CO.

(Circuit Court of Appeals, Sixth Circuit. January 14, 1901.)

No. 831.

1. EMPLOYERS—DUTY TO EMPLOYE.

A railroad company which is constructing new switches does not owe the duty to a brakeman of blocking a frog, which is a part of the new construction, during progress of the work; it being impracticable to block it till the tracks are ballasted and the alignment of the rails of the frog is perfected. Giving him such notice and warning as will put him on his guard against the dangers from use of the track while the work is in progress is enough.

2. SAME—NOTICE.

Notice to a brakeman that digging is being done between the ties at a certain place, with warning that he look out for it and avoid injury, is sufficient, without mentioning the danger from the unblocked frogs, especially where the work has been for two weeks within his daily view and observation while passing on his train.

3. WITNESS—CREDIBILITY—QUESTION FOR JURY.

Though, in an action against a railroad for death of a brakeman, the only direct evidence that notice of the danger was given deceased is the testimony of the conductor, whose duty it was to bring the bulletin in regard to it to the knowledge of the trainmen, his credibility is not for the jury, on the ground of his interest to show that he had done his duty; his testimony not being contradicted or brought in question by cross-examination or the admitted facts, and there being nothing else in the case tending to raise a doubt as to the truth of his testimony.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

The evidence shows that on the 10th day of June, 1898, at Muncie, Ind., the plaintiff's intestate, William V. Doty, a brakeman in the defendant's service, while coupling cars, received injuries of which he died within a few hours. At the time of his death he was in the twenty-fourth year of his age, and had been in the service of the defendant, as a brakeman, for about 18 months. He was employed on a freight train which passed daily over defendant's railroad between Tipton, Ind., and Lima, Ohio; and on the day of the accident his train came east, with eight cars, for Muncie, which were to be detached from the train and left at that place. For 10 days or 2 weeks next before the accident the defendant had been constructing two new switches near the place of the accident, and on that day the work was still in progress. Just before the arrival of Doty's train, several cars carrying gravel to ballast the new tracks had been unloaded near the place of the accident, and were standing on a storage track, on which the Muncie cars from Doty's train were to be placed, and, it being necessary to move them out of the way, the cars from Doty's train were backed in, to be coupled to them; and while the cars from Doty's train were backing, and while Doty was walking inside of the track behind them, keeping pace with their movement, his right foot was caught and held in an unblocked frog until they backed over him, causing the injuries of which he died. It was the usage and practice of the defendant to keep the frogs in its line of railroad blocked, but this particular frog was a part of the new construction, and had not been blocked because it was not practicable to block it until the tracks were ballasted and the alignment of the rails of the new switches with the alignment of the rails of the frog was perfected. The accident occurred about 11 o'clock of the forenoon, and the day was bright and clear, and there was nothing to obstruct the view of the track. During the 10 days or 2 weeks during which the new construction had been in progress, Doty passed by it daily, going east and west with his train. A bulletin which reads as follows:

| "Sent to | Time Sent | Sender | Receiver |
|---|---|---|---|
| Po | | | n |
| pd | 7:37 p. m. | B | Tn |
| Gx | | n | Gy |
| | From | 5\|30th | 1898. |

To all Cond Rd
All Trains East Gx
West Po

"Digging is being done between ties around Muncie yard office, and quarter mile west of yard office. Look out for it, and don't get injured.

S. R. K."

—was put on the train register in the yard office at Muncie, to which all trainmen had access, and it remained there until the work was completed. The conductor of Doty's train testified in chief concerning this bulletin as follows: "Q. Explain to the court and jury how those bulletins were handled, with relation to trainmen? A. They manifolded, eight or ten taken on manifold paper at a time; and each train going through Muncie, the conductor got them and showed them to the trainmen, to all concerned in the matter, to look out for new work being done at Muncie. Q. I will ask you if you received a copy of this message, which is marked 'Exhibit No. 2,' at Portland on the 9th, and also at Alexandria on the 10th? A. Yes, sir; that is a copy of it. Q. What is meant by 'Gx'? A. The station at Alexandria. Q. And 'Po'? A. Portland. Q. 'S. R. K.'? A. S. R. Kramer. Q. What did you do with this bulletin after you got it, so far as Mr. Doty was concerned? A. I told Mr. Doty about it, and showed it to him. He read it and handed it back to me. Q. Which one? A. The one at Portland, going west, and the one at Alexandria, going east. Q. You showed him the one at Portland on the 9th? A. Yes, sir. Q. And the one going east on the 10th at Alexandria? A. Yes, sir. Q. How often during the continuance of this work were these bulletins handed to trainmen? A. Every train that went in either direction, every day and night, as the case might be." And on cross-examination further testified: "Q. You knew that this bulletin you had did not say anything about unblocked frogs, but to look out for digging that was being done at Muncie? A. Yes, sir. Q. That was the only bulletin you had, was it? A. Yes, sir." Upon this state of fact, the plaintiff complained that the injuries of which Doty died were caused by the negligence of the defendant in failing to block the frog in which his foot was caught, in accordance with its established usage and practice. But the defendant contended that, as it was neither usual nor practicable to block the frog during the progress of the work, it owed no duty to Doty in respect thereto, other than to notify him that the work was being done, and to warn him of the danger incident to the use of the track while it was in progress, and alleged that it did so notify and warn him, and that his injuries, therefore, were not caused by any fault on its part. On the trial before a jury at the close of the evidence the trial judge sustained the contention of the defendant, and directed a verdict in its favor.

Henry W. Seney, for plaintiff in error.
Charles T. Lewis, for defendant in error.

Before DAY and SEVERENS, Circuit Judges, and THOMPSON, District Judge.

THOMPSON, District Judge, after stating the case as above, delivered the opinion of the court.

We agree with the learned judge who presided at the trial in the court below that the defendant was not required to block the frog during the progress of the construction, and that the only duty which it owed to the plaintiff's intestate, under the circumstances presented by the evidence, was to give him such notice and warning as would

put him upon his guard against the dangers incident to the use of the track while the work was in progress. It is urged, however, that the notice was insufficient because it failed to call attention to danger from unblocked frogs. It did call particular attention to the track, and to what was being done there. It is true, there was no attempt to point out all the possible or probable elements of danger which might arise out of the changes being made in the track, but the trainmen were required to look to the track and avoid being injured because of the work being done there. This was sufficient notice, especially in view of the fact that what was being done there was within the daily view and observation of Doty as his train passed through Muncie.

The only direct evidence of notice to Doty was the testimony of Jeffries, the conductor of the train; and it is suggested here, for the first time in the progress of the case, that his credibility as a witness was put in issue by his relation to the parties and to the subject-matter of the controversy, and that the cause should have been submitted to the jury upon that issue. The suggestion is that the witness, as an employé of the defendant, whose duty it was to bring the bulletin concerning the work at Muncie to the knowledge of the trainmen, had an interest in showing that he had performed the duty, and strong motive to falsely represent that he had done so, if in fact he had not performed the duty, and that this interest and possible motive raised a question as to his credibility, which should have been considered by the jury. The testimony of the witness was not contradicted by that of any other witness, nor was it brought in question by the cross-examination nor by the admitted facts of the case; and, outside of the suggested interest and motive, there is not a fact or circumstance in the case which tends to raise a doubt as to the truth of his testimony. It is said in Elwood v. Telegraph Co., 45 N. Y. 554, that:

"Very clear and decisive evidence was required in this case to establish that the message which came over the defendant's wires was not communicated in the natural and ordinary manner. From the necessity of the case, such evidence as there is to that effect proceeds wholly from parties having an important interest in the question. Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as the admission would subject him or her to severe responsibility for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive."

But in that case the admitted facts necessarily raised the question of the credibility of the witnesses. A telegram had been received at Pithole over the wires of the telegraph company, and delivered by the company's agent at Pithole as coming from Titusville. The telegraph company denied sending it from Titusville, and the operators at the Titusville office testified that it was not sent by them from that office, and the court say that:

"The only theory by which the testimony of the operators is sought to be reconciled with the conceded fact of the receipt of the message at Pithole over the defendant's wires is that the wires were cut by McCarthy, or a confederate, at some intermediate point, and a machine there applied, whereby the message was transmitted. And it is claimed that the court was bound to solve the difficulty by presuming that this was actually done, rather than

to permit the jury to pass upon the credibility or accuracy of recollection of the witnesses."

In Hankinson v. Electric Co., 175 Mass. 271, 56 N. E. 604, decided February 28, 1900, brought to recover damages for personal injuries occasioned the plaintiff by being struck in the eye by a burnt carbon thrown by one Bayrd, who was in the defendant's employ, Bayrd testified:

"I did not throw it at the team for any purpose connected with my business, but to attract his attention. I wanted to attract his attention, so as to speak to him; and I threw the carbon at the team, so as to attract his attention, so that I might speak to him, and not for any business connected with the company."

The defendant contended that there was no evidence on which the jury could find that the carbon was thrown by Bayrd for the purpose of performing the work of the defendant, but the court say:

"When the defendant's liability depends upon the purpose with which an act that is nearly neutral, so far as outward manifestations are concerned, is done, it would be strange if the jury were not at liberty to disbelieve the testimony of one employed by the defendant as to his mental processes. In that connection it was proper for the jury to take into consideration the fact that not only was this witness at the time of the trial in the employ of the defendant, but also that he had been taken back into its employ only two weeks before the trial; and the jury may have also believed that, from the terms in which his testimony was couched, it was evident that the witness had a particular knowledge of what the law required to exonerate the defendant from liability. We are of opinion that it was a question for the jury whether the explanation given by Bayrd of the purpose he had in throwing the disused carbon was true or not."

The impeaching circumstances in that case, outside of the mere fact that the witness was in the employ of the defendant, justified its submission to the jury.

In Bank v. Deifendorf, 123 N. Y. 200, 25 N. E. 404, the court say:

"The claim that the plaintiff's cashier was a disinterested witness, whose testimony must be regarded as controlling if not contradicted, cannot be sustained. Aside from the alleged improbability of his statements, he was the financial agent of the plaintiff, and the owner of one-fifth of its capital stock, and, aside from his direct interest, responsible to his principal for the care, fidelity, and prudence with which he discharged his official duties. His interest in the transaction was co-extensive with that of the plaintiff, and brings him directly within the cases which hold that the credibility of such a witness is a question for the jury to determine."

In these cases there were not only impeaching circumstances which necessarily raised the question of credibility, but it was insisted upon by the party interested. In the case at bar the question was neither made nor in any way suggested by the plaintiff or his counsel at the trial, nor do the facts and circumstances of the case justify an impeaching presumption against the credibility of the witness, founded upon his mere relation to the parties and to the subject-matter of the controversy, which should overcome the counter presumption that, as an uncontradicted witness, testifying under oath, he spoke the truth. The judgment of the court below therefore will be affirmed.

AYRES v. POLSDORFER et ux.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1900.)

No. 848.

1. WRIT OF ERROR—PARTIES—JOINT DEFENDANTS—NONJOINDER.
Where, in ejectment under a statute authorizing the joinder as defendants of all persons claiming an interest in the land, defendants severally pleaded title in themselves by distinct titles, and plaintiffs had judgment, a writ of error sued out by one of the defendants, in which the record did not show that the other defendant was invited to join and refused, will be dismissed, since separate pleas and defenses founded on separate rights will not make a judgment several which is rendered on a single cause of action.

2. SAME.
The fact that the defendant who did not join in suing out the writ was barred by lapse of time from doing so before the objection was raised is not ground for refusal to dismiss the writ, since the question is one of jurisdiction, and must be tested by the conditions existing when the writ was sued out.

3. SAME.
The fact that a judgment in ejectment in terms adjudged that plaintiffs recover the lands from the defendants severally is insufficient to render it one from which one defendant might sue out a writ of error alone, since, in substance and effect, the judgment is joint in operation.

4. SAME—OBJECTIONS—TIME FOR TAKING.
The objection that a writ of error from a judgment against two jointly was sued out by only one, without a proper severance, can be taken at any time before judgment is rendered thereon.

5. SAME—OBJECTION—HOW RAISED.
The objection that a writ of error from a judgment against two jointly was sued out by only one, without a proper severance, is one which may be taken by the court on its own motion.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

J. B. Heiskell and C. W. Heiskell, for plaintiff in error.

Wm. M. Randolph, George Randolph, and Wassell Randolph, for defendants in error.

Before LURTON and SEVERENS, Circuit Judges, and EVANS, District Judge.

SEVERENS, Circuit Judge. This is an action of ejectment brought by Polsdorfer and wife, the defendants in error, against Ayres, the plaintiff in error, Thomas Price, and others, to recover several thousand acres of land fronting other lands owned by the plaintiffs in the suit, on the eastern shore of the Mississippi river, in Lauderdale county, Tenn. Their right to recover the lands in question, which had been formed in the bed of the river by changes in the current and the deposit of alluvion, was rested upon the claim that they were accretions to the land which they owned along the shore. The parties defendant were made such under the provisions of the statute of Tennessee (Shannon's Code, § 4972 [3231]) which provides that, if there be no actual occupant of the lands, the action *is to* be brought "against any person claiming an interest therein,

or exercising acts of ownership at the commencement of the suit." The declaration alleged that the plaintiffs were at a date named "lawfully entitled in fee and were in possession" of the lands described, and then averred that "the plaintiffs being so entitled to the said property, and so in possession thereof, the said defendants, to wit, on the said 1st day of October, 1898, in the said county of Lauderdale, unlawfully and without right entered into and upon the said premises, and falsely and unjustly set up title thereto as in them, respectively, and cut timber therefrom and removed the same, and exercised acts of ownership thereof under such false and unjust claim of title, and denied and refused to recognize the claim of these plaintiffs to the title, or their possession thereunder, and wholly refused to admit and repudiated the same, as they still do." Ayres filed the general plea of not guilty, and a special plea of the statute of limitations of Tennessee. Price pleaded not guilty. For the purposes of the decision of this court, it is unnecessary to detail the proceedings in the suit which relate to or were taken by the other defendants. The case came on for trial before a jury. The plaintiffs gave evidence of their ownership of the land on the Tennessee shore, and of facts on which the accretion of the land in question was claimed to have inured to them by virtue of such ownership. The defendant Ayres (now plaintiff in error) gave evidence, to support his claim to the land, of a grant from the state of Arkansas, to a person from whom he deraigned title, of lands constituting an island or islands in the river, lying west of the middle of the channel, which constituted the boundary of the states, and of facts tending to support his contention that the lands in suit were accretions to that ownership. Price defended his claim to the lands under a grant of the lands by the state of Tennessee of recent date, contending that the plaintiff's ownership extended only to the shore, and that the made land was between that to which the plaintiff had title and the middle thread of the river, and rested upon that which had never passed from the state until its grant to that defendant. At the close of the evidence the jury, under direction of the court, rendered a verdict for the plaintiffs against both Ayres and Price for all the land claimed by each of them, except a portion claimed by Price only. The defendants excepted to this direction of the verdict. Judgment was entered thereon as follows:

"It is therefore considered, ordered, and adjudged that the plaintiffs do have and recover of and from the defendants, severally, the lands hereinbefore described, found by the verdict of the jury to belong to them in fee, and that the plaintiffs do have and retain the possession of such lands under and in accordance with their said title, and that as to the lands herein sued for, not embraced by the verdict of the jury in favor of the plaintiffs, the defendants go hence without day, and that the plaintiffs recover of the defendants all their costs herein expended, and that execution issue therefor."

Ayres tendered a bill of exceptions, which was settled and filed, and, without taking notice of Price, who appears to have been the only other contestant for the lands recovered, sued out this writ of error. Upon the hearing, counsel for defendants in error raised the objection that Ayres alone prosecuted the writ, without having obtained any order permitting him (Ayres) to proceed alone, or taking any equivalent steps in that regard to justify himself in suing out

the writ without the joinder of Price, and this presents a question which we must first consider. The rule is firmly established, at least in the appellate courts of the United States, that, where a judgment or decree is rendered against two or more jointly, all must join in suing out the writ of error or prosecuting an appeal, unless those who are not joined have been invited to come in and have refused; and proof that this has been done must be made to appear by the record of the circuit court, before a writ of error or an appeal by less than the whole can be allowed. The reasons for this, as has often been stated, are that the prevailing party to the judgment should have the right to execute it against those who do not appeal, and that neither the appellate court nor the party obtaining the judgment ought to be burdened with successive appeals upon the same matter. And, while considerable liberality has been shown in regard to the method by which the severance is effected, the rule itself has been constantly applied. The cases are too numerous, and the law and practice too well settled, to require comprehensive citation. We cite a few of the more recent: Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953; Simpson v. Greely, 20 Wall. 152, 22 L. Ed. 338; Estis v. Trabue, 128 U. S. 225, 9 Sup. Ct. 58, 32 L. Ed. 437; Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39, 36 L. Ed. 933; Davis v. Trust Co., 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563; Beardsley v. Railway Co., 158 U. S. 123, 15 Sup. Ct. 786, 39 L. Ed. 919. And see Mercantile Trust Co. v. Kanawha & O. Ry. Co., 7 C. C. A. 3, 58 Fed. 6,—a case decided by this court. In its enforcement a dubious question has frequently arisen, as to whether the judgment or decree was in legal contemplation a joint or several one, and in solving it the courts have looked to its substance rather than its form. See the above-cited cases, and those which follow. In many cases the rule has been held not applicable where the party claiming to be aggrieved, although he is one of several parties against whom the judgment was rendered, yet alone represents some distinct and substantive subject-matter, in which the others have no concern, or are only incidentally concerned by reason of the allowance or rejection of the claim in question. Cox v. U. S., 6 Pet. 172, 8 L. Ed. 359; Todd v. Daniel, 16 Pet. 521, 10 L. Ed. 1054; Germain v. Mason, 12 Wall. 259, 20 L. Ed. 392; Hanrick v. Patrick, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396; Gilfillan v. McKee, 159 U. S. 303, 16 Sup. Ct. 6, 40 L. Ed. 161; The New York (decided by this court Oct. term, 1900) 104 Fed. 561. It is earnestly insisted by counsel for the plaintiff in error that this case falls within the class of cases last mentioned, because it appears that Ayres and Price founded their claim to the land upon wholly distinct and antagonistic titles. But it was the land itself which was the subject of the suit, and the titles which each of these defendants advanced amounted to no more than separate means to a joint defense. Each of these means was also available to both defendants, for the plaintiff must recover upon the strength of his own title as against all others. The rule is that separate pleas and separate defenses, founded upon distinct sources of right, do not make the judgment several, when they are brought forward in defense of a single cause of action, upon which the judgment is recovered. The res is not thereby divided. In many of

the cases already cited there was no unity of title between the parties bound by the judgment from which the appeal was taken,—cases wherein the appeal was held ineffectual, because parties not joined had an interest in the question whether the judgment should stand or be reversed.

Counsel for plaintiff in error further urges that before the objection was brought forward the time for taking a writ of error by Price had expired, and that therefore he is as effectually precluded as if he had originally been summoned and had refused to join, and, further, that no right of the plaintiff has been delayed by his nonjoinder. This answer is plausible, but it does not reach the root of the matter, which is treated as one of jurisdiction. This must be tested by the conditions existing at the time when the writ was sued out. The action had not then been severed, and, for aught that then appeared, Price might also take out a writ. And it is clear that, if the present writ was ineffectual to remove the case, it could not be made valid by mere lapse of time and the coming on of subsequent conditions. Mattox v. U. S., 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409; Wilson v. Insurance Co., 12 Pet. 140, 9 L. Ed. 1032; Estis v. Trabue, 128 U. S. 225, 9 Sup. Ct. 58, 32 L. Ed. 437; Inglehart v. Stansbury, 151 U. S. 68, 14 Sup. Ct. 237, 38 L. Ed. 76.

The bill of exceptions was tendered by Ayres alone. The pleadings are in the statutory form, and the judgment simply responds to them. So far as we can see, no question could arise upon the record proper; and, as Price did not procure the settlement of a bill of exceptions in his behalf, there is perhaps some ground for saying that he was already disabled from prosecuting a writ of error, and that therefore a summons and severance would have been a futile performance. But, at the time when this writ of error was taken, Price, if he could not avail himself of the bill of exceptions which Ayres had procured to be settled, was not, so far as we know, debarred from procuring the settling of a bill in his own behalf, and joining in the writ of error and assigning errors thereon.

Stress is also laid upon the fact that by the language of the judgment it is adjudged in terms "that the plaintiffs do have and recover of and from the defendants severally," etc. But we think it manifest that, in substance and effect, the judgment operated against them jointly, conforming to the declaration and the verdict. In Hampton v. Rouse, 13 Wall. 187, 20 L. Ed. 593, the verdict was jointly against two defendants, but the judgment was in form against the one who brought the case up. The reporter states that the court held this a mere clerical error. The writ of error was dismissed for the nonjoinder of the other defendant.

It is a matter for regret that this defect was not brought to the attention of the court before the expiration of the time allowed by law for suing out the writ after the entry of the judgment. In these circumstances, seeing that the right to a new writ is now barred, we should have been willing, if possible, to find some ground on which to support the jurisdiction. But the objection is one which may be raised at any time before judgment is entered, and, indeed, is one of which the court may take notice sua sponte. The writ of error must be dismissed.

# AMERICAN SURETY CO. OF NEW YORK v. WOODS.[1]

(Circuit Court of Appeals, Fifth Circuit. January 8, 1901.)

No. 919.

1. DAMAGES—BREACH OF CONTRACT—LOUISIANA STATUTE.
Rev. Civ. Code La. art. 1934, which provides that, "where the object of the contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained and the profit of which he has been deprived," merely undertakes to secure full indemnity to the party aggrieved; and under it, as by the rule of the common law, to authorize a recovery of substantial damages there must not only be proof of the breach of the contract, but also of actual damages resulting to the plaintiff.

2. SAME.
Where a contractor employed to do certain work has, without legal cause, abandoned the work, unfinished, the right of the employer to sue for breach of the contract does not depend on his having completed the work; but where he has himself also abandoned it, and it has never been completed, the sum which the contractor would have lost had he fulfilled his contract, or the difference between the contract price and the cost of completion, cannot be taken as the measure of damages.

3. SAME—MEASURE FIXED BY CONTRACT—MODE OF ASCERTAINMENT.
A contract for the doing of certain work, which provides that in case of delay in doing the work the employer may take charge thereof and complete it at the cost of the contractor, not only provides the measure of damages for the breach of the contract by the contractor if he shall fail to complete the work, but also the manner in which the amount of such damages shall be ascertained; and under the provision of Rev. Civ. Code La. art. 1934, that "when the debtor has been guilty of no fraud or bad faith he is liable for only such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract," on the failure of the contractor to complete the work, without fraud or bad faith, the employer cannot recover as damages for breach of the contract the difference between the contract price and the cost of completing the work, as estimated by experts, where it abandoned the work, and in fact expended no money in its completion.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

On December 7, 1894, Stewart & McDermott made a written contract with the New Orleans Sewerage Company for the construction of certain sewers and their appurtenances in the city of New Orleans. By this contract the sewerage company agreed at its own cost and expense to furnish all the material required in the construction of the sewers and their appurtenances. The contractors, Stewart & McDermott, bound themselves to furnish all the labor required to properly construct the sewers and their appurtenances in a territory or portion of the city of New Orleans defined by certain maps "now on file in the office of the sewerage company." The nineteenth section of the contract is in these words: "In case of any unnecessary delay in doing the work, in the opinion of the engineer, he shall notify the contractors, in writing, to that effect. If the contractors shall not within fifteen (15) days after receipt of such notice take such measures as will, in the judgment of the engineer, insure the satisfactory completion of the work, the engineer may then, by and with the consent of the company, notify the aforesaid contractors to discontinue all work under this contract; and it is hereby agreed that the contractors are to immediately respect said notice and stop work, and to cease to have any right to possession of the ground, provided all things hereby agreed to be

[1] For opinion on rehearing, see 106 Fed. 263.

furnished or done by the company shall have been promptly furnished or done. The engineer shall thereupon have the power, under the direction of the company, to place such and so many persons as he may deem advisable, by contract or otherwise, to work at and complete the work herein described, and to charge the expense of said labor to the aforesaid contractors, and the expenses so charged shall be deducted and paid by parties of the first part out of such money as may then be due or at any other time thereafter becomes due to the said contractors under and by virtue of said agreement, or any part thereof; and, in case such expense is less than the sum which would have been payable under this contract if the same had been completed by the parties of the second part, they shall be entitled to receive the difference, and in case such expense is greater the parties of the second part shall pay the amount of such excess so due." The chief engineer of the sewerage company was to estimate on the last day of each month the total amount of work completed according to specification. Ninety per cent. of the amount earned on work so completed was to be paid the contractors before the 10th of the succeeding month, 10 per cent. being reserved. These payments were to be made according to specified prices for different kinds of work, all stated in detail in the contract. The contract recites the execution and delivery by the American Surety Company, as surety for the contractors, of a bond in the sum of $100,000, bearing even date with the contract. The condition of the bond is that Stewart & McDermott "shall well and truly, and in good, sufficient, and workmanlike manner, perform the work mentioned in the aforesaid agreement, in accordance with the terms and conditions therein stipulated, and in each and every respect comply with the conditions and covenants therein contained, and shall from time to time furnish a new bond for a proportionately reduced amount, as provided in said contract." In January, 1895, Stewart & McDermott began work, and continued until November 4, 1895. On that day they refused to proceed further with the work, and repudiated the contract, on the grounds that a fraud had been practiced upon them in obtaining it, and that, even if the contract were valid in its inception, they had been released from it by reason of a violation of its terms on the part of the sewerage company. In June, 1896, the sewerage company went into the hands of a receiver, on the petition of creditors applying to the civil district court for the parish of Orleans. The sewerage company made no attempt, after the repudiation of the contract by Stewart & McDermott, either to complete the work itself, or to procure it to be done by others. It was never completed. All of the assets of the sewerage company, including the franchise or right to construct the sewers, but excepting the claim urged in the present suit, were sold at public auction for about $90,000. In March, 1897, this suit was brought by A. A. Woods, receiver of the New Orleans Sewerage Company, against the American Surety Company, for the full amount of its bond; the plaintiff averring that said sewerage company had sustained damages in excess of that sum by reason of the breach of the contract. The petition alleged the breach of the contract by Stewart & McDermott, and then alleged, as a ground of damage, "that if said Stewart & McDermott had done the work which they agreed to do under said contract in a proper and workmanlike manner, and within the delay provided by said contract, the cost of said work to said New Orleans Sewerage Company would have been the sum of seven hundred and thirty-nine thousand five hundred dollars, whilst the cost of the work already done by said Stewart & McDermott, together with the amount which it would have cost and will cost said company to complete the work which said Stewart & McDermott by said contract agreed to do, will be, and would at the time when said Stewart & McDermott abandoned said work have been, the sum of nine hundred and twelve thousand and ninety-nine $^{09}/_{100}$ dollars ($912,099.09), and that the difference between said two sums is the sum of one hundred and seventy-two thousand five hundred and ninety-nine $^{09}/_{100}$ dollars, which amount petitioner is entitled to recover from said Stewart & McDermott and the said American Surety Company, their solidary surety." An answer was filed by the American Surety Company, traversing the plaintiff's claims, and making special defenses not material to be stated. There was evidence in the case tending to show that it would have cost the sewerage

company greatly more to construct the sewers than the sum for which Stewart & McDermott had agreed to construct them. At the request of the counsel for the plaintiff the circuit court charged the jury as follows: "(1) In cases of contracts between employer and contractor, providing for the performance and completion of constructions as described in the contract, if the contractor abandons the work before completion, and refuses to complete the same, having no lawful cause for such action, the measure of damages which the employer is entitled to recover is the difference between the cost of completing the work at the contract price, and what it would cost him to complete the work, or to procure the work to be completed by others. (2) After the abandonment of the contract by Stewart & McDermott, the sewerage company would have had the right to have gone on and completed the work itself, or to have let out a contract for the completion of the work to other contractors, upon the best terms attainable; and in that case they would have had the right to recover, as damages, the difference between what it would have cost them if Stewart & McDermott had complied with the contract and what it actually cost the company to complete the work. But the sewerage company was not bound to complete the work, or to employ anybody else to complete it, and they had the right to prove by competent testimony what it would have cost them to complete the work or have it completed, and to recover from Stewart & McDermott the difference between the necessary cost of completion, as thus established, and what it would have cost under their contract with Stewart & McDermott." The American Surety Company duly excepted to the action of the court in giving this charge. The jury found a verdict for the plaintiff, A. A. Woods, as receiver of the sewerage company, against the American Surety Company, for $90,000. To review and reverse the judgment on this verdict the American Surety Company has sued out this writ of error.

Thomas W. Bullitt and W. B. Spencer (W. W. Howe, Wm. Marshall Bullitt, and C. P. Cocke, on the brief), for plaintiff in error.

E. B. Kruttschnitt and Chas. E. Fenner, for defendant in error.

Before PARDEE, McCORMICK and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question to be considered is the charge of the court on the measure of damages. The instruction, in effect, was that the measure of damages was the difference between the contract price and what it would have cost to finish the sewers, and that, to recover this difference, it was not necessary for the sewerage company to complete the work. "Where the object of the contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained and the profit of which he has been deprived," under certain exceptions and modifications not material to this case. Rev. Civ. Code La. art. 1934. This statute merely undertakes to secure full indemnity to the aggrieved party. Reading v. Donovan, 6 La. Ann. 491. Article 2769 is the same in legal effect. To authorize recovery under the statute, two things must concur,—the inexecution of the obligation, and damages to the party complaining. This statute does not conflict with the common law, for by its rule there must be, to authorize a recovery, a breach of the contract, which causes damages. If the breach only is shown, there could be only a verdict for a nominal sum. Sedgw. Meas. Dam. (8th Ed.) § 98. When a contractor is discharged unlawfully, he can, in a suit for damages, recover his outlay and the probably certain profits he would

have made if he had been permitted to proceed with the work. His profits in such case would have been a gain he would have received but for the unlawful act of his employer. The courts uniformly sustain the right to recover profits in such cases. U. S. v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; Railroad Co. v. Howard, 13 How. 307, 14 L. Ed. 157; Masterton v. Mayor, etc., 7 Hill, 61. It is argued from this proposition that, if the contractor wrongfully abandons the contract and refuses to do the work he has contracted to do, the employer, in a suit for damages for breach of the contract, may recover the difference between the contract price and the sum which it would have cost the employer to have the work done, although the employer in fact does not have the work done. To apply the principle to this case, the contention is that, as Stewart & McDermott agreed to finish the sewers for sums aggregating $739,500, and then abandoned the work, and as it would have cost the sewerage company $912,099.09 to complete the work, the receiver of the sewerage company is entitled to recover the difference between the contract price and what it would have cost to finish the work, to wit, $172,599.09, though in fact the work was not finished, and no money actually expended to finish it. By the terms of the contract sued on, the contractors were to furnish all necessary labor to excavate and build the sewers. The sewerage company was to furnish at its own cost all material of every kind required to construct the sewers. We must keep in mind, therefore, that the contract on the part of the contractors was one to labor or to furnish labor. The question involved here can be made clear by an illustration of a suit on a short contract to do work. A merchant employs a clerk, by written contract, to work for one year at $50 a month, payable monthly. The clerk works two months, and without cause repudiates the contract and quits, receiving only the two months' pay. The merchant sues for damages for breach of the contract. The proof shows that he could not get another clerk to do the same work for the succeeding 10 months for less than $100 a month. But it also appears that he did not employ any one to take the clerk's place. Can the merchant recover $500,—the difference between the contract price and the cost of securing another clerk, that he never employed? Does the fact, if it be conceded as a fact, that the clerk would have lost $500 by working for less than his services were worth, show that the contract was worth that sum to the employer, and entitle him to recover a sum not paid, but which would have been paid if he had employed a substitute?

It is contended that as the contractor, in the case of a breach of the contract by the employer, can recover his lost profits, and that he would be permitted to prove what it would cost to complete the work he was prevented from doing, and, where it cost less than the contract price, could recover the difference, as the profit which he would have made; that, in all fairness, the same rule should apply when a breach of the contract is made by the contractor. There are several considerations making differences in the two cases. When the contractor is stopped from work by the owner or employer who is to furnish the materials, he cannot go on and finish the work. He cannot, by com-

pleting the work himself or by others, show just what his profit, if any, would be. When he sues for damages, therefore, he must, to recover profits, prove, if he can, what he would have made had he not been stopped. He is prevented from finishing the work, and such evidence is necessary to show what gain or profit to him was in the contract. On the other hand, when the contractor abandons the work the owner or employer is left in possession. He is free to employ others to finish the work. The contract often, as in this case, provides that he may employ others to finish it if the contractor quits. He therefore usually has it in his power by employing others to complete the work and ascertain exactly the amount of his damages. The contractor, when stopped or unlawfully discharged by the breach of the contract by the employer, has not this power. For the breach of a contract the injured party is entitled in a suit for damages to receive compensation for his loss,—compensation and nothing more. "Damages are given as a compensation, recompense, or satisfaction to the plaintiff for any injury actually received by him from the defendant. They should be precisely commensurate with the injury,—neither more nor less,—and this whether it be to his person or estate." Dow v. Humbert, 91 U. S. 294, 299, 23 L. Ed. 370; 2 Greenl. Ev. § 253. The contractor or builder stopped from his work by the breach of the contract committed by his employer has clearly lost the profit that he would certainly have made by the completion of the work. Can it be said that the employer who has obtained a contract securing services at cheap rates, when the contractor refuses to do the work, has certainly lost the difference between the contract price and the cost of having the work finished, when the employer does not have the work finished? Is this difference a certain gain or profit or value that the employer has lost? His loss would be certain, we think, only in the event he had the work done at a cost greater than the contract price. The contention that the measure of his damages is the difference between the contract price and a greater price which he has never paid must be based on the erroneous theory that the contract is necessarily worth to him the sum above the contract price that it would cost the contractor to finish the work. The fact that the contractor would lose a fixed sum by completing the work does not show that the employer loses that sum by the failure of the contractor to finish it. If the contractor stops the work, and the employer does not complete it, it cannot be said he has been damaged what the former would have lost had he not stopped the work. When the contractor breaks his contract he is liable to his employer for the amount the employer is damaged, but it does not follow that he is liable for the amount that the contractor saved by his abandonment of the contract. It is a mistake, we think, to assume that whatever the contractor saved by stopping the work was lost by the employer who does not complete it.

The precise legal question under discussion was decided in the case of Hunt v. Railroad Co. (C. C.) 36 Fed. 481. In that case a counterclaim was filed in which it was claimed that the defendants will be compelled to pay out large sums of money in excess of the contract price to complete the work that the plaintiff undertook, and in so doing

would be put to a large amount of trouble and expense, to defendant's damage $100,000. In deciding the motion to strike out this item of damages from the counterclaim, Judge Deady said:

"The damages claimed on account of the estimated difference in the cost of constructing the road by the defendant and the contract price are, in my judgment, too uncertain to be allowed. It can only be conjectured what the cost of constructing the road some time in the future will be. Owing to the fluctuations in the price of labor and materials, it may cost more or less to construct the road in 1888-89 than in 1887-88. Besides this, they are contingent. The defendant may never construct the road, and until it does, and necessarily at a greater cost than the contract price, it cannot be said to have sustained any damage by the breach."

It seems to us that the conclusion of the court in this case was correct, and that, whatever other damages may have been sustained, it cannot be said, before the work has been completed at a greater cost, that the injured party has sustained damages to the amount of the difference between the contract price and the cost of completing the work. In the absence of legal defense the employer can, of course, recover damages for a breach of the contract of employment by the employé. Where the employé or contractor without legal cause abandons the work, unfinished, the right of the employer to sue for the breach of the contract is not dependent on his completing the abandoned work. He may sue at once and recover of the employé or contractor such damages as under legal rules he can show he has sustained. But when the employer does not incur the expense of completing the abandoned work, and determines not to finish it, the sum that the contractor would have lost had he complied with the agreement and finished the work, or the difference between the contract price and the cost of completion, cannot be taken as the measure of damages.

Counsel for the defendant in error have shown great industry and ability in presenting argument and precedents claimed to be analogous; but, with all their research, no case is found where an employer who had not completed the work was allowed, in a case like this, to recover the difference between the contract price and what it would have cost to finish the work. The case mainly relied on to sustain the charge of the court as to the measure of damages is Kidd v. McCormick, 83 N. Y. 391. That case, we think, does not sustain the contention of the defendant in error. Kidd sold to McCormick certain lots, and took a mortgage on them for the purchase money; McCormick agreeing to build specified houses on the lots within a fixed time. McCormick began to build the houses, but failed to build them within the time agreed upon in the contract. He finally abandoned the work altogether. Kidd then foreclosed the mortgage, and there was a deficiency of several thousand dollars. For this deficiency he sued McCormick and other defendants. We understand from the opinion that in fact the plaintiff completed the houses after the work was abandoned by the defendants. We find this statement in the opinion, on page 399:

"It was the duty and the interest of the plaintiff to mitigate the damages therefrom as much as he could. To that end he took possession of the work and finished it to availability."

The part of the opinion which is quoted as sustaining the contention of the defendant in error is as follows:

"He has a right to a house as good as that which the defendants agreed to furnish, and his damages is the difference between the value of the house furnished and the house as it ought to have been furnished. One kind of testimony by which that difference may be known is that of experts, saying what would have been the value of the one, and what is the value of the other. Another kind of testimony is that of experts,—what it would cost to complete the unfinished house up to the mark of the contract. Another kind is, when the house has been in fact finished up to that mark, what it did in fact cost to finish it. But these ways all lead to the same end,—what is the difference in value between the unfinished house and a house had it been finished as agreed upon. And this is to be observed of the last-named kind of testimony: First, that the plaintiff is not under obligation to go on and finish the house."

It will be observed that the court states that "his damages is the difference between the value of the house furnished and the house as it ought to have been furnished." It is not held that the measure of damages is the difference between the contract price and what it would have cost to finish the house. It is stated, however, that the testimony of experts would be admissible to show what it would cost to complete the unfinished house up to the mark of the contract. As the houses were in fact completed, the observation that the plaintiff was under no obligation to go on and finish them was unnecessary to the decision of the case. And this remark is not used as controlling the question of the measure of damages, but it is made in reference to the admissibility of evidence to prove damages.

There are other reasons for our conclusion, based on the nineteenth section of the contract. The substance of this section is that, if the contractors delayed or failed to do the work, the sewerage company could take charge of it and finish it. The company is authorized to charge the expense of labor to the contractors. Such cost is to be paid out of the money due to the contractors or to become due by the contract. If the expense of doing the work was less than the sum that would be due and payable under the contract, the contractors were to receive the difference; and, if the expense was greater, the contractors should pay the amount of such excess. It is clear, therefore, that the parties to the contract anticipated that the contractors might not finish the work, and provided for the measure of damages on the completion of the work by the sewerage company at a cost greater than the contract price. In article 1934 of the Revised Civil Code of Louisiana it is declared that, "when the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract." In discussing the question of damages the common-law authorities frequently speak of them as either proximate or remote, and it is only the former that are allowed to be recovered, because it is said they are such as were in the contemplation of the parties to the contract. Hadley v. Baxendale, 26 Eng. Law & Eq. 398. In Goodloe v. Rogers, 10 La. Ann. 631, construing this statute, the court said that "when there is

no bad faith or fraud the obligor is liable only for damages that may reasonably be supposed to have been contemplated by the parties at the time of the contract." In this respect, as was said in the case last cited, "the doctrine of the civil and common law is not materially different." The case of Hunt v. Railroad Co. (C. C.) 36 Fed. 481, involved the construction of a contract containing a similar provision. On this point Judge Deady said:

"The contract gave the defendant the right whenever, in the judgment of its general manager, the work was delayed so as 'to imperil' its completion within the time limited, 'to assume entire control of the work' and complete it, and 'any outlay so incurred by the defendant in excess of the contract price of the work shall be a charge against any balance' due to the contractor for work done under the contract. This provision in the contract indicates plainly that the parties did not contemplate the payment of any damages for the delay or failure to construct the road until it was ascertained by the completion of the same what amount, if any, it cost in excess of the contract price."

This provision of the contract cannot be ignored in deciding this question. The provision seems to have been made for the benefit of both parties. It gave to the sewerage company the right and power to take charge of the sewers and finish them on account of the delay or failure of the contractors. On the other hand, it secured to the contractors any sum that might be left of the unpaid contract price after the sewerage company had paid for the completed work. It also fixed and limited their liability for damages on account of their failure to finish the work, so far as this item of damages is concerned, to such excess as the sewerage company would have to pay over the contract price. This clause of the contract, conceding a different rule to prevail in its absence, rescued the case from the uncertain and speculative control of expert witnesses, and applied to it the practical test of actual cost. This secured to the contractors and their surety a valuable right. They should not be deprived of it. From the contract in this case, having due regard to section 19 of it, we do not think it can "reasonably be supposed" that the parties contemplated that for a failure by the contractors to finish the work they were to be held liable for any outlay which might be required to complete it, before the sewerage company was at any expense on that account. The judgment of the circuit court is reversed, and the case remanded, with direction to grant a new trial.

## In re STEIN.

(Circuit Court of Appeals, Second Circuit. January 22, 1901.)

No. 62.

BANKRUPTCY—DELAY IN PROSECUTING PROCEEDING—JURISDICTION.

The court does not lose jurisdiction under an original petition of creditors alleging acts of bankruptcy of the debtor, and praying for his adjudication as a bankrupt, because such creditors do nothing more than have a subpœna issued, which is returned with indorsement that the debtor cannot be found; but may permit other creditors, whose petitions for leave to join in the original petition are filed more than four months after the alleged act of bankruptcy, to join, and prosecute to an adjudication; Bankr. Act, § 18, cl. "a," providing that, on the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made in the same manner that service of such process is had in suits in equity, except that it shall be returnable within 15 days, unless the judge shall fix a longer time, but, in case personal service cannot be made, notice shall be given by publication as in equity, being merely directory, and intention that a petition shall not become functus officii by omission of the petitioning creditors to proceed to an adjudication being apparent from section 59, cl. "f," providing that creditors, other than original petitioners, may at any time enter their appearance, and join in the petition, or file an answer and be heard in opposition to the prayer of the petition, and clause "g" providing a petition shall not be dismissed by the petitioners, or for want of prosecution, or by consent of parties, till after notice to the creditors.

Appeal from the District Court of the United States for the Southern District of New York.

Arthur Furber, for appellant.

Joseph E. Russell, Jr., for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The appellant was on the 24th day of January, 1900, adjudicated a bankrupt by the district court upon the petition of his creditors. The record shows that prior to December 8, 1898, a petition was filed in the court of bankruptcy by Vietor and others, creditors of Stein, alleging that on the 14th day of November, 1898, Stein was insolvent, and on that day committed an act of bankruptcy, which consisted in concealing and removing his property with the intent to hinder, delay, and defraud some of his creditors, and to prefer others, and praying for his adjudication as a bankrupt. Upon this petition a subpœna was issued on the 8th day of December, 1898, requiring Stein to appear on the 15th day of December following to answer or plead to the petition. This subpœna was returned by the marshal, with the indorsement, "Jule Stein not found in my district." At the time of filing the petition the district court granted an injunction restraining the State Bank from interfering with any assets or property received from Stein. On the 25th day of November, 1898, this injunction was vacated upon the application of the State Bank. Nothing further was done in the proceeding until April 3, 1899. At that time Hart and others, creditors of Stein, filed a petition praying that they be permitted to join as petitioning creditors in the original petition, and that he be

adjudicated a bankrupt. That petition referred to the original petition as setting forth the acts of bankruptcy which had been committed by Stein. The court thereupon made an order permitting these creditors to join in the original petition. Subsequently other creditors of Stein were permitted to join in the original petition. October 31, 1899, another subpœna was issued by the court directing Stein to appear and answer. Thereupon Stein appeared, and filed a plea, which, in substance, challenged the jurisdiction of the court to proceed, because he had not been served with a subpœna until after the supplemental petitions were filed. The plea was overruled, and an adjudication of bankruptcy was ordered.

The question which is raised by the appeal is whether the court lost jurisdiction under the original petition because of the omission of the petitioning creditors therein to prosecute the proceeding, and was without authority to permit other creditors, whose petitions were not filed within four months of the alleged act of bankruptcy, to join and prosecute to an adjudication of bankruptcy. It is insisted for the appellant that the court lost jurisdiction because there was no service of a subpœna to answer the original petition pursuant to the provisions of section 18, cl. "a," Bankr. Act. That provision reads as follows:

"Upon the filing of the petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by the law for notice by publication in suits in equity in the courts of the United States."

The argument for the appellant is that the word "shall," as used in the section, is mandatory. The rule of construction of statutory provisions regulating the time, form, and mode of proceeding by courts and public officers is that they are generally to be deemed directory, and as intended merely to secure system, uniformity, and dispatch in the conduct of public business. "Provisions of this character are not usually regarded as mandatory unless accompanied by negative words, importing that the acts required shall not be done in any other manner or time than designated." French v. Edwards, 13 Wall. 506-511, 20 L. Ed. 702, 703. We find nothing in the language of the section, or in any of the other provisions of the act, inconsistent with the application of the general rule. Undoubtedly, if the subpœna were made returnable in less than the 15 days prescribed by the section, the alleged bankrupt would be deprived of the full opportunity to appear and answer which the section contemplates, and an adjudication, under these circumstances, would be erroneous, but we do not suppose it could be held void; and this is the only regulation in the section having regard to the rights or protection of the alleged bankrupt. The other regulations are manifestly to secure convenient and orderly procedure. That it was not the intention of the act that a petition should become functus officii by the omission of the petitioning creditors to proceed to an adjudi-

cation is apparent from the provisions of section 59. Clause "f" reads as follows: "Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition." Clause "g" reads as follows: "A voluntary or involuntary petition shall not be dismissed by the petitioners or for want of prosecution or by consent of parties until after notice to the creditors." These provisions expressly authorize other creditors than the petitioners to avail themselves at any time of the original petition, including, of course, the act of bankruptcy alleged therein, and to contest the propriety of an adjudication whenever their rights would be injuriously affected thereby. They also prevent the dismissal of the original petition by the creditors therein, or by the bankrupt, whether for good cause or collusively, without giving the other creditors an opportunity to oppose.

It is urged that to permit other creditors to procure an adjudication who have not sought to do so until after four months have elapsed since the act of bankruptcy would enable them to overhaul conveyances and sales as fraudulent or preferential which could not be done otherwise, and might work injustice to those whose titles had by lapse of time become safe. Nothing in the bankrupt act indicates a solicitude for the protection of fraudulent vendees, and, if creditors whose preferences may be disturbed have any equities to urge against an adjudication, they are authorized by section 59 to intervene and present them. And, even if imaginable cases of hardship may arise, the plain language of the act, authorizing creditors "at any time" to join in the original petition, cannot be disregarded.

It is not necessary to decide that the bankruptcy court is without authority to dismiss a petition, on the application of the bankrupt, for want of prosecution, and upon notice to all his creditors, when there has been an unreasonable delay to proceed. All that we decide is that a plea to the jurisdiction in a case like the present cannot be maintained.

The judgment is affirmed.

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## ABLOWICH et al. v. STURSBERG et al.

(Circuit Court of Appeals, Second Circuit. January 22, 1901.)

No. 48.

BANKRUPTCY—REFUSAL OF DISCHARGE.

Bankrupts, having concealed or destroyed their books of account, to thwart investigation into their financial condition, are properly denied their discharge.

Appeal from the District Court of the United States for the Southern District of New York.

Arthur Furber, for appellants.

A. I. Elkus, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The evidence in the record satisfactorily denotes that the bankrupts had their books of account in their possession or under their control at the time of the preparation of the schedules annexed to their petition of bankruptcy, and that they have concealed or destroyed them for the purpose of thwarting an investigation into their financial condition. The order denying their petition for a discharge was consequently justified. Order affirmed, with costs.

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## In re STONER.

(District Court, E. D. Pennsylvania. January 12, 1901.)

No. 782.

BANKRUPTCY—VESTING OF TITLE IN TRUSTEE.

Interest of a bankrupt in land of his mother, who died intestate on the same day, but several hours before, his petition was filed and the adjudication entered, vests in the trustee; Bankr. Act 1898, § 70, cl. "a," providing that the trustee, "on his appointment and qualification, * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt."

Hastings Gehr, for bankrupt.
J. Gilmore Fletcher, for trustee.

J. B. McPHERSON, District Judge. The question certified by the referee arises under the following facts: On November 8, 1900, at 6 o'clock in the morning, the mother of the bankrupt died, owning certain real estate, and at 11 o'clock of the same day his petition was filed and the adjudication was entered. The decedent died intestate, so that an interest in her real estate descended to the bankrupt, and the question presented to the court is whether this interest passed to the trustee upon his subsequent appointment and qualification, or whether the interest still belongs to the bankrupt. I have not had the benefit of an argument, either oral or written, and I am, therefore, unable to say upon what ground it is supposed that the title to the property has not passed to the trustee. My own examination of the subject has furnished me with no good reason in support of the position that the property is still vested in the bankrupt. If the question is to be decided according to the precise order of events, the adjudication laid its hand upon this property, for the bankrupt had become possessed of his interest, by virtue of the intestate laws, several hours before the petition was filed and the adjudication was entered. And the same result is reached if the decision should be governed by the rule that ordinarily no fractions of a day are regarded by the law, for it then appears that upon November 8th the bankrupt was the owner of an interest in real estate, and upon the same day was adjudicated a bankrupt; the ownership and the adjudication being at least coincident. The fact that the title remained in the bankrupt until the trustee was appointed and qualified is not important. By the express provision of section 70, cl. "a," Bankr. Act 1898, the trustee, "upon his appointment and qualification,

* * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt."

The trustee, therefore, is now vested with the bankrupt's title to the property in question, and may take such steps as he may find necessary to enforce his rights.

## In re MARTIN.

(District Court, W. D. New York. November 30, 1900.)

No. 176.

BANKRUPTCY—ACTION IN STATE COURT—STAY—SURETY FOR DEBT—EFFECT OF DISCHARGE OF DEBTOR.

In an action for a debt the debtor denied the debt, and subsequently, as a condition of obtaining a continuance, gave an undertaking with a surety, conditioned to pay the amount of any judgment recovered in case the debtor in any way disposed of his property so that an execution should be returned unsatisfied. Before the adjourned day of trial the debtor petitioned to be adjudged bankrupt, and in his schedule admitted the debt at the amount claimed. *Held*, that it was not essential to the creditor's remedy against the surety in the state court that he should have an execution against the debtor returned unsatisfied, as a discharge of the bankrupt would have the same effect, and therefore it was unnecessary to pursue his action in the state court to judgment.

In Bankruptcy. On motion to stay an action against the bankrupt in the state court.

E. A. Griffith, for petitioner.

A. L. Gardner, for creditor Perry V. Nichols.

HAZEL, District Judge. An action was commenced before a justice of the peace by Perry Nichols against the bankrupt to recover $86.99 on the 24th day of August, 1900. Issue was joined on the return day of the summons, the bankrupt denying the indebtedness. Subsequently, as a condition of further adjournment of trial, an undertaking has been filed on behalf of defendant that the plaintiff recovers judgment in the action, and if plaintiff becomes entitled to an execution upon the judgment, the defendant removes, secretes, assigns, or in any way disposes of his property liable to levy and sale by virtue of an execution, and if execution upon the judgment is returned wholly or partly unsatisfied, the surety undertakes upon demand to pay to the plaintiff the sum due upon the judgment. Before the action pending before the justice came to trial, the defendant in the action on his own petition was adjudicated bankrupt. A temporary order on the bankrupt's application was granted by the referee in bankruptcy enjoining the plaintiff from taking any further proceedings in the pending suit. The matter comes before me on a return of an order to show cause why the suit should not be further stayed, and why plaintiff should not be prevented from continuing his suit to judgment. The debt sought to be recovered by the plaintiff is dischargeable in bankruptcy. The schedule of liabilities of the bankrupt contains the Nichols claim, and admits the indebtedness as claimed

by the plaintiff. This admission renders unnecessary further procedure in the action because of a dispute regarding the amount claimed to be owing from the bankrupt to the plaintiff. The question, therefore, presented here is whether the plaintiff in the suit pending before the justice of the peace is liable to lose his claim against the surety on the undertaking given as a condition of postponement of trial if the stay is continued, and the plaintiff is not permitted to proceed to judgment and execution, as provided by the undertaking. Is it essential that the plaintiff proceed to judgment, and exhaust his remedy in the manner specially pointed out by the undertaking? I am clearly of the opinion that it is not necessary. The plaintiff, by the restraining order of the bankruptcy court, is prevented from proceeding to judgment and execution in the pending suit before the justice of the peace by the paramount authority of the bankruptcy court. This court has power to stay pending suits founded upon a claim for which a discharge would be a release. The performance of the conditions imposed on the plaintiff in the suit by virtue of the stay becomes impossible, and the discharge of the bankrupt from his debts has the same effect as the return of an execution wholly or partly unsatisfied. Shellington v. Howland, 53 N. Y. 374, and cases cited; People v. Bartlett, 3 Hill, 570. The plaintiff must prove his claim in bankruptcy, and apply on the debt in reduction of the amount any dividends declared. The surety on the undertaking may only be held to pay whatever sum remains owing after the payment of dividends. For these reasons the suit pending before E. J. Gardner, justice of the peace, wherein Perry Nichols is plaintiff and the bankrupt is defendant, is stayed, and further proceedings are enjoined until 12 months after the date of the adjudication, or, if within that time the bankrupt applies for a discharge, then until the question of such discharge is determined.

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## In re UTT et al.

## RIDGELY NAT. BANK v. MATHENY.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 692.

1. BANKRUPTCY—PROCEEDINGS FOR REVISION—PARTIES.

In proceedings in the circuit court of appeals under Bankr. Act 1898, § 24b, for the review of an order made by a court of bankruptcy distributing a fund in the hands of the trustee of a bankrupt in payment of fees, costs, and expenses, in accordance with a petition of the trustee, where none of the distributees except such trustee were parties to the record below they need not be made parties to the petition for revision, but will be deemed sufficiently represented by the trustee.[1]

2. SAME—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.

A decree was entered in a state court foreclosing a first and second mortgage on real estate, and ordering its sale. Before the time fixed for the sale, creditors filed a petition against the mortgagors, on which

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[1] Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

they were adjudicated bankrupts. Such creditors also filed a bill in the circuit court of the United States on which they obtained an injunction restraining further proceedings for the sale of the mortgaged property by the state court. Thereafter the mortgagees joined in a petition to the court of bankruptcy asking that the property be sold by the trustee for payment of their liens, and such sale was ordered and made, the proceeds received being insufficient to pay the mortgage debts. On petition of the trustee the court ordered the first mortgage paid from the proceeds, but displaced the second in favor of the costs and expenses incurred in both the bankruptcy proceedings and the injunction suit, including fees allowed to counsel for the creditors and trustee. No other assets of the bankrupt came into the hands of the trustee. *Held*, that such order was erroneous, except in so far as it directed payment of the costs incurred in selling the property, including compensation to the trustee not exceeding that to which the master in the state court would have been entitled.

3. SAME—COMMISSIONS OF REFEREES AND TRUSTEES—DIVIDENDS.
Under Bankr. Act 1898, §§ 40, 48, providing that referees and trustees in bankruptcy shall be entitled to commissions on "dividends" paid by the estate, they are not entitled to commissions on sums paid to mortgagees from the proceeds of the mortgaged property on its sale by order of the court of bankruptcy, such sums not being dividends, within the meaning of the statute.

In Bankruptcy. Petition for revision of an order made by a court of bankruptcy.

This is a petition under subdivision "b" of section 24 of the bankrupt act of 1898 for a revision of proceedings in bankruptcy of the district court of the United States for the Southern district of Illinois. The material facts are these: Pamelia S. Clark, holding a first mortgage, and the Ridgely National Bank of Springfield, Ill., holding a second mortgage, executed by Edgar W. Utt, John P. Utt, and Frank Utt, partners under the name of Utt Bros., upon real estate, on March 21, 1899, obtained in the circuit court of Sangamon county, Ill., a decree of foreclosure, whereby there was determined to be due on the first mortgage $5,539.21, with $173 costs and solicitor's fee, and on the second mortgage $4,320.37, with $143 costs and solicitor's fee; and in pursuance of that decree the master in chancery of the court had duly advertised a sale of the property to occur on March 27, 1899. On March 17th the Black Diamond Coal Company and other creditors filed in the district court of the United States for the Southern district of Illinois a petition that the Utt Brothers be adjudged bankrupts, and on April 3d ensuing an adjudication to that effect was entered. Excepting the mortgaged property and the proceeds of the sale thereof, no assets of any character came into the trustee's possession. On March 22d, before the advertised day of sale and before the adjudication in bankruptcy, the Black Diamond Coal Company brought a bill in the United States circuit court for the Southern district of Illinois praying an injunction forbidding a sale of the mortgaged property by the master in chancery under the decree of the state court. On March 25th a restraining order was issued, and the defendants were ruled to show cause on April 5th why an injunction should not issue, and in June following the writ was ordered as prayed, and no appeal from the order was taken; but on November 4, 1899, the holders of the two mortgages joined in a petition to the district court that the trustee in bankruptcy be directed to advertise and sell the mortgaged property, and to pay to them out of the proceeds of the sale the amounts found due by the Sangamon circuit court. On November 27th the court made an order to that effect, including in the costs of this proceeding, directed to be first paid, the sum of $200 allowed to the solicitors of the petitioners. This allowance the solicitors for the Ridgely National Bank disclaimed in open court before the sale was made, and reserved to themselves and the bank the right to except to any allowance for any fees or charges in the bankruptcy proceedings. A sale made on December 26th was set aside because the bid was

less than three-fourths of the appraised value of the property, and on January 18, 1900, a resale was made to the Ridgely National Bank for the sum of $7,600, there being due on the first lien more than $6,000, and upon the lien of the bank near $5,000. The sale was reported to and approved by the court on February 3, 1900, and on the same day the trustee presented to the court a petition asking that the sum bid for the property "when received" be distributed as follows: "First. That said sum first be applied to the payment of principal and interest due on the mortgage held by Pamelia S. Clark and all the costs of this bankruptcy proceeding, which said costs shall include the clerk's, referee's, marshal's, trustee's, and appraisers' costs and commissions as provided by law, and all other costs incident to and growing out of such bankruptcy proceedings, and the sale of said real estate, including advertisements and other expenses incurred by the trustee in carrying out the decretal order of sale entered herein, and that said costs shall also include the sum of five hundred dollars for W. St. John Wines, the solicitor for the petitioning creditors, and also the sum of one hundred dollars for Robert Matheny, the solicitor for the trustee, which said sums of five hundred dollars and one hundred dollars, respectively, the court may find to be a reasonable compensation for their services; said payments to be made according to the schedule following, to wit. * * * Second. That after the payment of the said amount due the said Pamelia S. Clark and the costs and expenses as set out in the foregoing schedule the undersigned may be directed to apply the balance in his hands to the discharge of the principal and interest due on the mortgage held by the Ridgely National Bank set out in the decretal order heretofore entered herein, which said principal and interest at this date amounts to the sum of four thousand five hundred and seven and $^{57}/_{100}$ dollars, and if, after the application of said balance, there should still remain in the hands of the said trustee any portion of the money realized from such sale, that the undersigned may be directed to bring the same into court for further order and direction." Of the items embraced in the schedule referred to, the Ridgley National Bank objected that the following were not properly chargeable against the fund in preference to the lien of the bank:

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|---|---|
| Lee Matheny, trustee's commissions | $202 00 |
| Robert Matheny, attorney for trustee | 100 00 |
| M. B. Converse, clerk, for use of W. St. John Wines fees advanced | 25 00 |
| C. P. Hitch, U. S. marshal, marshal's fees advanced for use of St. John Wines | 2 00 |
| Appraisers' fees and expenses | 32 00 |
| W. E. Shutt, referee's expenses | 18 25 |
| Attorney's fees W. St. John Wines | 500 00 |
| W. E. Shutt, referee's commission on sale | 76 00 |
| S. D. Scholes, attorney's fees in Clark mortgage in district court | 100 00 |
| W. St. John Wines, expenses advanced in injunction suit | 11 55 |
| C. P. Hitch, marshal, for the use of St. John Wines | 6 00 |
| J. T. Jones, clerk's costs in injunction proceedings | 7 30 |
| J. T. Jones, clerk, use W. St. John Wines | 5 00 |

The court, on April 27, 1900, overruled the objection, and ordered "that the said trustee proceed to distribute said proceeds in the manner indicated in his said petition." These facts in greater detail, with full copies of the documents, orders, and decrees referred to, are set forth in the petition presented by the Ridgely National Bank to this court on May 15, 1900. The record shows a notice dated May 14, 1900, and addressed "To Lee Matheny, trustee, Robert Matheny, attorney, W. St. John Wines, William E. Shutt, S. D. Scholes," etc., to the effect that on May 15th, or as soon thereafter as the court would hear the same, application would be made to this court for leave to file a petition for the review of the order dated April 27th. Service of that notice on the day of its date was acknowledged by each of the persons to whom it was addressed. Upon presentation of the petition the order of this court was that it be filed and that "Lee Matheny, trustee, answer thereto within twenty days from service of a copy of this order." He filed an answer on June 5th, 1900, reiterating in substance the facts already stated.

C. L. Conkling, for petitioner.
Samuel P. Wheeler, for respondent.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

It is insisted that the petition should be dismissed for the lack of necessary parties, who, it is said, are directly interested and not represented by the trustee, who is the sole respondent. It is a sufficient answer that none of those referred to were parties to the proceedings below, none of them had intervened for the purpose of asserting a claim upon the fund, and except in the petition of the trustee their names appear nowhere in the record. Represented as they were solely by the trustee below, they must be deemed to be sufficiently represented by him here. Besides, as already stated, those of them chiefly concerned joined the trustee in accepting service of notice of the proposed application to this court, and also in acknowledging receipt of a copy of the petition which it was proposed to file, and it has been, therefore, a matter of their own choice that they have not appeared here in their own behalf,—an illustration, perhaps, of the scripture that "a prudent man foreseeth evil and hideth himself." Only the foolish needlessly expose themselves to a judgment for costs when there is a possibility of hiding behind a trustee, who, by reason of presumed innocence of wrongful intention, will not be held personally responsible, notwithstanding the only visible purpose of the proceedings has been to create claims for costs and commissions which could be paid only by the displacement of vested rights.

Concerning the merits: The mortgaged property having been sold by the trustee in bankruptcy under the order of the district court, it is equitable and right that the expenses of the sale, including advertisement, appraisement, if appraisement was required by law, revenue stamps, and compensation to the trustee, not exceeding that of the master in chancery if the sale had been made by him under the decree of the state court, should be paid out of the proceeds of the sale; but, in so far as it was directed that attorneys, the clerk, and the marshal should be paid for services in the bankruptcy proceedings not directly connected with the sale, or in the suit for an injunction, the order made was without justification in law or equity. This includes the $100 directed to be paid to the attorney for the trustee, for whose assistance, in connection with the sale, there could have been no necessity. What facts were alleged in the bill upon which further proceedings in the foreclosure suit in the state court were enjoined the record before us does not show, and whether, at the stage the suit had reached, there could have been a showing such as to justify the injunction, we do not consider. See, on the subject, In re Pittelkow (D. C.) 92 Fed. 901; In re Holloway (D. C.) 93 Fed. 638; In re Horton (C. C. A.) 102 Fed. 986. Without a clear showing of a substantial value in excess of the mortgage liens the applica-

tion for the injunction ought not to have been entertained, and it is difficult now to understand how such a showing could have been possible. It was, however, a matter within the jurisdiction of the court, and, the writ having issued, it was at least the privilege of the mortgagees, instead of appealing from the order, to apply for relief to the bankrupt court. Indeed, no other way of obtaining a prompt sale was open. The order of sale made, in its original form, provided for the application of the proceeds, after payment of the costs of the sale, to the discharge of the mortgage liens; but that provision was afterwards stricken out, and the question, held meanwhile under advisement, was finally determined by the order which we are asked to review.

If the commissions allowed to the trustee and the referee are warranted by the law, the allowances to attorneys and others are probably equally justifiable. By sections 40 and 48 of the bankrupt act the trustee and referee are to receive for their services a commission "on sums to be paid on dividends and commissions." The point in dispute is: What is the meaning of "dividends," as the word is used in these provisions? The question has been considered in a number of cases by the district courts. In re Wayne Electric Corp. (D. C.) 94 Fed. 109; In re Fielding (D. C.) 96 Fed. 800; In re Barber (D. C.) 97 Fed. 547; In re Sabine, 1 Am. Bankr. R. 321. We agree with the conclusion declared in the first two of these cases that sums to be paid upon secured claims or other claims entitled to priority of payment are not "dividends" upon which the trustee or referee may receive a commission. This is made clear by other provisions of the statute. By sections 56b and 57e creditors holding claims which are secured or have priority can vote at creditors' meetings, or their claims be counted in computing either the number of creditors or the amount of their claims, only when the claims exceed the value of the securities or priorities, and then only for the excess. They are treated as creditors only for the unsecured excess. Section 65a declares that "dividends of an equal percentum shall be declared and paid on all allowed claims, except such as have priority or are secured." This, if not strictly speaking a definition of the word "dividends," is equivalent to a declaration that in this respect claims having priority and secured claims are upon the same footing. The opinion in the Barber Case, supra, recognizes this construction, but makes a distinction against secured creditors who invoke the action of the bankrupt court, and through the action of that court alone have their security converted into a fund in the hands of the trustee. "If a secured creditor," it is said, "refrains from asking or invoking the aid of the court of bankruptcy to enable him, through its officers, and its exercise of jurisdiction, to turn his securities into cash, then, although the court, for the benefit of the unsecured creditors, should use its equitable power to the extent of selling the incumbered property free and discharged of the incumbrance, assuming to care for the equitable rights of the secured creditor in its disposition of the moneys arising from the sale, there would seem to be reason for holding that the moneys going to the secured creditor under such circumstances only came into the case inci-

dentally as the result of the effort to realize and obtain other money for the unsecured creditors, and that it should not be regarded as any dividend, or charged with any commissions. * * * But there is nothing in the law which excludes the referee from commissions upon the dividends to any class of creditors from a fund obtained through the action of the court alone, and the services of its officers, when such action and services have been invoked by such creditors." We find no warrant for this distinction in the terms of the statute. It rests on considerations of reasonableness and justice, which, if brought to the attention of congress, might perhaps have led to its express adoption; but if the statute, as it stands, does not exclude commissions to the referee or trustee upon a fund obtained through the action of the court when invoked by the secured creditor or by a creditor entitled to priority, then it does not exclude such commissions upon the fund when obtained by the action of the court upon the petition of the trustee, and when the creditor not only has not asked, but has objected to, the interference of the bankrupt court. If, however, the distinction were conceded in the terms stated, it would not apply in letter or spirit to the present case. These mortgagees had already obtained, and were proceeding to sell under the decree of the state court, and not until they had been enjoined against further steps in that direction did they apply to the district court. That court was not asked and did not assume to act independently and alone. In respect to the validity, amount, and priority of the mortgage liens one over the other and of both over the demands of other creditors, it recognized the conclusiveness of the foreclosure decree, and the sale ordered to be made was, in effect, a substitute for that about to have been made by the master in chancery. The effect may have been to cut off a right of redemption which would have existed if the sale had been made under the decree of foreclosure, but it does not appear that that right was of any value which could have been made available to the bankrupt estate, or that the sale was for a greater price than would have been offered at a foreclosure sale. On the contrary, it is evident that the entire value of the property was much less than the sum due upon the mortgages. To bring the case within the distinction declared in the Barber opinion, if conceded to be sound, it should be shown that the property had a rental value during the period of redemption of which the purchaser got the benefit under the sale made by the trustee, and which he could not have obtained by a purchase under the decree of foreclosure. It follows that the order under review should be set aside, and, that done, the court will proceed in accordance with this opinion. It not appearing that the trustee was responsible for what was done, and the petitioning creditors and their counsel, who presumably were responsible, not being parties to this proceeding, neither party will be allowed costs in this court. So ordered.

## In re RYAN.

(District Court, N. D. Illinois, N. D. July 26, 1900.)

No. 2,657.

1. BANKRUPTCY—PREFERENCES—SET-OFF.
Under Bankr. Act 1898, § 68a, providing that in cases of mutual debts or credits between the estate of a bankrupt and a creditor the account shall be stated between them, and only the balance allowed or paid, cash payments on account, made within four months of the filing of the petition, are not such debts or credits as entitle the creditor to state the account, and hold the bankrupt only for the balance found.

2. SAME—NEW CREDIT.
Bankr. Act 1898, § 60c, providing that if a creditor has been preferred, and afterwards in good faith gives the debtor further credit, without security, for property which becomes part of the bankrupt estate, the amount of such new credit, unpaid at the time of the adjudication, may be set off against the amount otherwise recoverable from such creditor, is not restricted to cases where the trustee sues the creditor to recover the amount of the preference, but the creditor may claim the set-off where the trustee merely refuses to allow the claim till the surrender of the preference.

In Bankruptcy.

Newman, Northrup & Levinson, for trustee.

KOHLSAAT, District Judge. I am of the opinion that the mutual debits and credits contemplated by section 68a, Bankr. Act, do not include cash payments on account within four months of the filing of the petition against the bankrupt, and that the referee's finding herein that creditors should be permitted to have an accounting of all transactions between them and the bankrupt, both prior to and during such four months, and to have their claims allowed for the balance shown by such accounting, is not sustainable. With reference to section 60c, I do not think that the word "recoverable," in the last line thereof, should be held to dominate the meaning of the entire section. The whole paragraph, until this word is reached, covers as well the creditor who receives a preference without, as one who receives a preference with, reasonable cause to believe it to be intended as such. Reasoning from general business experience, it is extremely difficult to imagine a case in which a creditor would give a debtor further credit "in good faith" after a knowledge of the latter's insolvency. Giving the word "recoverable" its strict legal signification, the decision of Judge Shiras in Re Christensen (D. C.) 101 Fed. 802, is undoubtedly correct; but the wording of the entire section is so general and untechnical that I am impressed with the belief that the word "recoverable" therein was intended to convey its lay meaning, and was not used in its strict legal sense. The injustice which would follow a construction differentiating between creditors who voluntarily surrender their preferences, in favor of the one who would be compelled to do so at the end of a lawsuit if he did not make the surrender voluntarily, should certainly have weight in the mind of the court in aiding it to arrive at the meaning of congress as em-

braced in the entire section. The ruling of the referee is reversed, with directions to proceed in the matters in question herein in accordance with the above construction of section 60c.

## In re MORALES et al.

(District Court, S. D. Florida. January 10, 1901.)

BANKRUPTCY—BASIS OF ADJUDICATION—CLAIM FOR BREACH OF WARRANTY.

A claim for damages for breach of warranty, though based on a contract, is not one founded on a contract, within Bankr. Act 1898, § 63, subd. "a," cl. 4, so as to permit it to be the basis of an adjudication in bankruptcy, but is such an unliquidated claim as, after such an adjudication, may, under section 63, subd. "b," be liquidated as directed by the court.

Petition of George S. Nicholas for Adjudication of Involuntary Bankruptcy.

F. M. Simonton, for petitioner.
Gunby & Gibbons, for defendant.

LOCKE, District Judge. The foundation of the claim upon which the petition for adjudication of involuntary bankruptcy against the defendant corporation, as stated in the petition, is an alleged warranty contained in a contract for sale of cigars made in June, 1898. The allegation of the petition is that at that time a contract was made for the sale of certain cigars, to be made of clear Havana. This contract appears by the petition to have been in force for a year and seven months, during which time it is alleged that upward of $70,000 worth of cigars were bought, accepted, received, and paid for. Nine months after the termination of said contract it is claimed that there was a breach of warranty for all of that time, and that the goods accepted and paid for were not made of clear Havana, but to a certain extent of domestic tobacco, and were worth 20 per cent. less than those warranted to be delivered. The only question is, is this a provable claim that would justify a court of bankruptcy in declaring the corporation a bankrupt, and permitting this creditor to come in and elect a trustee to take possession of the assets of the bankrupt and control the defense of this suit, it being admitted in argument that there are no other creditors of any importance? The ancient rule and practice was that a breach of an alleged warranty, although based on a contract, was not an action for the performance or fulfillment of the contract, but was an action on the case sounding in tort, and could only be presented as such. Stuart v. Wilkins, 1 Doug. 18; Schuchardt v. Allen, 1 Wall. 359, 17 L. Ed. 642. In this case there was no contract, expressed or implied, that the defendant would pay to the petitioner any amount of money. It is only the force of law that gives damages for the breach of a warranty in such a case. I consider that it should be classed with actions for tort, deceit, or fraud, rather than contract, such as is contemplated in section 63, subd. "a," cl. 4, of the law of bankruptcy. The result of this petition, if the defendant should be adjudicated a bankrupt and a trus-

tee elected by the petitioner, would be to place the control of the defense of the suit for damages now pending in the hands of the petitioner, so as to work great injustice and hardship to the defendant, and prevent any defense being made. I know of no way contemplated in bankruptcy by which such an unliquidated claim can be proven. It is the duty of the referee to allow and approve all provable claims; but certainly it would not be within his power to allow or approve this claim. It is true that, had the defendant in this case been adjudicated a bankrupt, the petitioner might present his claim, and under subdivision "b" of said section 63 it would be the duty of the court to determine how this claim, although unliquidated, might be thereafter proven and allowed against the estate; but I do not consider that the law contemplated that such an unliquidated claim as this, not capable of proof by any practice in bankruptcy, should be made the basis of an adjudication in bankruptcy. It is therefore ordered that the demurrer to the petition herein be, and the same is hereby, sustained, and that all action thereupon and adjudication thereunder be suspended until the claim alleged by the complaining creditor be reduced to judgment.

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## In re WELLS.

(District Court, W. D. Arkansas, Ft. Smith Division. December 28, 1900.)

1. BANKRUPTCY—GOODS EXEMPT—PURCHASE PRICE—TRUSTEE'S TITLE.
   Const. Ark. art. 9, § 2, provides that specific articles not exceeding $500 in value may be selected for exemption. Bankr. Law 1898, § 70a, provides that the trustee of the bankrupt's estate shall be vested with the bankrupt's title, except as to exempt property. Sand. & H. Dig. §§ 4727, 4728, forbid exemption for the vendor's debt for the purchase price. *Held*, that the trustee in bankruptcy did not acquire title to goods claimed as exempt by the bankrupt, though the purchase price thereof had not been paid.
2. SAME—VENDOR'S LIEN—NOT ENFORCEABLE IN BANKRUPTCY COURT.
   Where a bankrupt claimed exemptions under Const. Ark. art. 9, § 2, which states the exemptions allowed to the head of a family, the fact that the purchase price of the goods claimed as exempt had not been paid would give the seller no right to enforce his vendor's lien in a court of bankruptcy.

In Bankruptcy.

L. & A. Scharff sold to the bankrupt certain liquors, which, when Wells was adjudged a bankrupt, remained in his stock in unbroken packages, and unpaid for. Wells claimed this liquor as exempt. The trustee set it apart to him as a part of his exemptions. L. & A. Scharff and two other creditors of the bankrupt excepted to the action of the trustee in that behalf on two grounds: (1) Because the purchase money for the exempted property had not been paid; (2) because the bankrupt has not made a full, complete, and fair disclosure of the property belonging to his said estate, as required under the provisions of the bankrupt law. The referee sustained the action of the trustee, and the creditors appealed.

Martin & Winchester, for creditors.
B. T. Duval, for bankrupt.

ROGERS, District Judge. Chapter 3, § 6, Bankr. Law 1898, is as follows:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the

petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

Article 9, §§ 1, 2, of the state constitution of 1874 are as follows:

"Section 1. The personal property of any resident of this state who is not married or the head of a family, in specific articles to be selected by such resident, not exceeding in value the sum of two hundred dollars in addition to his or her wearing apparel, shall be exempt from seizure on attachment, or sale on execution, or other process from any court issued for the collection of any debt by contract: provided, that no property shall be exempt from execution for debts contracted for the purchase money therefor while in the hands of the vendee.

"Sec. 2. The personal property of any resident of this state who is married or the head of a family, in specific articles to be selected by such resident, not exceeding in value the sum of five hundred dollars in addition to his or her wearing apparel, and that of his or her family, shall be exempt from seizure on attachment, or sale on execution, or other process from any court on debt by contract."

Sections 4727, 4728, Sand. & H. Dig., are as follows:

"Sec. 4727. In any action brought in the courts of this state for the recovery of money contracted for property in possession of the vendee, it shall not be lawful to include said property in any schedule intended to protect said property, or exempt it from seizure on attachment or sale on execution or other process issued from any court for the collection of any debt upon the claim of the plaintiff.

"Sec. 4728. In any such action the court or clerk shall issue, on petition of the plaintiff, duly verified, describing the property and stating its value, at or after the commencement of such action, an order, which may be embodied in the original summons, stating the name of the court and the style of the action, and directing the sheriff or other officer to take the property described in the petition, and hold the same subject to the orders of the court."

It was held in Friedman v. Sullivan, 48 Ark. 213, 2 S. W. 785, that the provision in section 1, art. 9, of the constitution of 1874, "that no property shall be exempt from execution for debts contracted for the purchase money thereof while in the hands of the vendee," applies also to the second section in that article, and excludes all classes of persons from exemption of such property from execution.

Section 70a, Bankr. Law 1898, is as follows:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt."

Section 47a, Bankr. Law 1898, provides that:

"Trustees shall respectively * * * (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."

The property claimed by Wells as exempt was manifestly his property from the date of its purchase. No effort is made to show that it was obtained by him by misrepresentation or fraud. Indeed, the effort in this proceeding to prevent him from holding the property as exempt by enforcing the vendor's lien in effect affirms the sale of it; and, if it had been sold to him, it was his, subject to the vendor's right to enforce a lien for the purchase money. Such was the legal status of the property at the time the trustee of his estate was ap-

pointed and qualified. By the trustee's appointment and qualification, did he become vested with the title of the property? The bankrupt law (section 70a) answers that question. It says:

"The trustee of the estate of the bankrupt, upon his appointment and qualification, * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt."

What property is exempt to the bankrupt? Chapter 3, § 6, Bankr. Law, supra, answers that. It is the same that is exempt under the state laws. What is exempt under the laws of the state? The state constitution answers that question (article 9, § 2), viz.:

"Specific articles to be selected by such resident, not exceeding in value $500.00, in addition to his or her wearing apparel, and that of his or her family."

Wells selected and claimed this very property as exempt, and it was set apart to him by the trustee as such. The title to this property did not, therefore, pass to the trustee. It never became vested in him. By the very terms of the bankrupt act the title remained in Wells, or, at least, did not pass to the trustee. It did pass to the possession of the trustee for a specific purpose,—that of preparing a complete inventory of the bankrupt's estate,—and to set apart the exemptions according to the provisions of the forty-seventh section of the act, with the estimated value of each article. Rule 17, Sup. Ct., General Orders in Bankruptcy. 18 Sup. Ct. vi. But the title to the exempted property did not change.

In re Bass, 3 Woods, 382, Fed. Cas. No. 1,091, referred to in 1 Am. Bankr. R. 165, 91 Fed. 745, in the case of In re Camp, Mr. Justice Bradley used this language:

"In other words, it is made as clear as anything can be that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made. But, whether so or not, it is not for the bankrupt court to inquire. The exemption is created by the state law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it, he may prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not. Nor does it make any difference that the homestead was not ascertained or set out in severalty until after the proceedings in bankruptcy were commenced, or until after the conveyance to the assignee was executed. Whenever properly claimed and designated, the exemption protects it; and the exemption created by the bankrupt act relates back to the conveyance, and limits its operation. Though not designated when the conveyance was executed, it was capable of being designated; and on the principle that 'id certum est quod certum reddi potest' it is as much entitled to the benefit of the exemption as if it had been designated and set apart before the bankruptcy occurred. And here it is proper to remark that the assignee in this case misconceived his duty and powers when he assumed to judge that the bankrupt was not entitled to a homestead. That is for the court to say, and not for him. It was his business to report to the court whether the property claimed as homestead was or was not within the limit of value which the laws of Georgia allow for that purpose. Unless the court had this information, it cannot determine whether the property claimed is fairly within the allowance for homestead or not, and whether it has jurisdiction over the property or not. What equities might arise if there were several creditors, and some of them had a lien or claim against the homestead property and the others not, it is not necessary to decide. Those who

have no such claim might, perhaps, properly object to those having such a claim being allowed to come in for a dividend against the general assets until they had first exhausted their remedy against the exempted property, on the principle of marshaling assets. This would depend on the question whether the equity of the general creditors is superior to that of the bankrupt and his family in reference to the right of homestead and exemption. In some cases, at least, the equities might, perhaps, be equal, in which case the court would not require the assets to be marshaled. But, even where the right to marshaling existed, the bankrupt court could not assume jurisdiction of the exempted property, and order it to be sold, but would require the favored creditor to pursue his remedy against such property in a forum that could lawfully reach it. The decree of the district judge is affirmed, with costs."

To the same effect see Rix v. Bank, 2 Dill. 367, Fed. Cas. No. 11,869; In re Poleman, 5 Biss. 526, Fed. Cas. No. 11,247; Byrd v. Harrold, 18 N. B. R. 437, Fed. Cas. No. 2,269; In re Stevens, 5 N. B. R. 298, Fed. Cas. No. 13,392; In re Preston, 6 N. B. R. 545, Fed. Cas. No. 11,394.

In view of this decision, and having regard to the very language of the bankrupt act as quoted, supra, I cannot doubt that the title to this property remained in the bankrupt, and that he had the right in law to claim it as exempt. I am equally clear that the bankrupt court is not the proper forum to enforce the vendor's lien against it. Rix v. Bank, 2 Dill. 367, Fed. Cas. No. 11,869; In re Poleman, 19 Fed. Cas. 918 (No. 11,247). I am aware that two district judges—Spere and Paul—have held in cases where creditors of the bankrupt held his notes waiving exemptions that the bankrupt courts had jurisdiction to enforce such a note against the bankrupt's exempted property. In re Sisler, 2 Am. Bankr. R. 760, 96 Fed. 402; In re Woodruff, 2 Am. Bankr. R. 678, 96 Fed. 317. Whether those opinions are sound or not it is not necessary to decide. Those cases are easily distinguished. In those cases, in so far as the creditors holding the notes waiving all exemptions were concerned, it may be said that all the estate of the bankrupt passed to the trustee, for the supreme court of Georgia had held that the waiver of exemptions in a note was valid and binding; so that, under the laws of Georgia, as to these creditors, nothing was exempt. In the case at bar there is no waiver of exemptions. On the contrary, the absolute title to the property in controversy was in Wells, the bankrupt; and, if he had not claimed it as exempt, it would have passed to the trustee for the benefit of all the creditors, for the reason that such property as passes to the trustee is for the benefit of all, subject, of course, to any valid liens. It has been held by the supreme court of Arkansas that property assigned for the benefit of creditors was not subject to the vendor's lien for the purchase money. Moreover, it has been held that the statute quoted supra, and intended to make effective the constitutional provision forbidding the vendee to claim as exempt property for which the purchase money had not been paid, did not give the vendor a lien at all, but only forbade exemption for the vendor's debt for the purchase price, and to enable him to seize it at the commencement of his action, if still in the possession of the vendee, or under his control. It was declared to be a statutory process for impounding the chattel to prevent alienations pendente lite; and the object of the action was not to enforce a previously existing lien,

but to create a lien by service of process upon the property. Bridgeford v. Adams, 45 Ark. 136; Swanger v. Goodwin, 49 Ark. 288, 5 S. W. 319. The vendor in this case, therefore, had no lien upon this property for the purchase money. He can only acquire it by complying with the statute. He cannot enforce it by exceptions to the trustee's report. Whether he can enforce this lien in another forum having jurisdiction is not a question I am called upon to decide. The whole equity of this case, however, is with the vendor; and, if he elects to proceed against the bankrupt to enforce the vendor's lien, the court, on application, will withhold the discharge of the bankrupt, if he be otherwise entitled thereto, until the proper tribunal may pass on the question. The exceptions are overruled, and the action of the referee is affirmed.

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## TIFFANY v. UNITED STATES.

(Circuit Court, S. D. New York. February 2, 1901.)

1. CUSTOMS DUTIES—DRILLED PEARLS.
Drilled or pierced pearls are not pearls in their natural state and are taxable under the tariff act of July 24, 1897, par. 434, and subject to a duty of 20 per cent. ad valorem, as articles manufactured in whole or in part.

2. SAME—APPEAL FROM COLLECTOR.
On appeal from a decision of the collector, the burden is on the importer to prove that his contention is right, and, if he fails, the action of the collector stands, even though the collector, also, has selected the wrong paragraph.

Appeal by importer from decision of board of general appraisers affirming the action of the collector in assessing duty on certain articles of merchandise known as "drilled pearls."

William B. Coughtry, for importer.

Henry L. Burnett, U. S. Atty., and Henry C. Platt, Asst. U. S Atty.

COXE, District Judge. The importations involved in this controversy are drilled or pierced pearls. The collector classified them under section 6 of the act of July 24, 1897, and assessed a duty of 20 per centum ad valorem as "articles manufactured, in whole or in part." The importer insists by his protest that they should have been classified under paragraph 436 of said act and subjected to an ad valorem duty of 10 per centum as "pearls in their natural state, not strung or set." He also insists in the protest that if not classified in the first instance as pearls in their natural state they should be so classified by virtue of the similitude clause of section 7 of the said act. That pearls with holes drilled through them by skilled labor are not "pearls in their natural state" was decided by this court in Tiffany v. U. S. (C. C.) 103 Fed. 619. It is admitted by the district attorney that the similitude clause should operate before the general catch-all clause providing for nonenumerated manufactured articles. Hahn v. U. S., 40 C. C. A. 622, 100 Fed. 635, and cases cited. He insists, however, that the resemblance of the imported articles is greater to

"pearls set or strung," as provided for by paragraph 434 of the act, than to "pearls in their natural state," as provided for by paragraph 436. The burden is upon the importer to prove that his contention is correct, and if he fails in sustaining this burden the action of the collector stands, even though it appear that the collector also has selected the wrong paragraph. In other words, in order to succeed the importer must show by a preponderance of proof that his importations bear a greater similitude to pearls in their natural state than to any other article enumerated in the act. The only difference between a drilled pearl and a pearl in its natural state is that the former has a hole in it, but there is no difference whatever between a drilled pearl and a strung pearl; the two are identical. No difference in the quality, texture or use to which the two pearls are applied can be predicated of the fact that one has a cord through the hole and the other has not. Place drilled pearls on a cord and they become strung pearls, take strung pearls off the cord and they become drilled pearls. An attempt is made in the importer's brief to establish a greater similarity in the use to which they are put between drilled pearls and pearls in their natural state than between drilled pearls and strung pearls, but the court is unable to discover anything in the proof or the tariff act to sustain this contention. The testimony is undisputed that pearls, whether whole or drilled, are used for jewelry or ornament and "ordinarily all pearls are strung that are drilled." One of the importer's witnesses testified as follows:

"The Chinese as well as the East Indians drill very many pearls for convenience in carrying them, for convenience in handling them. Pearls come into the London and French markets in bunches, where they are strung for convenience, and the bunches are joined together with a silver thread; it would be practically impossible to make such a bunch; we have no one skillful enough after once they are apart here to get them together again. They do not come to this country upon strings. We do not bring them in that way. The tariff law is so against that that of course we do not bring them that way."

Another witness said:

"Many of these drilled pearls, the subject of this importation, were undoubtedly used by some person in the East as ornaments, and many were not, it would be impossible to distinguish between the two."

The court is clearly of the opinion that the imported pearls bear a closer resemblance to strung pearls than to pearls in their natural state. That this ruling may result in hardship is a contention which should be addressed not to the judicial but to the legislative branch of the government. The decision of the board is affirmed.

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## UNITED STATES v. McBRATNEY.

**(Circuit Court of Appeals, Second Circuit. January 4, 1901.)**

No. 59.

CUSTOMS DUTIES—WOVEN FLAX GOODS.

Tariff Act 1897, par. 346, imposing on "woven fabrics or articles of flax," weighing 4½ ounces or more per square yard, specified rates of duty, varying with the number of threads to the square inch, "provided that none of the foregoing articles * * * shall pay a less rate of duty than

50 per cent. ad valorem," and then, imposing a duty on "woven fabrics of flax" weighing less than 4½ ounces per square yard, uses the words "fabrics" and "articles" interchangeably, so that the latter provision applies not only to piece goods, but to articles, like "doilies" and "tray cloths," weighing less than 4½ ounces per square yard.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Charles D. Baker, Asst. U. S. Atty.

W. Wickham Smith, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The importer, Robert McBratney, imported, in December, 1897, into the port of New York, articles known as "linen doilies" and "tray cloths," which were woven manufactures of flax, and completed articles ready for use, weighing less than 4½ ounces per square yard, and containing more than 100 threads to the square inch, counting the warp and filling. Duty was imposed thereon at 45 per cent. ad valorem, under paragraph 347 of the act of July 24, 1897, which is as follows:

"All manufactures of flax, hemp, ramie, or other vegetable fiber or of which these substances, or either of them, is the component material of chief value, not specially provided for in this act, forty-five per centum ad valorem."

The importer protested against this classification, on the ground that woven articles of flax of the weight and fineness which have been specified were dutiable at 35 per cent. ad valorem, under the last clause of paragraph 346 of the act of 1897, which reads as follows:

"346. Woven fabrics or articles not specially provided for in this act, composed of flax, hemp, or ramie, or of which these substances or either of them is the component material of chief value, weighing four and one-half ounces or more per square yard, when containing not more than sixty threads to the square inch, counting the warp and filling, one and three-fourths cents per square yard; containing more than sixty and not more than one hundred and twenty threads to the square inch, two and three-fourths cents per square yard; containing more than one hundred and twenty and not more than one hundred and eighty threads to the square inch, six cents per square yard; containing more than one hundred and eighty threads to the square inch, nine cents per square yard, and in addition thereto, on all the foregoing, thirty per centum ad valorem: provided, that none of the foregoing articles in this paragraph shall pay a less rate of duty than fifty per centum ad valorem. Woven fabrics of flax, hemp, or ramie, or of which these substances or either of them is the component material of chief value, including such as is known as shirting cloth, weighing less than four and one-half ounces per square yard and containing more than one hundred threads to the square inch, counting the warp and filling, thirty-five per centum ad valorem."

The board of general appraisers sustained the collector, the circuit court reversed the decision of the board (99 Fed. 424), and from the decision of the court the United States appealed.

The theory of the government is that the term "woven fabrics" is limited to goods in the piece, and does not include manufactured articles, while the importers insist that the whole paragraph shows that "fabrics" and "articles" were used therein interchangeably. It is a comprehensive paragraph, to establish the rate of duty upon woven flax goods, not specifically mentioned elsewhere, and com-

mences by imposing upon woven fabrics or articles of flax not specially provided for, which weigh 4½ ounces or more per square yard, specified rates in accordance with the number of threads to the square inch, provided that none of the foregoing articles "shall pay a less rate of duty than fifty per centum ad valorem." It is not contended that the word "articles" in the proviso does not include fabrics, but, inasmuch as the paragraph proceeds to impose a duty upon woven fabrics of flax weighing less than 4½ ounces per square yard, it is urged that the clause relates only to piece goods. This construction ignores the comprehensive character of the paragraph, and that guidance to the meaning of the different clauses which is naturally found in the context. In this case, the context shows that, in the concluding clause, the word "fabrics" was used interchangeably with "articles."

Much stress is placed by the United States upon one of the points to which the supreme court in Arnold v. U. S., 147 U. S. 494, 13 Sup. Ct. 606, 37 L. Ed. 253, attached some importance. The question in that case was whether, under the act of October 1, 1890, knit woolen shirts and drawers came within the enumeration of wearing apparel of every description, in whole or in part of wool, or of knit fabrics of wool. For divers reasons, the court thought that the articles should be classified in the act of 1890 as wearing apparel, and found some significance in the substitution of the term "knit fabrics" in the act of 1890 for "knit goods" in that of 1883, although the court says that the terms are frequently interchangeable. The language of the court does not have the relation to the circumstances of this case which is attributed to it by the government. The decision of the circuit court is affirmed.

## DAVIS v. DAUGHERTY, Collector.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 700.

WRIT OF ERROR—TRIAL BY COURT—QUESTIONS REVIEWABLE.

In an action to recover the amount of internal revenue taxes which plaintiff was required to pay as a brewer and for beer stamps, tried by stipulation without a jury, it was stipulated that plaintiff manufactured a beverage from ingredients and in a manner stated, but it was a disputed question, upon which testimony was taken, whether such beverage was a "fermented liquor manufactured from malt, wholly or in part, or from any substitute therefor," within the meaning of Rev. St. § 3244, which rendered plaintiff liable for special tax as a brewer, and which was subject to tax under section 3339. *Held*, that requests to the court to hold as propositions of law on the facts stipulated that plaintiff was not a brewer, and the beverage was not subject to tax under the statute, conceding the practice of requiring findings upon propositions of law in such cases to be permissible, involved a finding of the disputed question of fact whether the beverage was a fermented liquor, and, as such requests were not based on all the evidence, so as to be treated as a motion for judgment as matter of law on the entire case, the ruling of the court thereon was not reviewable on a writ of error.

In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.

This action was brought by the plaintiff in error, Albert Davis, to recover of A. J. Daugherty, collector of internal revenue for the Fifth collection district of Illinois, sums paid under protest for special taxes as a brewer at Galesburg and Peoria, Ill., and for beer stamps, penalties, and interest. Trial by jury was waived by written stipulation, and the case submitted for trial to the court, which made a general finding, and gave judgment thereon for the defendant. The evidence consisted of an agreed statement of facts, and testimony offered in pursuance of a stipulation in the agreed statement that "either party may offer such evidence as he shall see fit upon the question of the quantity of 'sugar color' used by the plaintiff in coloring Maltina, and as to the chemical result of adding 'sugar color' and the chemical properties of 'sugar color.'" The significance of this is shown by the seventh clause of the agreed statement, which reads as follows: "That the drink Maltina, hereinbefore mentioned, was manufactured by the plaintiff in the following manner: A bottle was filled one-third full of lager beer drawn directly from a regularly stamped package of beer as it came from the brewery, and the bottle was then at once filled full of plain, carbonated water (commonly called soda water). It was then corked and tied precisely as ginger ale is tied. When the beer from which Maltina was being made was light in color, and the bottles in which it was being bottled were also light in color, sufficient 'sugar color' was added to each bottle to give the color of beer." When the evidence was all in, the plaintiff in error "requested the court to hold the following propositions of law in the case": "(1) That the manufacture of a beverage in the following manner, to wit, by filling a bottle one-third full of lager beer drawn directly from a regularly stamped package of beer as it came from the brewery, which was manufactured by a brewer who had duly paid his special tax as such brewer, and which package of beer was duly stamped with United States internal revenue stamps as required by law, and then filling the bottle full of plain carbonated water, and adding sufficient sugar color to give the contents of the bottle the color of ordinary lager beer, and then corking the same, does not constitute the manufacturer of such beverages a brewer, within the meaning of the United States internal revenue laws. (2) That a beverage manufactured in the following manner, to wit [the same as in the first proposition], is not subject to a tax as a fermented liquor under the United States internal revenue laws." Error is assigned upon the refusal of each of these requests, and also upon the action of the court "in finding the issues for the defendant," "in denying the motion for a new trial," and "in giving judgment for the defendant." Section 3244 of the Revised Statutes defines a brewer, and imposes special taxes as follows: "Brewers shall pay one hundred dollars. Every person who manufactures fermented liquors of any name or description for sale, from malt, wholly or in part, or from any substitute therefor, shall be deemed a brewer: provided, that any person who manufactures less than five hundred barrels a year shall pay the sum of fifty dollars." By section 3339 it is provided: "There shall be paid on all beer, lager beer, ale, porter and other similar fermented liquors, brewed or manufactured and sold, or removed for consumption or sale, within the United States, by whatever name such liquors may be called, a tax of one dollar for every barrel containing not more than thirty-one gallons; and at a like rate for any other quantity or for any fractional parts of a barrel." The contention of the plaintiff in error is thus summarized in the brief: "The statutory definition of a brewer * * * does not cover the manufacture of Maltina. This definition implies the manufacture of an alcoholic liquor from malt, or some substitute, by some process of fermentation. The mixing of beer with water is not the manufacture of fermented liquor. There was no fermentation whatever in the making of Maltina. If any fermentation took place, the beverage was destroyed." The contention of the defendant in error is thus stated: "Maltina is a fermented liquor, manufactured in part from lager beer, as a substitute for malt, combined with other substances; and under section 3244 of the Revised Statutes the manufacturer thereof is a brewer, and is subject to a special tax as such under said section."

Dan Raum and W. T. Whiting, for plaintiff in error.
S. H. Bethea, for defendant in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The dispute between the parties is mainly upon the question whether the product of the plaintiff in error was a fermented liquor, within the meaning of the statute. That was a question of fact not covered by the agreed statement, but expressly left open for proof. The propositions submitted to the court, to be found or declared as matters of law, were framed substantially in the terms of the agreed statement of facts, and do not say whether the liquor in question was a fermented product, or whether fermentation occurred in the process of production. They were not propositions of law purely. They implied a determination by the court of the very question of fact which it was stipulated should be the subject of proof. If, therefore, it were a permissible practice to require a finding upon propositions of law in cases where the trial is without a jury,—on which question see the opinion in Distilling & Cattle-Feeding Co. v. Gottschalk Co., 13 C. C. A. 618, 66 Fed. 609, 24 U. S. App. 638,—these propositions were not of that character. It is settled by numerous decisions, some of which are referred to in Distilling & Cattle-Feeding Co. v. Gottschalk Co., that no question of fact involved in a general finding by the court in a case at law, when a jury has been waived, can be the subject of review. In such case "the losing party has no redress on error except for the wrongful admission or rejection of evidence." Dirst v. Morris, 14 Wall. 484, 491, 20 L. Ed. 722. It may be urged that there is and can be no dispute about the facts of this case, but whether or not that is so is itself a question of fact upon which the court may not be required to enter. "The burden of the statute," said the supreme court in Lehnen v. Dickson, 148 U. S. 71, 77, 13 Sup. Ct. 481, 37 L. Ed. 373, "is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts; and in another it may be difficult when the testimony is largely in parol and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another because of the difficulty in such determination." In the same case, after a review of earlier decisions on the subject, the court said: "But still, as was ruled in Flanders v. Tweed, 9 Wall. 425, 19 L. Ed. 678, this court is disposed to hold parties to a reasonably strict conformity to the provisions of the statute prescribing the proceedings in the case of a trial by the court without a jury; and no mere recital of the testimony, whether in the opinion of the court or in a bill of exceptions, can be deemed a special finding of facts within its scope."

The question whether the article manufactured or produced by plaintiff in error was a fermented liquor, within the meaning of the statute, being, in part at least, one of fact, dependent upon evidence

outside of the agreed statement of facts, this court, in the absence of a motion below for judgment upon the entire evidence as a matter of law, will not enter upon the inquiry. A party having the burden of proof may insist upon a finding in his favor as a matter of law if "the evidence in his favor is adequate, unimpeached, and without conflict or uncertainty." World's Columbian Exposition Co. v. Republic of France, 38 C. C. A. 483, 96 Fed. 687; Machine Co. v. Barratt, 40 C. C. A. 571, 100 Fed. 590. But, to raise such a question as one of law, the exception or motion in the trial court must be so specific to that effect as to distinguish it from a question of the weight of evidence. Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862. In the World's Columbian Exposition Case a proposition was submitted which, though not expressed with entire accuracy, this court treated as sufficient to present the question as one of law whether the evidence adduced was sufficient to sustain the finding. The propositions submitted here cannot be fairly so treated. They were intended for no such purpose, and, if treated as propositions of law, which, according to the practice indicated in Ex parte Morris, 9 Wall. 605, 19 L. Ed. 799, the court might properly be asked to adopt or reject, the refusal of the court to pass upon them was unimportant, because they are limited by their terms to the stipulated facts, and do not cover the whole case. They do not embrace the one disputed fact of the case; and, if the court had adopted them, and yet had found on the evidence—as presumably it did—that the article in question was a fermented liquor, manufactured by the plaintiff in error "from malt, wholly or in part, or from any substitute therefor," the judgment rendered would be right. If the practice of submitting questions of law to the court when trial by jury has been waived were conceded to be permissible, it would still be true that the adoption or rejection of a proposition which is not determinative of the case or of a controlling issue in it could not constitute available error.

The judgment below is affirmed.

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## DOAN et al. v. AMERICAN BOOK CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 715.

1. Appeal—Assignments of Error.

Under rule 11 of the circuit court of appeals for the Seventh circuit (31 C. C. A. cxlvi., clxiv., 90 Fed. cxlvi., clxiv.), requiring assignments of error to "specify separately and particularly each error asserted and intended to be urged," where the court made a finding "that all the material allegations of said bill of complaint are true," an assignment of error thereon is sufficient which sets out the language of such finding, being in fact as specific as, in the nature of the case, it could be made.

2. Same—Order Granting Preliminary Injunction.

On an appeal from an order granting a preliminary injunction it is a sufficient assignment of error to assert that the court erred in granting the injunction.

3. Copyright—Infringement—Right of Owner to Rebind Book.

The sale of a copyrighted book by the owner of the copyright carries with it all the rights and incidents of ownership, including the right to resell and to maintain the book as nearly as possible in its original condition, so far at least as the cover and binding are concerned; and the purchaser or any subsequent owner may rebind the book in exact imitation of its original binding, as regards the title and cover designs, including the name of the publisher, and may sell the same, as so rebound, without infringement of the copyright.

4. Unfair Competition—Sale of Rebound School Books.

A dealer who purchases secondhand school books, cleans, trims, and rebinds the same, using covers in exact imitation of the originals, and places them in the market to be sold in competition with those of the publisher, although at a reduced price, is guilty of unfair competition, where, by reason of their new appearance, they are likely to be purchased by children in the belief that they are new books, and the product of the original publisher, including the cover and binding; and a court may properly require a notice to be plainly stamped upon the cover sufficient to prevent such deception.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This is an appeal from an order entered June 29, 1900, allowing a preliminary injunction upon a bill filed by the appellee, the complainant below, to restrain the defendants therein, the appellants here, from preparing, printing, manufacturing, and from causing to be prepared, printed, and manufactured, any book covers or cover designs which are copies or imitations of the book covers and cover designs made by the complainant for certain school books published by them; and from binding and rebinding, and from causing to be bound or rebound, any book, secondhand or new, in covers which are copies of, or imitations of, the whole or any substantial part of complainant's book covers and cover designs; and from printing or placing thereon the "Galley Cut," so called, or the name, "American Book Company," or from selling any such books with such covers thereon; and from rebinding any secondhand copies of the school books published by the complainant in covers calculated to create the belief that the new covers and the rebinding thereof are of the manufacture of the complainant, or in any covers except those indicating by appropriate language on their face that the new covers and the rebinding of the secondhand books are not of the manufacture of the complainant; and from selling, giving away, delivering, shipping, or in any way handling or disposing of such secondhand books so rebound; and from violating the copyrights and rights of copyright, trade-marks, and trade-mark rights of the complainant in such school text books. The American Book Company is a publisher of school books, employing a large force skilled in preparing and publishing school books, and selling over 1,000,000 copies per annum. Van Antwerp, Bragg & Co. were proprietors of certain school text books, namely, McGuffey's Spelling Book, McGuffey's First, Second, Third, Fourth, and Fifth Readers, Ray's Primary, Elementary, Intellectual, and Practical Arithmetics, Elementary and Complete Geographies. These were composed for them by certain citizens employed for that purpose, and also new, original, and artistic cover designs were prepared by them in 1883. They copyrighted these books in 1877, 1879, and 1883, and assigned the copyrights to the appellee, by whom these text books were revised in 1896, and a copyright issued in that year to that company therefor. The appellee then caused new cover designs to be prepared. As long ago as 1875, Van Antwerp, Bragg & Co. adopted as a trade-mark, and placed upon the covers of these books, the picture of a galley, and used the same in their business until 1890, when they sold this right to the appellee as a trade-mark, and it has since been used by that company upon the covers of their text books. These school books are part of a series of copyrighted school books, known as the "Eclectic Series," forming a complete system, and graduated to meet the necessities of the primary, common-school, and high-school course; and they have been bound in distinctive cover de-

signs, unlike other school text books, and many thousands of them are sold annually throughout the United States, and by their peculiar binding are identified as the goods manufactured by the appellee. These text books for many years had been used in the public schools in the states of Tennessee and Texas, and many thousands of copies had been distributed among families in those states. In the years 1898 and 1899 the school authorities of those states directed the use of other school books published by other firms, requiring the publishers of such to accept the secondhand books published by the American Book Company, and then in use in the schools of those states, in exchange as part of the price of the new book. This "exchange stock," so called, was turned over to the appellants here, who are dealers in secondhand school books, who thus acquired several hundred thousand copies of secondhand school books published by the appellee in different stages of preservation, some soiled and defaced. It appears that some publishers deal in others' secondhand school books, but refuse to sell any secondhand books of their own publication. These secondhand school books are cleaned, the edges of the pages trimmed when necessary, and, when needed, the books are rebound in exact imitation of the original binding, and are sold by the secondhand dealers at about one-half the price of the new books. The sale of these secondhand school books is said to amount annually to over $200,000. There is no charge that the defendants in any instance had sold any book that was other than the genuine and original book published and sold by the appellee, and which came into the possession of the appellants in the manner stated, and that such book was sold by the appellants as and for a secondhand book; and they have not misled the public, except as the secondhand book so rebound might of itself be misleading. It also appears that about 90 per cent. of the school text books in this country are purchased directly by children of tender age, and not by their parents.

Upon the hearing of the motion for preliminary injunction the court, by its order, found "that all the material allegations of said bill are true," and ordered as follows: "It is therefore ordered, adjudged, and decreed by the court that said George B. Doan and Hart Hanson, their confederates, assistants, agents, employés, servants, and attorneys, and each of them, be, and they are, and each of them is, hereby enjoined and restrained until the further order of the court, and that a writ of injunction issue enjoining them until the further order of this court: (1) From binding or rebinding any copies (secondhand or new) of the McGuffey's Readers, McGuffey's Spelling Book, Ray's Arithmetics, Eclectic Elementary Geography, and Eclectic Complete Geography, published by the American Book Company, hereinafter described, or any or either of them, in any covers or cover designs having thereon the name of the complainant, the American Book Company, or the cut described and designated in the bill of complaint as the 'Galley Cut,' or anything that can be mistaken therefor, or any reproduction or simulation or imitation of the whole, or any substantial part of the covers and cover designs described and designated in said bill of complaint as the '1883 Cover Designs' of said geographies, and the '1896 Cover Designs' of said readers, arithmetics, and spelling book, or any or either of them, and from selling, giving away, delivering, shipping, or in any way or manner handling or disposing of any such books so bound or rebound, and from preparing, printing, or manufacturing any such book covers or cover designs for the purpose of binding or rebinding therein or therewith the school text books published by the American Book Company, hereinafter described, or any or either of them." Then follows a detailed description of the books in question, and at the close the order contains the following paragraph: "The above is not intended to prevent the repairing of secondhand copies of school books by rebinding the same in and with the original genuine covers manufactured by the American Book Company, with which said copies or like copies were bound when originally published."

The defendants below filed the following assignment of errors: "(1) That the court erred as to all the findings appearing in the said interlocutory order or decree, and the awarding or granting of an injunction thereby. (2) That the court erred in finding that the material allegations of said bill of complaint are true. (3) The court erred in granting the injunction identified by

said order or decree. (4) The court erred in ordering that these defendants should be enjoined from binding or rebinding any copies (secondhand or new) of the McGuffey's Readers, McGuffey's Spelling Book, Ray's Arithmetics, Eclectic Elementary Geography, and Eclectic Complete Geography, published by the American Book Company, described in said order, or any or either of them, in any covers or cover designs having thereon the name of the complainant, the American Book Company, or the cut described and designated in the bill of complaint as the 'Galley Cut,' or anything that can be mistaken therefor, or any reproduction, or simulation, or imitation of the whole or any substantial part of the covers or cover designs described and designated in said bill of complaint as the '1883 Cover Designs' of said geographies, and the '1896 Cover Designs' of said readers, arithmetics, and spelling book, or any or either of them, and from selling, giving away, delivering, shipping, or in any way or manner handling or disposing of any such books so bound or rebound, and from preparing, printing, or manufacturing any such book covers or book-cover designs for the purpose of binding or rebinding therein or therewith the school text books published by the American Book Company, described in said order, or any or either of them." They thereupon appealed from the order or decree granting the preliminary injunction. The appellee filed its motion to dismiss the appeal because of noncompliance by the appellants with rules 11 and 24 of this court (31 C. C. A. cxlvi., clxiv., 90 Fed. cxlvi., clxiv.), which motion was argued and submitted contemporaneously with the hearing upon the merits.

C. C. Lenthicum, C. K. Offield, and W. J. Calhoun, for appellants.
Jacob Newman, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

We are of opinion that the motion to dismiss this appeal must be overruled. The motion proceeds upon the ground of noncompliance with rule 11 and rule 24 of this court (31 C. C. A. cxlvi., clxiv., 90 Fed. cxlvi., clxiv). Rule 11 has respect to the assignment of errors, and provides that the appellant should file with his petition for an appeal an assignment of errors "which shall specify separately and particularly each error asserted and intended to be urged." Rule 24 has respect to the briefs of plaintiff in error or appellant, and provides that they shall contain: "2. * * * (2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged, and in cases brought up by appeal the specification shall state as particularly as may be in what the decree is alleged to be erroneous." The purpose of those rules is to obtain an orderly presentation of the errors relied upon, that the court may at a glance, and without laborious search, ascertain the precise grounds asserted against the integrity of the judgment or decree. They are rules of order and of convenience, but are not designed to prevent the correction of obvious errors. The first assignment of error is altogether too general, and points out no particular error. The second assignment of error is "that the court erred in finding that the material allegations of said bill of complaint are true." This is also in a sense general, and not specific, but is not more general or less specific than the language of the order or decree which finds "that all the material allegations of said bill of complaint are true." The decree finds no specific

facts, and does not state which allegations of the bill are true and which are untrue or unproved. The order is objectionable in the use of the word "material," as applied to the word "allegations," leaving the matter at large with respect to which allegation the court deemed material and which immaterial. The practitioner can hardly be blamed for couching his exception in the very language employed by the court. He could not tell from the language of the order what fact was deemed material and what immaterial. The third assignment of error asserts the error of the court in granting the injunction. The fourth assignment asserts the error of the court in ordering the injunction with respect to the specific things mentioned in the injunction and in the assignment of error. We have frequently spoken of the necessity of particularity in the assignment of errors, and do not design to recede in any particular from the rule established by the court. We think, however, that with respect to an order granting a preliminary injunction it is a sufficient assignment of error to assert that the court erred in granting the order. The assignment does not require the particularity demanded of a pleading, but only that the error complained of should be pointed out. The case is not like that of exceptions to the charge of the court, a specific part of which is claimed to be erroneous; nor is the case like to that of exceptions to a decree of the court finding specific facts to be true. In such cases the assignment should specify the particular part of the charge or of the decree claimed to be erroneous. This is a mere order granting a preliminary injunction, the office of which is simply to preserve the status quo pending litigation and until set aside. It determines no right, and rests largely in judicial discretion. There was here no need to find specific facts, and there were no specific findings of fact; nor, indeed, are the facts, in any substantial sense, in dispute. The sole question is whether, upon these facts, an injunction should issue to preserve the rights of the parties until a hearing upon the merits. We think that question fairly presented by the assignment that the court erred in granting the injunction, especially when it is coupled with an exception specifying the particular acts enjoined and claimed to have been improperly enjoined.

Coming now to the merits of the order, we are satisfied that there is here no infringement of the right accruing to the appellee under the copyright laws of the United States. The books which are the subject of controversy are copyrighted books, which were printed, published, and sold by the American Book Company. The sale of them by the appellee carried with it the ordinary incidents of ownership in personal property, including the right of alienation. Harrison v. Maynard, 10 C. C. A. 17, 61 Fed. 689; and the appellants, purchasing them, had the right to resell them. The monopoly of the statute with regard to copies sold by the appellee was gone upon their sale. It is urged, however, that the sale passed the right to the particular thing sold, and did not carry with it the right of repair or renewal. We cannot yield assent to the proposition in the broad terms in which it is couched. The question is analogous to that of the repair of a patented machine which has

been sold by the patentee, touching which the supreme court in Chaffee v. Belting Co., 22 How. 217, 16 L. Ed. 240, says:

"Hence it is obvious that if a person legally acquires the title to that which is the subject of letters patent, he may continue to use it until it is worn out, or he may repair it, or improve upon it as he pleases, in the same manner as if it were property of any other kind."

It is unnecessary, as we think, to consider the limitations of that right. We think the right of repair with respect to a copyrighted book sold, to the extent to which that right is here claimed, may not properly be denied. These books had been in use by school children. Some were written upon and defaced; some were soiled and torn; the covers of some were wholly or partially destroyed, and the binding had become imperfect. To render these books serviceable for use or sale, it became necessary to clean them, to trim the edges of the leaves, and to rebind them. We think that, so far as respects the copyright laws of the United States, no legal right of the appellee was invaded by so doing. What was done was merely the restoration of the books to their original condition when sold by the appellee, or so nearly so as could be done. If it may be assumed that the copyright of the book comprehends the cover and the title of the book, as well as its text and illustrations,—a proposition to which we are not to be held as assenting,—it would be intolerable and odious to hold that a purchaser from the owner of the copyright of a set of books could not restore the binding of one of them in exact imitation of the original and of the other volumes of the set, and that in rebinding the one volume he must differentiate its binding from the binding of the others. A right of ownership in the book carries with it and includes the right to maintain the book as nearly as possible in its original condition, so far, at least, as the cover and binding of the book is concerned. See Harrison v. Maynard, supra.

Under the claim of unfair competition in trade a different question is presented. The American Book Company has attained to a high reputation with respect to its school books. That reputation goes not only to the text of the book, but to the quality of the book itself, the character of the print, the quality of the paper, the binding, and the cover. The latter is of a unique design, catching the eye, and identifying the book as the product of the American Book Company. These books are purchased at retail, as appears from this record, by children of from 5 to 15 years of age. They come to know the books rather by the pictures presented upon the cover than by the text, for they are uninformed as to the text, and purchase them to study the text. The sale of these books is large, amounting to hundreds of thousands annually. It is the duty of a court of equity to protect these children from imposition. It is likewise the duty of a court of equity to protect the American Book Company from any unlawful interference with its trade. As we have said, the appellants have a right to rebind the books which they have purchased, and to re-cover them, and, as we think, in exact imitation of the original covers, and with the name of the American Book Company upon the cover as upon the title-page, as

originally placed there by the appellee, and to sell such books; but the rebinding and the re-covering are not the work of the American Book Company, and they should not be held out to the world as responsible for such rebinding or re-covering of the books; nor, as we think, should children of tender age, who constitute a large class of purchasers of such books, be subjected to the possibility of imposition by a sale of them by the retail dealer as a new book, rendered possible by the newness of the cover. While, therefore, we hold that the appellants have the right to rebind and re-cover these books in exact similitude of the originals, amounting to a mere repair of them, and have a right to sell the book so rebound, we are of opinion that the book so rebound and re-covered and offered for sale should have prominently displayed and stamped upon its cover in clear and unmistakable language notice that the book was a secondhand book, rebound or re-covered, as the fact may be, by the appellants; so that the appellee, not issuing secondhand books, shall not be chargeable in public estimation with the character of the binding or of the cover, or with palming off upon purchasers secondhand books as and for new books. In this way, and in this way only, as we conceive, can the vested rights of property of both parties be respected, and the right of the public be subserved. The injunction complained of was, therefore, too broad. It prohibited the rebinding or re-covering of the books in any covers or cover designs having thereon the name of the American Book Company, or having thereon the cut described and known as the "Galley Cut," or having thereon any reproductions, simulation, or imitation of the whole or any substantial part of the original covers. The injunction should be restricted in its terms to accord with the views herein expressed.

WOODS, Circuit Judge (concurring). Excepting the portions touching unfair competition, I concur fully with the foregoing opinion. The supposed duty to protect children from imposition seems to me more imaginary than real. There is no proof or strong probability that imposition has been practiced, or to any considerable extent could be. The books are sold as secondhand, and for a reduced price. Once opened, it is in most instances evident that they are not new, and any attempt to sell them as new could rarely succeed; not so often, I think, as to justify interference by injunction. The proposition that the American Book Company should not be held out to the world as responsible for the rebinding or re-covering of the books has more force, and, though danger in that direction seems to me exaggerated, and probably avoidable without the aid of the courts, I consent to a decree that there shall be stamped on the cover of each book a statement showing that it had been "rebound," and by whom. If anything were needed outside of the book itself to show it to be secondhand, the word "rebound" I think enough.

The order appealed from is reversed, and the cause is remanded to the court below for further proceedings not inconsistent with this opinion.

## BUERKLE et al. v. STANDARD HEATER CO.

(Circuit Court, D. Pennsylvania. January 12, 1901.)

1. PATENTS—WATER HEATERS.
The Buerkle patent, No. 29,584, for a design for a case or shell for water heaters, is not infringed by another design, though both are elliptical in form, where there is no such sameness of appearance to the eye as to constitute substantial identity.

2. SAME—INFRINGEMENT.
Where complainant's water heater is known in the trade and to the public as the "Monarch," and that name conspicuously appears on the case inclosing the heater, immediately below a lion's head, and the heater is distinctly marked with the name of the manufacturer, the patent for the case inclosing the heater is not infringed by one known in the trade and to the public as the "Standard," though of a somewhat similar form, where that name is plainly marked on the heater, as is also the name of defendant as manufacturer, and the designs are otherwise distinguishable.

In Equity. Sur motion for a preliminary injunction.

Christy & Christy, for complainants.
James C. Boyce and Chapman & Campbell, for respondent.

ACHESON, Circuit Judge. The bill charges infringement of letters patent No. 29,584, granted on November 1, 1898, to August Buerkle for a "design for a case or shell for water heaters." The specifications set forth the design in the words following:

"In the accompanying drawing, forming a part of this specification, is shown a perspective view of my new design for a case or shell for water heaters. The leading feature of the design is a case or shell having the side walls or panels, 1, the double-wing doors, 2, at the ends of the case or shell, and a sliding door, 3, about midway of the height of one of the side walls or panels. The doors, 2, are curved, thereby giving a circular contour to the ends of the case or shell."

The claim is in these words:

"I claim as my invention the design for a case or shell for water heaters, as herein shown and described."

For the right understanding of what the patented design is, the text of the specification must be read in connection with the patent drawing. The drawing, indeed, is a declared part of the specification. The only statement as to shape is that "the doors, 2, are curved," whereby a "circular contour" is given to the ends of the case or shell. The general form of the water heater exhibited by the drawing seems to be elliptical. The "side walls or panels, 1," present flat surfaces entirely plain. The drawing shows at each end of the case two pairs of hinged folding doors, one pair immediately above the other, each bearing the number 2. Each of the four upper doors has conspicuously in the center of its panel a lion's head in bas relief. These projecting lion heads are distinguishing marks. The panels of the lower doors are plain. The defendant's water heater is elliptical in form. It does not, however, have two pairs of folding doors at either end of the case, but one pair of folding doors at each end. These doors in the defendant's construction extend from the top to the bottom of the heater, and the panel of each door is conspicuously embellished its entire length with the figure of a stork standing on one

foot in front of a background of reeds, all in bas relief. The defendant's heater does not have a sliding door in the side panel, but has there, for a different purpose, a rigidly fixed plate, peculiarly ornamented. In general aspect the defendant's water heater, in its design, differs greatly from the design of the patent in suit. I cannot see how one of the designs could be taken for the other. It seems to me that the only feature common to the two designs is the general elliptical shape of the case or shell.

It is urged that Buerkle was the first to construct a water-heater case in elliptical form, and this may be so. It appears, however, that that form was old and common in coal and gas stoves and heaters; and it cannot, I think, be successfully maintained that it involved invention to select this old form and apply it to such new use. Smith v. Saddle Co., 148 U. S. 674, 679, 13 Sup. Ct. 768, 37 L. Ed. 606. Again, the patented design is by no means confined to the shape or configuration of the case or shell. It is true, as we have seen, that the specification states that "the leading feature of the design is a case or shell" having certain named parts and characteristics, one of which characteristics, it may be conceded, is shape or configuration. Clearly, however, other distinguishing characteristics are present in the described design. Undoubtedly the design as shown by the patent drawing and described in the text of the specification was claimed and patented as a whole. The main test of the substantial identity of two designs is sameness of appearance to the eye of the ordinary observer. Manufacturing Co. v. White, 14 Wall. 511, 20 L. Ed. 731; Smith v. Saddle Co., supra; Monroe v. Anderson, 17 U. S. App. 184, 7 C. C. A. 272, 58 Fed. 398. Now, applying this test to the complainants' patented design and the design embodied in the defendant's water heater, I must conclude that infringement by the defendant of the patent in suit does not appear.

There is no evidence of any bad faith or unfair competition on the part of the defendant. The complainants' water heater is known in the trade and to the public as the "Monarch," and that name conspicuously appears on the case immediately below each lion head. The heater is also distinctly marked with the name of the Monarch Water-Heater Company as the manufacturer. The defendant's water heater is known in the trade and to the public as the "Standard," and that name is plainly marked on the heater, as is also the name of the defendant as manufacturer. The most unobservant and careless purchaser could not well mistake one of the defendant's heaters for one of the complainants' heaters. The motion for a preliminary injunction is denied.

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## ELGIN WIND POWER & PUMP CO. v. NICHOLS et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 713.

PATENTS—SUIT FOR INFRINGEMENT—RECOVERY OF PROFITS.

In a suit for infringement of patents relating to windmills, which were for improvements only, not indispensable to an operative mill, it cannot be assumed that the entire profits made by the defendant on windmills sold which contained the infringing devices were due to such devices, but

the burden rests upon the complainant to prove by competent and satisfactory evidence what portion of the profits were due to such improvements, to entitle him to recover.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The interlocutory decree in this case, affirmed on appeal to this court (12 C. C. A. 578, 65 Fed. 215, 24 U. S. App. 542), found that the appellant had infringed two patents for improvements in windmills, Nos. 240,607 and 390,698, issued respectively on April 26, 1881, and October 9, 1888, to W. D. Nichols. The bill, alleging no damages, sought only an injunction and accounting for profits, and in obedience to an order of reference "to ascertain and report an account of gains, profits, and advantages which the defendant had received or which had arisen or accrued to it," the master made a report which in respect to matters of fact was based upon a stipulation of the parties, and in no important particular is disputed. His conclusion was that the complainants on the proof made were entitled to nominal damages only. On exceptions filed by the appellees the court decreed a recovery of $5,294.49 and costs. It appears, and is undisputed, that during the time covered by the accounting, October 1, 1888, to September 1, 1895, the appellant manufactured and sold, in infringement of the first patent, 125 pumping mills for the aggregate sum of $4,255, and in infringement of the second patent 186 power mills for $26,007, amounting together to the sum of $30,262. Whether this is "less discount and commission" is not stated. The cost of labor and material for all these mills was $15,261, leaving the gross profit $15,001. The appellant was also engaged in the manufacture and sale of other articles, the total sales during the period covered by the accounting, less commission and discount, being $238,031.48, and the total expense (not including labor and material) for carrying on the business being $76,348.43. The proportionate amount of this general expense allotted by the master to the windmills was $9,706.51, which deducted from the gross left a net profit of $5,294.49, the amount of the decree. Of this profit, if apportioned on the same basis between the two kinds of mills, $134.08 only must be regarded as derived from the pumping mills, and the remainder, $5,160.41, from the power mills. No proof of profits, except on the basis stated, was offered. The power mills in question, besides the device of the second Nichols patent, contained the device covered by patent No. 349,197, issued on September 14, 1886, upon an application filed April 3, 1886, to Truman C. Albee. The master, finding that the Albee and Nichols devices were separate and independent improvements, capable of use either without the other, and that the testimony did not sustain the contention that all the profits arising from the manufacture and sale of the infringing machines was due to the use of the Nichols inventions, and holding it incumbent on the plaintiff to show what, if anything, was due to the unlawful appropriation of the Nichols inventions, and what to other causes, and particularly to the Albee device, came to the conclusion stated, that the right to nominal damages only was established. The specification in patent No. 240,607 contains this: "My invention relates to improvements in the method of mounting windmills, the object being to lessen the friction and secure a smooth and easy movement of the parts, so that the apparatus will readily adjust itself to the direction of the wind; and my invention consists in balancing and supporting the windmill on a center or pivotal bearing, and in connection therewith the mechanism hereinafter described for communicating the reciprocating motion of the pitman to the pump rod. * * * The operation is as follows: The whole rotating mechanism of the mill is supported, balanced, and turns upon the bridge, E, as a center or pivot, thus accommodating itself with great freedom and ease to the direction of the wind, and by means of the connecting mechanism described the motion of the pitman is communicated to the pump rod without causing the least wrenching or disturbance or irregularity in the motion of the same, by reason of the rotation of the hollow shaft, C." The first and fifth claims read as follows: "(1) The rotating carriage of the windmill, terminating in a closed end or pivotal point at its bottom, in combination with the plate, E, upon which the rotating carriage turns and is balanced and supported, substantially

as specified." "(5) In a windmill, the hollow rotating slotted carriage, terminating at its bottom in a pivotal point, in combination with the reciprocating pitman inside thereof and rings working on the outside thereof, to which the pump rod is attached, substantially as specified." The specification of No. 390,698 contains this: "This invention relates to devices for correcting the side draft of geared tailless windmills, and is an improved device for that purpose. It consists in the mill having a pawl engaging with an annular rack on the tower, as hereinafter stated, when said rack is permitted a slight rotation upon its support, and a spring cushion is employed to resist such rotation. This feature prevents any sudden wrenching of the tower, which would result if the rack were immovable." The claim reads as follows: "The combination, in a windmill, of the tower cap, the movable rim mounted on the cap, and the spring interposed between lugs upon the cap and rim for cushioning the strain on the tower, substantially as specified." The Albee device, it is explained in the specification, is designed to overcome the "side draft" in windmills, "caused by the tendency of the gear wheel on the horizontal shaft to climb around the gear wheel on the vertical shaft." The claims read in this wise: "The combination, with the bell-crank lever, J, connected at one end to the sails of the mill and at the other end to a rod reaching down towards the ground, of the lever, M, operated by said first-named lever and the loose pawl, P, and its actuating vane, E, whereby the same operation which throws the sails out of the wind will simultaneously unlatch the pawl and leave the mill free to swing on the tower, substantially as specified." The court below, after quoting from Garretson v. Clark, 111 U. S. 120, 14 Sup. Ct. 291, 28 L. Ed. 371, and City of Elizabeth v. American Nicholson Pavement Co. 97 U. S. 126, 24 L. Ed. 1059, touching the burden of proof, said: "I am inclined to the opinion that the Nichols invention of April 26, 1881, relates to an entire structure. The mills when constructed under this patent being an entirety and unlike other mills, his second invention would be an improvement upon the first. The Albee device, it would seem, could only be used in connection with the Nichols mill, and was useful only when the mill itself was not in operation. It would seem to have been an advantage in selling the Nichols mill, but to what extent is not shown by the evidence. I think the burden of proof in such case should be cast upon the infringer. When he unlawfully makes use of an entire thing which is protected by a patent, and adds to that a device which may give some additional value to it, he should be able to show, and should be required to show, what added value the superadded device gave to the machine. I am of opinion, therefore, that the master erred in holding that the complainant could recover only nominal damages, and that he should have reported the net profits, namely, the sum of $5,294.49." In the brief for the appellees are cited, in addition to the cases mentioned above, Seabury v. Am Ende, 152 U. S. 561, 14 Sup. Ct. 683, 38 L. Ed. 553; Crosby Steam-Gauge & Valve Co. v. Consolidated Safety-Valve Co., 141 U. S. 441, 12 Sup. Ct. 49, 35 L. Ed. 809; Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566; Holmes v. Truman, 29 U. S. App. 572, 14 C. C. A. 517, 67 Fed. 542; Tuttle v. Claflin, 22 C. C. A. 138, 76 Fed. 227; Rose v. Hirsh, 36 C. C. A. 132, 94 Fed. 177; Morss v. Form Co. (C. C.) 39 Fed. 468. In the brief for the appellant: Tilghman v. Proctor, 125 U. S. 136, 151, 8 Sup. Ct. 894, 31 L. Ed. 664; Dobson v. Carpet Co., 114 U. S. 439, 5 Sup. Ct. 945, 29 L. Ed. 177; Blake v. Robertson, 94 U. S. 728, 28 L. Ed. 245; New York v. Ransom, 23 How. 487, 16 L. Ed. 515; Philp v. Nock, 17 Wall. 460, 21 L. Ed. 679; Rude v. Westcott, 130 U. S. 152, 167, 9 Sup. Ct. 463, 32 L. Ed. 888; Robbins v. Watch Co., 53 U. S. App. 406, 27 C. C. A. 21, 81 Fed. 957; Forbush v. Bradford, Fed. Cas. No. 4,930; The Tremolo Patent, 23 Wall. 518, 23 L. Ed. 97; Hitchcock v. Tremaine, Fed. Cas. No. 6,539; Brady v. Atlantic Works, Fed. Cas. No. 1,795; Calkins v. Bertrand (C. C.) 8 Fed. 755.

D. B. Sherwood and Ephraim Banning, for appellant.
Charles Wheaton, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The general rule is clear that in an accounting of profits derived from the infringement of a patent the plaintiff has the burden of proof, and the infringer is chargeable only with the actual gains and advantages derived from the use of the invention. The scope of the rule is well defined in Garretson v. Clark, where it is said:

"When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the court below. 'The patentee,' he says, 'must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.'"

In Dobson v. Carpet Co., where the infringement was of a design for carpets, it was said:

"This court has, in a series of decisions, laid down rules as to what are to be regarded as 'profits to be accounted for by the defendant,' and what as 'actual damages,' in suits for the infringement of patents; and no rule has been sanctioned which will allow, in the case of a patent for a design for ornamental figures created in the weaving of a carpet, or imprinted on it, the entire profit from the manufacture and sale of the carpet, as profits or damages, including all the profits from the carding, spinning, dyeing, and weaving, thus regarding the entire profits as due to the figure or pattern, unless it is shown by reliable evidence that the entire profit is due to the figure or pattern. * * * The same principle is applicable as in patents for inventions. The burden is upon the plaintiff, and if he fails to give the necessary evidence, but resorts, instead, to inference and conjecture and speculation, he must fail for want of proof. * * * There is but one safe rule,—to require the actual damages or profits to be established by trustworthy legal proof."

In Blake v. Robertson the patent was for combinations relating to a stone-breaking machine, apparently not less an entirety than a windmill, and it was there said:

"No license fee charged by the complainant is shown. The burden of proof rests upon him. Damages must be proved. They are not to be presumed. The complainant made a profit of $40 an inch on the width of the jaws of the numerous machines he had sold. But inventions covered by other patents were embraced in those machines. It was not shown how much of the profit was due to those other patents, nor how much of it was manufacturer's profit. The complainant was therefore entitled only to nominal damages."

To show an exception from the rule or a distinction by which to justify the decree in the present case, the decision in City of Elizabeth v. American Nicholson Pavement Co., 97 U. S. 126, 24 L. Ed. 1000, is relied upon. The infringement in that case was of the Nicholson reissued patent for "a new and improved wooden pavement," of which, in discussing the question of profits, the court, at page 141, 97 U. S., and page 1007, 24 L. Ed., said:

"The Nicholson pavement was a complete thing, consisting of a certain combination of elements. The defendants used it as such,—the whole of it. * * * Equally without foundation is the position taken by the appellants that other pavements, approaching in resemblance to that of Nicholson, were open to the public, and that the specific difference between those pavements and Nicholson's was small, and that therefore the Nicholson patent was entitled to only a small portion of the profit realized. Nicholson's pavement, as before said, was a complete combination in itself, differing from every other pavement. The parts were so correlated to each other, from bottom to top, that it required them all, put together as he put them, to make the complete whole, and to produce the desired result. The foundation impervious to moisture, the blocks arranged in rows, the narrow strips between them for the purposes designated, the filling over those strips, cemented together, as shown by the patent, were all required. Thus combined and arranged, they made a new thing, like a new chemical compound. It was this thing, and not another, that the people wanted and required. It was this that the appellants used, and, by using, made their profit, and prevented the appellee from making it. It was not the case of a profit derived from the construction of an old pavement together with a superadded profit derived from adding thereto an improvement made by Nicholson, but of an entire profit derived from the construction of his pavement as an entirety."

It is possible to see the truth of the holding in that case, but in the present case we are not able to perceive or to believe that by using the Nichols inventions the appellant made the entire profit derived from the manufacture and sale of windmills. The second patent is only for an attachment, which doubtless may be usefully employed, especially in power mills, but if left off or removed no equivalent in its place is imperative. It is not an improvement upon the first invention, though it may, of course, be used in connection therewith. Like the Albee device, it is an independent improvement, which may be used upon any windmill in which there is on the tower an annular rack which is "permitted a slight rotation upon its support." There can, therefore, be no good reason for supposing that the profits derived from the manufacture and sale of the mills in which that device was employed were all due to its use. The first patent is more important, in that it shows improvements upon indispensable parts of a windmill, but it does not in itself, like the Nicholson invention, constitute "a complete thing," certainly not "a new thing, like a new chemical compound." On the contrary, windmills resembling in general structure and in many essential parts mechanically identical with the Nichols mills had been long in use before this patent was applied for. It does not profess to be for an entire device, but for improvements only, and they not general and comprehensive of an entire mill, but limited to "the method of mounting," of which the specified purpose is to lessen friction and secure a smooth and easy movement of the parts designated. The claims differ in minor particulars, but no one or all of the five can be regarded as embodying a complete windmill, the entire profit of the manufacture and sale of which should, or could fairly, be attributed to the presence of the patented combinations.

The decree below will be reversed, and the cause remanded, with direction to give a decree for nominal damages only, unless in the discretion of the court there shall be another reference for the purpose of admitting competent evidence of profits.

## HARACOVIC v. STANDARD OIL CO.

(Circuit Court, N. D. Illinois, N. D. April 14, 1900.)

No. 24,796.

REMOVAL OF CAUSES—ALIENAGE OF PLAINTIFF—SUBSEQUENT NATURALIZATION —REMAND.

Under Act 1887, as amended by Act 1888 (25 Stat. 434, § 1), providing that actions brought in the state courts, involving more than $2,000, between citizens of a state and aliens, may be removed into the United States circuit court, a case so removed on account of the alienage of plaintiff will not be remanded to the state court because the plaintiff has subsequently become a naturalized citizen of the United States.

Jas. J. Wooley, for plaintiff.
A. D. Eddy, for defendant.

KOHLSAAT, District Judge. At the date of the commencement of this suit in the state court plaintiff was an alien, although he had declared his intention of becoming a citizen in due form of law. The cause was removed on the ground of alienage of plaintiff. Subsequent to the removal plaintiff has become a naturalized citizen. I am of the opinion that the conditions in this case are analogous to those wherein subsequent to removal on account of diverse citizenship the parties so change their domicile that they all become residents of the same state. In the latter class of cases the rule has been laid down by the supreme court that, the jurisdiction having once vested on ground of diverse citizenship, it will not be subsequently devested by changes occurring in this relation. Morgan's Heirs v. Morgan, 2 Wheat. 290, 4 L. Ed. 242; Conolly v. Taylor, 2 Pet. 556, 7 L. Ed. 518. The case of Houser v. Clayton, 3 Woods, 273, Fed. Cas. No. 6,739, is a similar case to the one at bar. Whether or not the decision in that case in conformity with this opinion was obiter, I am of the opinion that the act of 1887 as amended by the act of 1888 (25 Stat. 434, § 1) sustains this analogy. The cases cited by plaintiff on this motion to remand are those involving a change in the subject-matter of the controversy, or in the parties themselves, and not in the status of the parties as regards citizenship. These instances I do not deem analogous to the facts of this case. The motion to remand is denied.

## SHELDON et al. v. WABASH R. CO. et al.

(Circuit Court, N. D. Illinois, N. D. July 6, 1900.)

No. 25,465.

1. CARRIERS—POWER OF STATE TO REGULATE RATES—INTERSTATE TRAFFIC.
A state has no power by statute to regulate rates upon traffic between different states.

2. SAME—RIGHTS CREATED BY INTERSTATE COMMERCE LAW.
There is not, and has never been, any jurisdiction at common law over commerce between the states, and the interstate commerce act creates

rights and remedies not existing at common law, and which the federal government had sole power to create.

3. COURTS—JURISDICTION—ACTION UNDER INTERSTATE COMMERCE LAW.
The jurisdiction of the federal courts over causes arising under the interstate commerce act is exclusive, and no action can be maintained thereon in a state court.

4. SAME—JURISDICTIONAL QUESTIONS.
The question of want of jurisdiction is always open for determination, even though there may be in the case prior rulings of the same or another judge sustaining the jurisdiction.

5. REMOVAL OF CAUSES—WANT OF JURISDICTION IN STATE COURT.
A state court having no jurisdiction of an action to enforce rights given solely by the interstate commerce law, a federal court acquires no jurisdiction of such action by its removal.

On Demurrer for Want of Jurisdiction.

Defrees, Brace & Ritter, for complainants.

Shope, Mathis & Barrett and Ullman & Hacker, for defendants.

KOHLSAAT, District Judge. This is a suit commenced in the state court, and removed by defendants to this court, in which complainants seek a mandatory injunction compelling defendants to cease the enforcement of certain alleged unjust discriminations against complainants in the matter of rates of freight on car-load shipments between New York and Chicago. The sole question presented by counsel on the argument of the demurrers herein is that of the jurisdiction of the state court to entertain this proceeding. From the briefs and arguments of counsel I am of the opinion that the following propositions of law are sustained by the authorities, and are controlling in the decision of this question:

1. That the statutes of Illinois relied upon in the bill are void so far as they attempt to regulate rates upon traffic between different states.

2. That there is not now, and never has been, any jurisdiction at common law over commerce between the states.

3. That the interstate commerce act creates rights and remedies not existing at common law, and constitutes legislation solely within the power of the federal government.

4. That the jurisdiction of the federal courts over causes arising under the interstate commerce act is exclusive, and no action can be maintained in the state courts thereon.

5. That the question of lack of jurisdiction presented here is always open for determination, even though there may be in the case prior rulings of the same or another judge sustaining the jurisdiction.

The bill will therefore be dismissed for want of jurisdiction in the state court to entertain it.

## FRASER v. BARRIE et al.

(Circuit Court, N. D. Illinois, N. D. October 10, 1900.)

No. 25,649.

COPYRIGHT — DRAMATIC COMPOSITIONS — JURISDICTION OF SUIT TO ENJOIN INFRINGEMENT.

Rev. St. § 4966, as amended by Act Jan. 6, 1897 (29 Stat. 481), does not authorize a suit to enjoin the unauthorized performance of a copyrighted dramatic or musical composition to be brought in any district in which the defendant may be found, but merely confers the right upon the circuit court of any such district to enforce, dissolve, or modify an injunction which has been issued in the original suit, which must be in the district of his residence.

In Equity. On objection to jurisdiction.

M. R. Powers, for complainant.

Rubens, Dupuy & Fisher, for defendants.

KOHLSAAT, District Judge. This is a bill for injunction brought under section 4966 of the Revised Statutes, as amended in 1897. Neither of the defendants resides in this district, and defendant Frohman enters a special appearance questioning the jurisdiction of the court on this ground. Complainant insists that section 4966, as amended, modifies the act of August 13, 1888, touching the district in which defendant may be sued, and enables suit under said section to be brought in any district in which the defendant may be found. Upon a careful reading of said section, I am unable to concur in this construction, but am of the opinion that the amendment of 1897 simply confers upon courts other than those issuing the injunction the power to consider, enforce, and modify the same, and does not alter the pre-existing requirement that original jurisdiction in such cases vests only in the federal court of the district in which the defendant resides. The bill is dismissed for want of jurisdiction.

## CLARK et al. v. NATIONAL LINSEED OIL CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 718.

1. CORPORATIONS—APPOINTMENT OF RECEIVER—SUIT BY MINORITY STOCKHOLDERS.

That a corporation has lost or disposed of the greater part of its property, and permanently abandoned its business, is not alone ground for the appointment of a receiver for its remaining assets on application of minority stockholders, but it must be shown in addition that its officers have been guilty of mismanagement of its affairs, which renders a receivership necessary to preserve the property for its creditors and stockholders, and for that purpose general averments of negligence and misconduct on the part of the officers are not sufficient, nor is the mere belief of affiants that frauds have been committed.

2. SAME—SUFFICIENCY OF SHOWING.

A bill filed by stockholders owning but 3 per cent. of the stock of a corporation, making general charges of fraud and misconduct against its

**officers, and verified as to the incriminating part of such charges only on information and belief, is insufficient, treated as an affidavit, to warrant the appointment of a receiver for the corporation against the wishes of the other stockholders, and a specific denial of the alleged misconduct in the answer, which is positively verified by one having knowledge of the facts; and especially where the real purpose of the bill is to secure the appointment of a receiver who will bring suits against the officers and directors in the name and at the expense of the corporation, where complainants, as individuals, have a remedy by suit in their own names to recover for the losses they may have sustained through the frauds and misconduct of the officers.**

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The bill is on behalf of appellants, owners of forty-six hundred shares of the capital stock of the appellee—the total issue being one hundred and eighty thousand shares—and all other stockholders of the appellee joining therein. No other stockholders have, however, joined. Its object is to wind up the company, and appoint a receiver. It avers, in substance, that upon the organization of the company in 1890 it became the owner of over forty linseed mills situated in various parts of the United States, worth five millions of dollars, and other property to the amount of two million dollars, besides a valuable trade and good will; but that despite this valuable property, the company was not successful, and was so negligently and badly managed, by its officers, that, by the year 1898, its assets had been almost entirely dissipated.

The bill, then, coming to particulars, proceeds as follows:

"That in the year 1895 the said Alexander Euston, being president of the defendant company, entered into a speculation in the shares of stock of the said company wherein he undertook, together with one Edgar T. Wells and the London Share & Debenture Company of London, England, to enter into a contract for the purchase of shares of stock of the said company, and that in pursuance of the said contract some six thousand of the said shares of stock were actually purchased at a price of about thirty dollars per share; but the market price of the said stock soon began to decline and thereupon, after the price of said stock had so declined, said Euston, on to wit, about the 24th day of July, 1895, with the knowledge and consent of the said McCulloh and other Directors, (but as your orators are advised and believe without the knowledge of all the Directors) caused the said contract to be assumed by the company as its own obligation, and thereupon the company, acting through the said Euston and the said Directors, paid to the said Euston about twenty thousand dollars ($20,000.) to reimburse said Euston for margins which had been put up by him on account of said purchase, and in the same way the said company pledged certain of its securities to secure any loss that might result from said speculative deal; and your orators allege upon information and belief that at the time of this transaction the said Euston and the said Directors knew that the said contract was not an advantageous contract, and that they acted therein with the sole end in view of assisting the said Euston to shift upon the company the liability and probable loss under the said contract; your orators further show that the price of said shares so purchased did decline and that the said stock was finally sold out at an additional loss to the company of about one hundred and thirteen thousand dollars ($113,000.) which said Euston and said Directors afterwards, to wit, in the year 1895, caused to be paid out of the monies of the said company contrary to law and good morals, a transaction entirely foreign to the business of the company, and one which, as your orators charge, rendered the said Euston and the said Directors personally liable to the said company and its stockholders for the full sum so paid out of the company's funds. And your orators aver that such of the then Directors of the company as took no part in the said transactions, whose names your orators are unable to specify, did subsequently fully ratify and acquiesce in the said transactions, and that for several years past the

said transactions have been fully known, ratified and acquiesced in by all of those who then constituted the Board of Directors.

"And your orators aver that the foregoing transactions were carried on secretly and entirely without the knowledge or consent of your orators, and have only lately come to the hearing or knowledge of any of them, to-wit, on or about the month of October, 1898, nor could your orators by the exercise of reasonable diligence on their part have gained earlier knowledge thereof."

"And your orators show that in the spring and summer of 1898, and prior to August, 1898, the said Euston, acting with the knowledge and consent of a majority of the directors, and in the name of the company, but without the knowledge or consent of any of your orators, entered heavily into speculation in flaxseed on the Board of Trade in Chicago and at other places, buying hundreds of thousands of bushels of flaxseed in excess of the then present or possible future needs of the Company in the pursuance of its legitimate business, borrowing sums amounting to hundreds of thousands of dollars to carry on such speculation and executing the company's notes therefor, the exact amounts not being to your orators known; which said sums of money were deposited as margins in the purchase of flaxseed for future delivery at various times.

"Your orators state upon information and belief that said Euston sought by the purchase, upon margins, of these vast amounts of flaxseed with the money so as aforesaid borrowed, on the company's credit, to control the market by creating what is termed a 'corner' in flaxseed; and your orators aver that the said transactions in the flaxseed market, so carried on by said Euston with the funds of said company did cause a large temporary advance in the price of flaxseed but that owing to the inability of said Euston to any longer borrow money on the company's credit, he failed to bring about such a 'corner' or to uphold said advanced market prices, but the same rapidly declined from natural causes; in order to meet maturing obligations the company was then obliged to sell at a sacrifice the flaxseed which it had purchased at high prices caused by such purchases in said attempt to 'corner' the market; and that the net result was a loss to the company in said transactions of about five hundred thousand dollars, the exact amount not being known to your orators.

"Your orators aver that such use of the company's funds by said Euston and said directors was unauthorized and illegal and that the appropriation by them of the company's funds to pay losses incurred in such illegal speculations was contrary to law and good morals, and thereby said Euston and said directors became liable to repay the amount of such losses to the company, for the benefit of your orators and the other stockholders of said company.

"Your orators further show, on information and belief, that other losses of large amounts were incurred and paid out of the company's funds by said Euston and said directors in other previous speculations, similar to those specifically referred to as aforesaid, whereby other large sums of money of said company were lost, the amounts of which losses and the exact dates at which they were incurred your orators are unable to state."

"Your orators further show that by reason of the matters above set forth and by reason of various other negligence and mismanagement of the officers and directors, the said corporation ceased in the year 1891 to make any profits or declare any dividends, and as a matter of fact, no dividends have been declared by said company since the year 1891, except a certain false and fictitious dividend declared in the year 1895 as hereinafter set forth. That is to say, that during the year 1895 said Euston and the directors, fearing that the stockholders of said company would become dissatisfied by reason of the failure to declare dividends, secretly caused a resolution to be adopted by all the directors of said corporation, as follows, on to-wit the 21st day of August, 1895: 'Whereas the properties owned by this company have largely increased in value since they were purchased by reason of valuble and permanent improvements, and the natural and reasonable increase in value of the real estate during the past eight years, therefore be it resolved that the amount of plant account be increased to eighteen million

dollars ($18,000,000) including the permanent improvements made to this date,' and thereupon caused the following entry to be made upon the auditor's journal of said company, viz:

"'Plant account Dr. to Earnings, for amount of valuation of the properties of the Company, representing increased value on the original basis, covering a period of eight years, since 1887, as per resolution of the Board of Directors, adopted August 27, 1895, $1,122,359.28.'

"And thereupon said Directors caused a dividend of one per cent. to-wit, of one dollar on each share of $100.00 to be declared and paid to the stockholders of said company; but your orators show as a matter of fact said resolution and the recitals thereof were wholly false, and that said plants and properties had not increased in value, but on the contrary, since the year 1890 and up to and including the year 1895, said plants and properties had enormously decreased in value, and large numbers of said plants and properties had been allowed to fall into disuse and had become dismantled and wasted and practically worthless to said company, so that as a matter of fact said Plant and Property Account should have been diminished by many millions of dollars at the time when it was fictitiously increased as above set forth and that the said dividend of one per cent. was not paid out of any profits of the said corporation but was in fact paid out of the capital, thereby seriously crippling the resources of the company and impairing the practical operation of its business.

"And your orators aver that the above mentioned facts were entirely unknown to your orators at the time said action was taken, and have only lately come to the ears of your orators, or any of them, to-wit, on or about the month of October, 1898, nor could your orators, by the exercise of reasonable diligence on their part have gained earlier knowledge thereof."

It is further averred that in September, 1898, the affairs of the company being then in a desperate condition, the majority of the stockholders, at the inducement of the directors of the company, deposited their stock with the Central Trust Company of New York, in a trust for a certain reorganization committee; that this stock was deposited under an agreement by the terms of which the committee was to formulate a plan for a reorganization, submitting the same to the stockholders for their approval; that no plan has ever been formulated by the committee or submitted to the stockholders; but that instead thereof the committee permitted the directors, in December, 1898, to sell and transfer practically all the assets of the company to a new corporation called the American Linseed Company for an inadequate consideration; that the Central Trust Company refuses to return the said stock to its owners, and that this action on the part of the Central Trust Company was taken by collusion with Euston and the directors for the purpose of preventing any proceedings by the stockholders, on account of any of their acts of misconduct.

It is further averred that since the said transfer the appellee has permanently ceased to carry on its business, and its directors have permanently ceased to hold meetings, but that other moneys are still left in the hands of Thomas G. McCulloh, one of the directors of the company, and one of the parties who participated in the management of the company, and the various acts of misconduct; that the directors have refused to prosecute the company's claims against Euston and themselves for their personal liability on account of the acts of misconduct, and a receiver is asked to take possession of the assets of the company, including this claim against the directors, and to administer the same, proceeding to wind up the affairs of the company, and distribute its assets among those entitled thereto.

The bill is sworn to by each of the appellants, the jurat in each case reading substantially as follows: "That he" (the affiant) "has read the Bill of Complaint and knows the contents thereof, and that the allegations therein made are true, except as to such allegations as are therein said to be upon information and belief, and that as to such allegations he believes them to be true."

The answer, in effect, denies that the directors, at any time, acted in bad faith, or in excess of their powers, or used their control over the property

for any improper purpose, or for the furtherance or carrying on of any secret or speculative transactions in oil or flaxseed, or in stocks or bonds, either on the Board of Trade in the City of Chicago or elsewhere. It is denied that the directors ever made secret speculative contracts for the purchase or intended purchase, or sale of flaxseed with the funds of the company, or that any speculative deals whatever in flaxseed were made. It is denied that, by reason of any of the acts set out in the bill, the appellee lost any sum of money or failed to make any profits, or declare any dividends, except in the ordinary and legitimate conduct of the business, or that the said appellee was ever engaged directly or indirectly, or that any of its funds or credit have ever been used, in any attempt to corner flaxseed, on the Board of Trade in the City of Chicago or elsewhere.

Respecting the alleged loss in the year 1898 on flaxseed, the answer states that the appellee bought upwards of two million bushels of said seed for future delivery as its manufacturing necessities required; that such amount was much less than these manufacturing necessities; and that, owing to causes set forth in detail, none of which were fraudulent or negligent, or in the nature of speculation, or unfair toward the company, the appellee was unable to take the flaxseed, and pay for the same as agreed upon, and that, by reason thereof, lost about twenty cents per bushel on the two million bushels of flaxseed.

Respecting the dividend of one per cent. declared in 1895, the answer avers that the said dividend was paid out of the surplus over and above its capital stock, after the charging off of certain purchases, and that such dividend was ratified by every stockholder of the appellee by accepting the same, no stockholder having ever offered to return the sum.

Respecting the purchase of the stock on account of the contract made in the name of Euston with the London Share & Debenture Company, it is averred in the answer that said purchase was made by resolution July 24th, 1895, and that all the stockholders since that time have had opportunity to ascertain, by inspection of the record books, the fact of said purchase; that the purchase was in good faith for the sole and only purpose of aiding the appellee in borrowing money on ten year unsecured bonds, so that it might retire its short time paper, thus greatly benefiting the appellee, and that the directors, in good faith, believed, and were advised that they had the legal right to make such contract; it is denied that such contract was brought about by false representation of Euston, or any one else, or that the stock so purchased diminished in value, on account of any fraudulent or unlawful act by said Euston; but, it is averred, that no circumstance was known at the time which indicated that said contract would cause a loss to anybody.

The answer in detail states the business causes leading to the failure, and the litigation ensuing, as well as the steps taken to reorganize, and the sale to the new company.

The answer is sworn to by Thomas G. McCulloh, vice-president of the appellee. The jurat reads that the affiant "knows the contents thereof and that the same is true in substance and in fact."

The report of a certain committee, unsworn to, is submitted with the bill, and the report of another committee, also unsworn to, together with affidavits in support of the answer, are submitted with the answer.

Upon the bill and answer and affidavits filed, as thus substantially stated, the motion for a receiver was originally denied. Thereupon a motion was made to set aside the order of denial, and this motion was overruled, and the bill dismissed.

It was stated at bar, upon the hearing, that no error to the order, on account of the dismissal of the bill, would be insisted upon.

The contention of the appellants, on the motion for the appointment of a receiver, was based upon the two following propositions, as stated by their counsel:

I.—"The National Linseed Oil Company has sold all its tangible property and permanently abandoned the business for which it was incorporated. Its remaining assets therefore constitute a trust fund to be distributed among the stockholders and creditors. But the officers and directors now in control are not proper persons to perform that office by reason of various acts

of misconduct, past and present, and consequently the court should undertake the office by appointing a receiver.

II. "The Central Trust Company unlawfully holds a majority of the stock of the National Linseed Oil Company. The entire control of the Company is thus in the hands of those who have no right to that control. The rightful owners of the stock have no practical remedy against the Central Trust Company. The only means of effectively and immediately getting the control of the Company out of the hands of those not entitled thereto and into some lawful hands, is to have the court itself take possession, on the petition of these stockholders, who represent in this suit the whole body of the stockholders."

Martin T. Baldwin, for appellants.
H. S. Stone, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

The proceedings below were irregular, and possibly present no question for review. At most we can consider the appeal as upon a final hearing below upon bill, answer and affidavits; this is, properly, the effect of the waiver of the technical error embraced in the dismissal.

The effect of appointing a receiver over a corporation is to take the property out of the control of its officers, to whom it has been entrusted by its stockholders. Courts proceed with extreme caution in the exercise of so summary a power; and this is true, not only in cases where the jurisdiction of the court is invoked upon general equity powers, but, also, where such powers have been extended by legislation with reference to the winding up of a corporation. Cessation of business, alone, does not make a fit case for the appointment of a receiver of the remaining assets of the company; it must be shown, in addition, that the officers have been guilty of mismanagement of its affairs, or that there exists some need to preserve the property, through a receivership, for the benefit of the creditors and stockholders. High, Rec. (3d Ed.) 292.

Applying these rules to the first proposition upon which the motion for a receivership is pressed—that the appellee has abandoned its business—it will be seen that the order of the court below is justified. The loss of the company's property, and its failure to continue doing business, independently of any causal mismanagement by its officers, is not ground sufficient for the appointment of a receiver; nor will a general averment of negligence and bad management on the part of its officers make good such insufficiency; nor will the mere belief of affiants that great frauds have been committed be sufficient, when it is not clearly shown in what the frauds consist.

Coming, then, to the averment of specific misdeeds, we greatly doubt if the hearing is not to be treated as upon bill and answer alone, in which event, the answer constituting a complete denial, there is no ground left for the appointment of a receiver. But, in our opinion, the same result follows, if we treat the bill as the affidavit of the

five appellants, and the answer as a contra affidavit upon the part of but one affiant. The question is not whether five have sworn against one, but whether the affidavit of the five, upon the points in dispute, is so convincing, that the court below ought to have been persuaded of its truthfulness.

Paragraph VIII. of the bill, in substance, charges that Euston entered into a contract with the London Share & Debenture Company for the purchase of six thousand shares of its stock at about thirty dollars per share; that the market price of such stock soon began to decline; and that, after such decline, Euston, with the consent of some of the directors, caused the contract to be assumed by the appellee as its own obligation, reimbursing Euston for the margins put up by him on account of the purchase; and resulting, in the end, in a loss to the appellee of one hundred and thirteen thousand dollars. The answer admits these facts, but avers, in substance, that the purchase was made originally, by direction of the directors, in the name of Euston, but for the benefit of the appellee, so as to secure the retirement of certain short time paper. On this state of the proof no misconduct is, with anything like certainty, shown. It is true that the transaction is denominated a speculation, but the court does not accept names; it must look to facts, as to such averment. It is true, also, that the bill avers that the contract was not an advantageous one, and that Euston, and those joining him, acted therein with the sole end in view of assisting Euston to shift upon the company the liability and the loss the purchase had entailed; but the averment is not made upon the knowledge of the affiants, but only upon their information and belief.

Paragraph X, in substance, charges that Euston, with the knowledge and consent of a majority of the directors, bought, upon the Board of Trade, many thousand bushels of flaxseed, in excess of the then needs of the appellee, borrowing therefor, to margin said purchases, sums amounting to many thousands of dollars. The answer avers that the purchase was upwards of two millions of bushels; that it was much less than appellee's then manufacturing requirement; and that, owing to intervening financial difficulties, alone, the appellee was unable to take the flaxseed, whereby the loss occurred. No effort is made, on the part of the bill, to show the appellee's manufacturing need, in the way of flaxseed supply; nor, indeed, any of the particulars of the transaction, presumably accessible, through the books of the company. Such general averment, respecting a business transaction that should be put in evidence in detail, if at all, as also the general averment that the deal was in the nature of a speculation, are, to say the least, unsatisfactory. As a general charge in a pleading they are probably sufficient, for there the requirement is the ultimate fact; but as parts of an affidavit they violate the requirement that, in the matter of evidence, the court must have, not the ultimate, but the primary facts. The additional averment that Euston's motive was to corner the market, to his own personal advantage, is only upon information and belief.

The contention respecting the improper declaration of a dividend is left, as to the primary facts, equally obscure; except that, whether

the dividend was proper or improper, the appellants have shared in its fruit, and are offering to make no return.

These strictures upon the bill, as an affidavit, would be cogent, had all the stockholders, or a large proportion of them joined the appellants in their attack upon the president and directors; but they are still more cogent, when it is borne in mind that ninety-seven per cent. of the stockholders refuse such an alliance. Is it not probable that the ninety-seven knew, as well as the three, the details of these transactions? Is it probable that they would acquiesce in the misconduct alleged—misconduct so harmful to their interests? Under circumstances like these, there should be the clearest and most convincing presentation, in the affidavit, of the facts—each material one within the personal knowledge of the witness—to justify the court in disregarding the judgment of the ninety-seven, in an effort to meet the wishes of the three.

The purpose underlying the bill is plain. It is to get control, through a receivership, of the appellee's alleged right of action against the directors, so that such suit can be prosecuted in the name of the appellee, and at its expense. It is admitted that the appellants, as individual stockholders, have already a remedy against the directors for whatever loss they have suffered through the supposed frauds and misconduct; but the court is asked, preliminary to such suit, and as a preparation for it, to transfer the control of the corporation from the accused to the accuser, together with the corporation's cash assets available for the sinews of war. The court is, in effect, asked to prejudge the contest, and upon the bill as an affidavit, to give to the appellants the substantial fruits of victory, before the real contest has begun. We are not satisfied that there is a sufficient showing for so important an order.

The order of the court below will be affirmed.

## CLEVELAND TEL. CO. v. STONE et al.

(Circuit Court, N. D. Illinois, N. D. October 10, 1900.)

No. 25,665.

1. EXCHANGES — RIGHT OF PROPERTY IN QUOTATIONS — PROTECTION BY INJUNCTION.

There exists in the board of trade of the city of Chicago a right of property in the quotations made upon the transactions of its exchange until the same are made over to the public, and it is within the powers of the board to convey such right by contract to a third person who is entitled to protection in the enjoyment of the same before publication by injunction against the unauthorized publishing or distributing of such quotations by others.

2. PARTIES IN EQUITY—NONJOINDER OF FORMAL PARTIES—FEDERAL COURTS.

A federal court will not require the joinder of one who is a proper, but not an indispensable, party, when such joinder would defeat its jurisdiction.

In Equity. On motion for preliminary injunction and on demurrer to bill.

Henry S. Robbins, for complainant.
Kerr & Fullen and Bulkley, Gray & More, for defendants.

KOHLSAAT, District Judge. This is a suit brought by complainant, a corporation of West Virginia, for the purpose of obtaining both a temporary and permanent injunction against defendants, prohibiting the latter from obtaining, receiving, selling, or distributing quotations of the Chicago Board of Trade; the complainant claiming right thereto by virtue of its contract with the said board of trade set forth in the bill. The cause now coming on to be heard before me on application for a preliminary injunction upon bill and affidavits and arguments of counsel, and also upon demurrer to the bill, and the same having been duly considered, I am of the opinion:

1. That there exists in the board of trade of the city of Chicago a right of property in the quotations made upon the transactions of its exchange until the same are made over to the public.

2. That there is no such dedication to public use shown herein as will serve to defeat or terminate such property right in the party entitled thereto.

3. That it was within the powers of said board of trade to convey to complainant the property right in said quotations in the manner set out in its contract with complainant, and that complainant acquired good title to the same by said contract as against these defendants.

4. That defendants have appropriated and used, and are appropriating and using, said quotations before publication thereof, wrongfully, and contrary to law, and in violation of complainant's rights.

I deem this latter finding satisfactorily established by the proofs submitted by complainant, corroborated by the shuffling evasiveness of the affidavits presented by defendants. There is indubitable proof that defendants have entered into a scheme to defraud some one out of a valuable property right. While the board of trade of Chicago has an interest in the subject-matter of this suit, and would be a proper party, yet, following the trend of precedent in the federal courts based upon equity rule 47, the court will not require the board of trade to be joined as complainant herein, as such joinder would oust the jurisdiction of this court, and the rights of the parties now before it can be fully determined in this proceeding without prejudice to the rights of said board. Granting that the right to these quotations is a property right, then it cannot be denied that complainant is greatly damaged by the broadcast scattering of these quotations by purloiners, who, by reason of having to pay nothing for these quotations so stealthily obtained by them, can obviously render complainant's right of property, acquired by the payment of two dollars per subscriber to the board of trade, valueless. I am therefore of the opinion that a temporary injunction should issue as prayed, and complainant's counsel may prepare an order accordingly. The demurrer to the bill is overruled.

## WENGER et al. v. CHICAGO & E. R. CO.

(Circuit Court, N. D. Illinois, N. D. July 6, 1900.)

No. 24,182.

1. RAILROADS—REORGANIZATION—LIABILITY FOR CLAIMS AGAINST OLD COMPANY.
The holder of an unliquidated claim against a railroad company will be held barred by laches from the right to charge a reorganized company succeeding to the property with liability thereon, on the ground that it issued bonds and stock to stockholders of the old company, where, with ample opportunity, he neglected to assert such claim against the new company until after the transaction had been completed and the bonds and stock delivered.

2. SAME—SUIT TO CHARGE NEW COMPANY—PARTIES.
A suit cannot be maintained against a reorganized railroad company to charge it with liability for a claim against the old company on the ground that it issued bonds and stock to stockholders of the old company without joining such stockholders.

In Equity. On demurrer to bill.

John C. McShane, for complainants.
Johnson, Stirlen & King, for defendant.

KOHLSAAT, District Judge. This matter comes on before me to be heard upon demurrer to the bill of complaint, which bill alleges, in substance, that Wenger was, on the 10th day of June, 1888, injured while riding as a passenger on a train of the Chicago & Atlantic Railway Company; that on April 29, 1889, he filed his declaration against said company in the superior court of this county; that on May 7, 1889, said company entered its appearance in said suit, and filed its plea to said declaration; that prior to the said injury to Wenger certain mortgages on the property of said company were in existence; that foreclosure proceedings had been commenced prior to the institution of said suit by Wenger, in which foreclosure proceedings decrees had been entered on January 29, 1888, January 29, 1889, and February 20, 1889, ordering the sale of said property in satisfaction of said mortgages; that under and by virtue of said decrees public sale by the master, appointed commissioner for such purpose, of said property, was made on August 12, 1890, which sale was duly confirmed; that the persons purchasing at said sale were trustees under a reorganization agreement, and represented certain of the owners of said mortgage indebtedness and of the capital stock of said Chicago & Atlantic Railroad Company; that in and by said reorganization agreement the said purchasers of said property should convey the property so purchased to a new railroad corporation, to be organized pursuant to law; that certain of the capital stock and bonds of such new corporation should be used in paying certain creditors of said Chicago & Atlantic Railway Company, and should be exchanged for certain debts and stock of said latter company; that in pursuance of said reorganization agreement the defendant corporation, Chicago & Erie Railroad Company, was duly organized, and certain of its bonds and stock exchanged for certain of the debts and stock of said Chicago

& Atlantic Railway Company; that no provision was made in said reorganization agreement, or in the distribution of said stock and bonds of defendant company, for the payment of the claim of Wenger on account of his said injury; that subsequently, and on October 4, 1893, the aforesaid suit of said Wenger came on for trial, and resulted in a verdict and judgment in favor of said Wenger for $25,000; that subsequently the other complainant, by assignment duly made, acquired an interest in said judgment; and that by reason of the premises complainants are entitled to have their said judgment paid by defendant corporation. The theory upon which complainants proceed is that defendant corporation took the property of the Chicago & Atlantic Railway Company subject to all claims against the latter company of every kind, nature, and description; that the sales under foreclosure decrees above set forth were simply formal, and are no protection to the purchasers; that defendant knew, or was bound to know, of complainants' claim, and to make provision for the payment of the same, when taking over the property aforesaid. It does not appear from the bill that any attempt whatever was made to make defendant a party to said damage suit, or to inform any officer of defendant of the pendency of said suit. In fact, it appears from the bill and exhibits that the Chicago & Atlantic Railway Company was practically out of existence at the time the judgment in question was recovered by Wenger. It at most had but a technical existence. It does not appear that any steps were taken to present Wenger's claim in any manner, either to the reorganization committee or to the new corporation. The bill herein was not filed until June 3, 1896. At this time the reorganization in question had long been completed, and the securities of defendant corporation distributed in accordance with the terms thereof, so far as the bill discloses. Certainly, under the conditions thus shown, it would require the presentation of very strong excuses to avoid the fact of laches appearing on the face of the bill. Under the authority of Railroad Co. v. Howard, 7 Wall. 392, 19 L. Ed. 117, complainants possibly might have intervened pending the carrying out of the reorganization scheme, and obtained relief; but, even in that case it was only the property which was to be received by the stockholders of the old company which was declared subject to the rights of a general creditor, and that property was sequestered before it had been distributed. Under the theory of that case the old stockholders who received the stock and bonds of the new company in exchange for their stock in the old are the ones interested. These stockholders are not made parties here. Without, therefore, determining whether or not the claim for personal injuries sued on by Wenger was, at the date of the consummation of the reorganization scheme, such a claim as would constitute an equitable lien against the property of the Chicago & Atlantic Railway Company, the demurrers herein will be sustained—First, on the ground of laches; and second, for want of proper parties. The bill is dismissed for want of equity.

## DE ROUX v. GIRARD et al.

(Circuit Court, E. D. Pennsylvania. January 16, 1901.)

No. 55.

1. MORTGAGES—FRAUD—CONFIDENTIAL RELATIONS.
Several of the owners of certain timber and coal lands in common, one of whom was an attorney, agreed to a division of the timber land and a scheme for the management of the coal lands; but the other owners in common commenced suit against them to set the agreement aside, and a settlement was made, and the timber land was conveyed to two of the objecting owners, who gave a mortgage on the timber lands and on their interest in the coal lands to the other owners to secure the entire purchase money. The attorney at the time of the execution of the mortgage represented all the tenants in a certain litigation over the coal lands, but was not shown to be the attorney of the mortgagors in other respects. The mortgage was personally acknowledged by one of the mortgagors, and the certificate recited that she was informed of the contents thereof. The objection that the coal lands were included in the mortgage was not raised in a contested foreclosure suit. *Held* not sufficient evidence of the confidential relation of attorney, and the fraudulent insertion of the coal lands in the mortgage, to authorize a recovery of the property by the mortgagor after the foreclosure sale thereof.

2. HUSBAND AND WIFE—DISQUALIFICATION OF WIFE—EXECUTION OF MORTGAGE.
A married woman was not incompetent to execute a valid mortgage on her lands in 1857.

3. FOREIGN WILL—FAILURE TO PROBATE—RECOVERY OF REAL ESTATE.
Where a foreign will devising real estate is not probated under the laws of the state where the property is situated, an action based thereon cannot be maintained by the devisee to recover such property.

4. TAX SALE—VALIDITY.
Where real estate in which an interest is claimed by plaintiff under a foreign will is sold for taxes, and conveyed after the expiration of the period of redemption to defendant, who owns the remaining interest therein, and no fraud is shown, the plaintiff cannot recover her alleged interest therein, since it was devested by the tax sale.

See 90 Fed. 537, 92 Fed. 948.

Carrie B. Kilgore, for complainant.

R. L. Ashhurst, John M. Gest, Thos. Hart, Jr., J. Percy Keating, John G. Johnson, and Wm. M. Stewart, Jr., for respondents.

J. B. McPHERSON, District Judge. Stephen Girard, who died in 1831, disposed of nearly all his estate by will, but failed to devise certain tracts of land in the counties of Schuylkill and Columbia, and these tracts descended to his heirs. Among these was a niece, Marie De Roux, a resident of France, whose children are the complainants in this proceeding. The city of Philadelphia took possession of the land, claiming to be the owner under the will of Girard, and the heirs were therefore obliged to bring an action of ejectment to establish their title. This action was brought in the year 1850 in the circuit court of the United States for the Eastern district of Pennsylvania, and among the counsel for the plaintiffs was Theodore Cuyler, whose heirs are the principal parties defendant in the pending bill. The action was successful, and in May, 1853, a writ of habere facias possessionem was issued, under which the heirs of Girard were put into possession of the land in controversy. There

were 12 tracts in all; 9 being tracts of timber land, called also "farm lands," and 3 being underlaid with coal, not then developed.

In June, 1854, the heirs conveyed to Mr. Cuyler and Mr. Read, one of his associates,—who afterwards sold his interest to Mr. Cuyler, and need not be further mentioned,—"one full, equal, undivided interest, equal in amount, number of acres, extent, quantity, and value to fifteen per cent. of the entire amount, number of acres, extent, quantity, and value of, in, and to each and all of those twelve tracts * * *"; the deed reciting that the grantees had agreed to "undertake and conduct proceedings in the law for the recovery of the said tracts, pieces, and parcels of lands, estates, and premises, and, as compensation for their services rendered in such legal proceedings, [to] receive an interest in all such lands equal to fifteen per cent. of their full amount and value," and reciting further that "such legal proceedings have been successfully conducted, and by final process, issuing out of the circuit court of the United States in and for the Eastern district of Pennsylvania, actual possession of said lands has been delivered unto the" heirs. For the time being, this ended the professional relation between Mr. Cuyler and the heirs. He ceased to be their counsel, becoming instead a tenant in common, owning an undivided 15 per cent.

In December, 1854, the city of Philadelphia brought a second action of ejectment in the common pleas of Schuylkill county, claiming to recover the coal lands only, and Mr. Cuyler appears of record as counsel for the heirs defendant. No evidence was offered concerning the progress of the case in the common pleas, but from the record in the supreme court it appears that the city was defeated at the trial, and sued out a writ of error in March, 1863. Meanwhile, in December, 1857, a transaction took place which lies at the foundation of the complainants' case, and should therefore receive careful attention. On December 26th a mortgage was made by two of the heirs; Marie De Roux being one, and Mr. Cuyler being one of the mortgagees. The bill charges that when this mortgage was executed Mr. Cuyler was acting as the attorney of Marie De Roux, that he fraudulently concealed from her the true nature of the instrument, and that "the said Marie Celeste De Roux, trusting the said Cuyler as her proper attorney in the matter of the said mortgage, and in all matters, took no means to protect herself against any duplicity in connection therewith." If these averments are not proved, the complainants have no case; and it is essential, therefore, to understand, as nearly as may now be possible in the light of the evidence presented, what was the relation of the parties in December, 1857. For this purpose it is necessary to go back to the year 1854.

In May of that year the heirs had been put into possession of the lands, and the next matter to be determined was, what should be done with them. This question was solved by two agreements, one dated in May and the other in June. The first agreement provided that the coal lands should be held together and undivided, and should be managed by five persons as commissioners or agents for all the owners, Mr. Cuyler being chosen as one of the commissioners; and the second agreement undertook to make an amicable par-

tition of the timber lands. These agreements were not satisfactory to some of the heirs (Marie De Roux being one), who were living abroad, and were represented in this country by attorneys in fact with limited powers. Accordingly, in December, 1856, a bill was filed by the dissatisfied heirs in the supreme court of Pennsylvania to set aside the two agreements, and this was done by a decree entered in the following July. The decree also directed an account to be taken of the rents, issues, and profits that had been received by the commissioners, and by those of the parties defendant that had gone into possession of the timber lands under the deed of partition. No account was taken, however, for a reason that appears upon the face of the papers that were executed a few months afterwards. During this interval, from July to December, the existing disputes were amicably adjusted, the commissioners and those of the heirs that had gone into possession of the timber land were released from liability to account, and Marie De Roux and Stephanie De Lentilhac, two of the heirs, agreed to buy the interest of all the other tenants in common of the timber lands for $23,111.13. I say that all this was agreed upon, because it was actually done on December 26th. Up to this point there is not a spark of evidence that Mr. Cuyler was Madame De Roux's attorney in the settlement of these difficulties among the heirs. On the contrary, the proceedings to set aside the agreements were adverse, so far as he was concerned. He was himself a defendant, and counsel of record for all the other defendants except one, and Madame De Roux was represented by M. R. Thayer as her attorney. Neither is there the slightest evidence that Mr. Cuyler was her attorney in the matter of the purchase and sale of the timber lands. There is nothing whatever to overcome the prima facies of the transaction, which presents him simply as the owner of an undivided interest, agreeing to sell to two of the other owners for a price mutually agreed upon, and bearing no confidential relation to the purchasers. At that time he was attorney for Madame De Roux and the other heirs in a separate and distinct piece of business, namely, the defense of their title to the coal lands against the attack of the city of Philadelphia, but this business had no relation to the settlement of the dispute among the heirs themselves. He was therefore acting merely as an owner of property engaged in the sale of it upon his own account, and was under no obligation, moral or legal, to look after the advantage or interest of the purchasers. He had a right to sell to the two heirs that were disposed to buy, and, so far as the evidence discloses, he was under no professional engagement to take charge of their interest in the transaction.

As far as appears upon the face of the papers, no money was paid by the grantees, but a mortgage for the whole of the purchase money named in the deed was given by Madame De Roux and Madame De Lentilhac, joined by their husbands; and the mortgage was so drawn as to cover not only the timber lands, but also the interest of the mortgagors in the coal lands. This is the precise point of the complainants' attack,—the inclusion of the coal lands in the mortgage. The circumstance is said to be so unusual as to arouse and

justify suspicion of unfair dealing on the part of the mortgagees,—especially on the part of Mr. Cuyler,—and to be of itself sufficient to cast discredit upon the transaction. I am wholly unable to take this view of the matter. No doubt, a purchase-money mortgage ordinarily includes no other property than the land just bought by the mortgagor; but this is because part of the purchase money is usually paid in cash, and the land is considered sufficient security for the rest. It is evident that neither reason existed here. No money was paid, and the lands were apparently an insufficient security, because they were mainly timber lands, and their value consisted largely in the growing trees. It appears from an affidavit made six years later by the husband of Madame De Lentilhac that, out of more than 4,000 acres embraced in the nine tracts of so-called farm lands, only 546 acres were improved and cultivated in 1863, so that in 1857 more than seven-eighths of the surface of these tracts was covered with timber. Manifestly, to take a mortgage for the whole consideration merely upon the timber land conveyed, leaving the purchaser at liberty to strip the land of its valuable covering,—to say nothing of danger from forest fires,—would have been a most imprudent step; and it is not at all surprising, therefore, that the security taken by the mortgagees should have included other property than the lands conveyed. Moreover, even if this sufficient explanation did not exist, not only is there no evidence that the coal lands were fraudulently inserted in the mortgage, but Madame De Roux, who was then in this country, executed the instrument in person, and not by attorney, and acknowledged before an alderman of the city of Philadelphia that the contents of the mortgage were fully make known to her before signing. In the face of this acknowledgment, which is not contradicted by a syllable of testimony, it is impossible to draw the conclusion that the complainants urge the court to draw. In Pennsylvania the certificate by a magistrate of the acknowledgment of a deed is a judicial act, and, in the absence of fraud or duress, is conclusive. Heeter v. Glasgow, 79 Pa. St. 79; Carr v. Coke Co., 170 Pa. St. 70, 32 Atl. 656. Fraud is never to be presumed, but must always be proved by the party alleging it, and this burden the complainants have certainly not been able to bear. Even if the inclusion of the coal lands tended to support the complainants' averment of fraud, it would unquestionably be insufficient of itself; for the bill calls for an answer under oath, the answer responsively denies the allegations of fraud, and the requisite quantity of proof to overcome the denial is not forthcoming. Vigel v. Hopp, 104 U. S. 441, 26 L. Ed. 765; Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678.

If, as seems perfectly clear to my mind, Mr. Cuyler was not the attorney of Madame De Roux in the purchase of the timber lands, and did not fraudulently conceal from her the fact that the coal lands were included in the mortgage, the complainants' case breaks down wholly at this point. The mortgage was valid, and there was nothing to forbid the mortgagees from proceeding upon it at law after it became due, and enforcing collection by appropriate process. This was done in the year 1863, and Mr. Cuyler bought the coal

property finally in June of 1864 for himself and several other persons; the deed being recorded in November of the same year. It may be noted, in passing, that during the proceedings upon the mortgage, which lasted nearly 18 months, and were contested upon various grounds, there was no suggestion that the mortgage included lands that were not intended to be embraced thereby. It is true that Madame De Roux had gone back to France two or three years before the suit was brought, and that she was not personally served; but Madame De Lentilhac was served personally, and her interests were identical with those of Madame De Roux. But, although she made a vigorous effort to prevent a sale, attacking the proceedings on several grounds, it was never suggested that the inclusion of the coal lands was due to fraud.

It is argued, however, that as Madame De Roux was a married woman in December, 1857, the law of Pennsylvania disabled her from making the mortgage in question. To this argument it is enough to reply that the decided cases do not support the position. Jamison v. Jamison, 3 Whart. 471; Black v. Galway, 24 Pa. St. 18; Haffey v. Carey, 73 Pa. St. 431; Kuhn v. Ogilvie, 178 Pa. St. 303, 35 Atl. 957; Siebert v. Bank, 186 Pa. St. 233, 40 Atl. 472.

Other defenses are set up to the bill, such as the statute of limitations; the fact that Madame De Roux in 1859 covenanted to convey her interest in the coal lands to two persons, not parties to the bill; and the further fact that in 1863 this interest was levied upon under a judgment recovered against her husband and herself, and was sold to one John B. Solms, the sheriff's deed bearing date the 13th of March. In the recovery of this judgment, Mr. Cuyler was attorney for the plaintiff, thus showing plainly that he did not represent Madame De Roux generally, but only by particular employment. I shall not extend this opinion by considering these defenses, but there is a final defense about which a few words must be said. In 1861, after the mortgage had been executed, Madame Vidal, who was also one of the heirs, died in France, and, by an instrument in writing purporting to be her last will, devised a certain interest in these coal lands to Madame De Roux. It is evident that this interest could not have been included in the mortgage, which was executed several years before the death of Madame Vidal, and complainants therefore set up a right to recover on behalf of this interest, even if their attack upon the validity of the mortgage should fail. There are, however, two answers to this claim: In the first place, the paper produced, which is said to be a copy of Madame Vidal's will, has never been probated as a foreign will in accordance with the law of the state of Pennsylvania, and cannot, therefore, avail the complainants in the present proceeding. In the second place, even if the will had been probated in Pennsylvania, I think it is clear that whatever title may have passed in 1861 to Madame De Roux under this devise was levied upon and sold in 1868 for nonpayment of taxes. In June of that year the treasurer of Schuylkill county sold these tracts of coal land to William F. Donaldson, and in March, 1871, after the time for redemption had gone by, Donaldson conveyed the land to Mr. Cuyler and certain other persons.

There is no evidence of any kind to impeach the regularity, fairness, or validity of this sale, or to show that any person concerned therein or profiting thereby was in any respect acting fraudulently or in bad faith. The lands being unseated, the effect of this sale was to devest the title of the real owner. "The land, by whatever name assessed and sold, was debtor for the taxes imposed, and a sale in satisfaction of the assessment conveys a good title to the purchaser." Miller v. Hale, 26 Pa. St. 432. See, also, Lightner v. Mooney, 10 Watts, 407; Russel v. Werntz, 24 Pa. St. 338; Woodside v. Wilson, 32 Pa. St. 52; Everhart v. Nesbitt, 182 Pa. St. 513, 38 Atl. 525.

Further discussion seems to be unnecessary. The bill must be dismissed at the costs of the complainants.

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CENTRAL TRUST CO. OF NEW YORK v. RICHMOND, N., I. & B. R. CO.
STONE v. PRYSE et al. TRIMBLE et al. v. HAZARD POWDER CO. et al. WHEELER v. SAME.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1900.)

No. 818.

1. ATTORNEY AND CLIENT—LIEN OF ATTORNEY.
Under Ky. St. § 107, which gives attorneys a lien on any judgment recovered by them "for the amount of any fee which may have been agreed upon by the parties," attorneys employed to establish a claim and a mechanic's lien therefor, under an agreement that if they succeeded they should receive a stipulated fee, which was reasonable in amount in view of the sum involved, who after long litigation established both the claim and lien, are entitled to a lien on the proceeds for the full amount of the stipulated fee, as against persons to whom their client had made partial assignments of his claim, and who appeared in the case only after it had been established, to assert their rights under their assignments, notwithstanding the amount realized was sufficient to pay only a part of the sums assigned; and it is immaterial that some of the assignments were made before the attorneys were employed, where the assignee knew of such employment and made no objection thereto.

2. EQUITY—DISTRIBUTION OF FUND IN COURT—FILING OF CLAIMS.
Where a person not a party to a suit holds two distinct and separate claims against property sold therein, the fact that he presents them for allowance against the fund realized from such property at different times does not constitute a splitting of a single demand, which should debar him from the right to prove his second claim.

3. SAME—TIME FOR PRESENTING CLAIMS.
Persons who are not parties to a suit, but who have claims against property which must be sold therein, may properly be permitted to come in at any time before the proceeds of such property have been distributed; and such a person should not be charged with laches to defeat his claim because it is not filed until after an interlocutory decree for sale of the property has been entered, where no prejudice has resulted to other parties by reason of the delay; nor should one be denied the right to establish his claim because such decree undertook to adjudge certain fixed amounts to be paid from the fund to parties then before the court, since such decree was not final in respect to the matter of distribution, but remained subject to such modifications as might be necessary to permit other legitimate claims to be asserted at any time before actual distribution.

Cross Appeals from the Circuit Court of the United States for the District of Kentucky, at Louisville.

John B. Baskin, for Thomas M. Pryse and others.
Kennedy Helm, for Hazard Powder Co.
H. L. Stone, for Stone & Sudduth.
George Wessinger Smith, for Trimble Bros.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. These are appeals taken by interveners in the case first above entitled from the decree of the circuit court directing the distribution of funds in the hands of the court arising from a sale made upon the foreclosure of a mortgage given by the railroad company, the defendant in the principal case, to the trust company, for the purpose of securing an issue of bonds. The case has been here on former appeals, involving other questions. 31 U. S. App. 675, 15 C. C. A. 273, 68 Fed. 90, 41 L. R. A. 458; 31 U. S. App. 704, 15 C. C. A. 289, 68 Fed. 105. In the case among the appeals reported in the last of the above citations was one by L. F. Mann, who, though not an original party, had been permitted in the court below to intervene and file a cross bill and answer setting up a lien under the statute of Kentucky for labor and materials furnished in the construction of the railroad, besides interest. By the decree of the circuit court his claims had been allowed in the amount of the principal thereof, but he had claimed interest from the date of the filing of his lien, and this was refused. From the refusal to allow interest, he appealed. This court was of opinion that he was entitled to recover interest as claimed, and directed that the decree be modified so as to include it. The case was remanded to the circuit court, and upon receiving the mandate that court, on July 25, 1895, entered a decree for foreclosure and sale of the road, in which, among other things, the claim of Mann was allowed at the sum of $22,129.68, and a lien upon the expected fund therefor was admitted. But the decree went on to declare that certain partial assignments of Mann's claim had been made by him to parties, and in amounts enumerated, and ordered that out of the sum allowed to Mann the several amounts assigned should be paid to the assignees, "subject, however, to the prior lien of Stone & Sudduth for legal services in behalf of said Mann herein." After several fruitless attempts to sell the road, and on the 1st day of May, 1899, a sale was effected at the price of $301,000; and this sale was subsequently confirmed, and the proceeds were brought into court. All the present appeals relate to the distribution of the sum realized on the Mann claim.

1. On the 30th of October, 1897, Stone & Sudduth filed a petition alleging that, prior to the filing of the answer and cross bill of Mann above mentioned, they had entered into a contract with him whereby they undertook the prosecution of his claim in the circuit court, and, if necessary, upon appeal in the circuit court of appeals, in consideration of which Mann agreed to pay them for their professional services, if they succeeded in establishing the claim, the sum of

$2,200, and in the event that the case should be carried to the circuit court of appeals, the further sum of $1,000, making in all in the latter event $3,200. Their petition further stated that they had performed their part of the contract, and had succeeded in establishing the claim finally upon appeal to the circuit court of appeals, and they prayed that a prior lien be given them upon the portion of the fund in court belonging to Mann's claim over all other parties. The matter of this petition was referred to a commissioner to report "(1) by whom and when Stone & Sudduth were employed as counsel herein; (2) what services were rendered herein by them as such; (3) whether they rendered any services for or at the request or in the interest of any other person or party interested in the questions now involved." The commissioner took testimony and reported that he found that Stone & Sudduth were employed as counsel in the early part of January, 1892; that they filed for him his answer and cross bill on February 1, 1892, and thereafter prosecuted the claim with diligence and vigor through a long and tedious litigation to its final establishment; that they were not employed by any other party, nor represented any other interest associated with the Mann claim, but that, in view of the small percentage which would be realized upon Mann's entire claim, a reasonable sum to allow Stone & Sudduth for their services would be $1,900. He reported the testimony which had been submitted with reference to the amount which Mann agreed to pay Stone & Sudduth; and for his omission to find that they were entitled to recover for their services, what the testimony showed Mann had agreed to pay for them, they excepted. The report was confirmed, except in respect to the amount which would be a reasonable compensation. This was fixed at $1,000, the smallest estimate which had been given by the witnesses. The judgment of the court in this regard was, as appears from its opinion, greatly influenced by the small amount realized on the Mann claim ($7,364.78) in proportion to the amount of the claim, which was three times that sum; the amount realized being very much short of enough to pay all the sums claimed by counsel and by assignees. The exception to the commissioner's report was overruled. From the determination of the court fixing their services at $1,000 only, Stone, who is the survivor of his firm,—Sudduth having died pending the suit,—appeals, and assigns for error that the court refused to allow the sum of $3,200 in accordance with their contract with Mann. The contract which is alleged in that petition is sufficiently proven. The questions raised by counsel who resist the claim are in respect of the law assuming the contract to have been made as stated. As has been mentioned, the decree of the circuit court made in July, 1895, upon the reception of the mandate of this court, declared a priority in favor of this claim, but it did not fix the amount. For a reason presently to be stated, we shall consider the claim with respect not only to its amount, but also in respect to its validity. Counsel for some of the appellees contend that as Stone & Sudduth were not then before the court as parties, and there was then no issue or controversy respecting their claim, the decree was in that regard upon a matter not before the court, and was therefore beyond the power

of the court and void. But, whether void or valid, the matter was still subject to the control of the court, and open to changes or modification if the court should conclude that equity required it. The decree was final for all the purposes of the sale, but was not final in respect to the disposition of the proceeds. A decree may be final for the purposes of an appeal, but not final in that it has terminated the control of the court over the case. The statute of Kentucky concerning liens of attorneys in force when the contract in question was made (section 107, Ky. St.) reads as follows:

"Attorneys at law shall have a lien upon all claims or demands, including all claims for unliquidated damages, put into their hands for suit or collection, or upon which suit has been instituted, for the amount of any fee which may have been agreed upon by the parties, or, in the absence of such agreement, for a reasonable fee for the services of such attorneys; and if the action is prosecuted to a recovery, shall have a lien upon the judgment for money or property which may be recovered—legal costs excepted—for such fee; and if the records show the name of the attorney, the defendant in the action shall have notice of the lien."

It cannot be doubted that within the meaning of this statute the claim of Mann was a claim put into the hands of his attorneys for enforcement by suit. And it seems to us it was put into their hands by one competent to enforce it. It is urged that Mann, after his partial assignments, stood in the relation of a trustee for the assignors, and we are referred to cases in which it has been held that the cestuis que trustent are not the clients of the counsel employed by the trustee; that the counsel must look to the trustee for his compensation, and the question of its reasonableness will be open upon the settlement by the trustee of his accounts. And it is further urged that the case is within the operation of another rule,—that, where one party to a suit employs counsel to take care of his own interests, no liability to compensate such counsel rests upon another party from the fact that the results accomplished by their endeavors inure incidentally to the benefit of such other party. But, in our opinion, neither of these rules applies to the case before the court, for several reasons. In the first place, the Kentucky statute gives a direct and express lien. Then, again, these assignees must work out their interests through the lien, which is incident to the Mann claim. If Mann had sued in an action at law to recover the debt for which his lien was given, there would have been no question of the case being within the statute. We can perceive no reason for any distinction when the proceeding is in equity to enforce the lien given for its payment, and the statute makes no distinction. Partial assignments of a claim or fund belonging to the assignor are not recognized at law. Suit to enforce the claim must be brought by the assignor. The reason is that the cause of action is entire and cannot be split up. After the fund is established by judgment, the court in most jurisdictions exercises more or less control by the adoption of equitable principles for the protection of assignees; but until then it looks only to the assignor, who remains the holder of the legal title. The assignment passes only an equitable interest, and in a court of equity the original claim is primarily the subject of inquiry, and must first be established. The separate rights of the

assignees are attended to in the distribution, a branch of the equitable jurisdiction beyond the powers of a court of law. The rights of the assignee are connected by a vital thread with those of the assignor, and are dependent upon them. They cannot be established except through the vindication of the latter. The situation is well illustrated by what has taken place here. The claim of Mann was established in his own name in its entirety by his counsel. Afterwards the assignees came into the case, not to litigate the original claim, but upon the distribution of the fruits, for their own protection. It is altogether unlike the case where one of two parties having independent claims reaps an incidental advantage by the disposition of the claims of another.

The objection is urged in behalf of Pryse, who is one of the assignees, that his assignment antedates the employment of Stone & Sudduth by Mann. But, for the reasons above stated, we think this makes no difference. Moreover, it appears that Pryse was informed of Mann's contract with the counsel, and he approved it. He must be presumed to have known of the provisions of the statute according a lien, and he cannot now complain when it is sought to enforce it. The assignees took no steps for the establishment of the main lien, and were content that Mann should enforce it. If the contract had been tainted with actual fraud towards the assignees, or was so unreasonable as to operate unjustly upon those holding prior assignments of which the counsel had notice, doubtless they might be relieved. But actual fraud is not alleged or claimed. It is, however, claimed that the contract was unreasonable in the amount stipulated, and oppressive upon the assignees. This might seem to be so if we tested the matter by the amount eventually realized. But at the time when the agreement was made all parties supposed the claim was good for its face value, and that enough would be realized to meet all demands upon it. The result has been a disappointment. The contract was to make the compensation for the establishment of the claim. That has been accomplished, and we can see no valid ground for ignoring the contract in the fact that the fruits of it are not all that was expected. We think, therefore, that the court erred in failing to give effect to the contract and the lien, incident to the employment. The appeal of Stone is therefore sustained.

2. It appears that Trimble Bros. had two claims,—one derived under an assignment by Mann of a part of his claim to Charles M. Pryse, who was, as already stated, an assignee of Mann. Another was under a different and distinct assignment from Mann to themselves. The first was presented before the decree of July 25, 1895, and was therein allowed. The second was for $680.60, under an assignment bearing date December 31, 1891. It was not presented until May 29, 1899. From these dates it is seen that the presentation of the claim was after the decree last mentioned, and before the fund realized from the sale was brought into court. The court rejected this claim in its order for distribution, and from this Trimble Bros. have appealed. The grounds upon which this claim was disallowed were stated by the court, as appears from the record, to be these: First, because it was not held by assignment from

Mann; second, because Trimble Bros. had been guilty of inexcusable delay in presenting it, the way having been previously open to them when they presented their prior claim, which, with this, it was said, were parcels of the same demand, which they ought not to be allowed to assert piecemeal. The first ground appears to have been a misapprehension of the fact. The record shows that it was one of the successive partial assignments made by Mann to Trimble Bros. The second reason above stated, we think, is not sound. The claim was not parcel of an entire claim of which the one previously made was part. They were separate and distinct claims for different sums, made at different times, and had, so far as we can see, no relation to each other. They appear to have been as distinct as if they had been assigned to different parties. The only consequence of the claim in question not having been presented with the other, which occurs to us, is the possible bearing it might have on its good faith and validity. But the claim seems to be clearly proven, and its existence in point of fact is not controverted. With respect to the laches imputed, it is proper to observe that it is a common though not universal practice for those who are not parties, but who have claims upon the property which must be sold to accomplish the objects of the suit, to come in after the interlocutory decree has been passed, and set up their claims before the question of distribution is settled. The time between those dates when the intervention should be made is ordinarily a matter of convenience merely, and if no rights have accrued by reason of delay it is unimportant. Nothing of that kind appears in the present case, and, as the claim was presented before even the fund had been brought in, we think it should not have been rejected because it was not brought forward at an earlier date. Neither Stone & Sudduth nor Trimble Bros. nor Price McGuire had presented their claims when the decree of foreclosure in 1895 was entered. They were not, therefore, before the court for adjudication. The uniform current of authority is in accord upon the propositions just stated. And the rule has been extended to cases where the distribution has been actually made if the owner of the claim has not been inexcusably negligent and is otherwise free from fault. Ex parte Howard, 9 Wall. 175, 19 L. Ed. 634; Williams v. Gibbes, 17 How. 238, 15 L. Ed. 135. The law upon this subject was well and fully stated by Judge Morrow, at the circuit, in The Elmbank (D. C.) 72 Fed. 610. The court also seems to have laid some stress upon another objection stated below as made to the claim of Wheeler, administrator of McGuire, namely, that by the decree of the court made July 25, 1895, certain fixed amounts were decreed to be payable from the fund belonging to the Mann claim to persons therein enumerated, and that other claims could not be admitted to disturb those allowances. Not only was that decree not final in respect to the matter of distribution, but it was, in the nature of things, subject to such modifications as might be necessary if legitimate claims upon the fund might still in due course be established. In substance and effect it merely established the basis on which the claims allowed would be entitled to have their proportions when distri-

bution should eventually be made. The objection which these parties make to the Stone claim, based upon the fact that their claim is under an assignment prior to the employment of Stone & Sudduth, is disposed of by what we have said in reference to a like objection in dealing with that claim.

3. The claim of Wheeler, as administrator aforesaid, rests upon another partial assignment, made by Mann to McGuire, of the sum of $671.75, on December 22, 1891. This claim was filed October 4, 1895, and had, therefore, been on file several years before the foreclosure sale took place. It was rejected upon the ground that there had been laches in presenting it, and that it was excluded by the operation of the decree of July 25, 1895. We have already considered this objection on the appeal of Trimble Bros., and held that it was not tenable. As there appears to be no other objection to this claim, it should have been allowed. This appeal is also sustained.

It appearing that none of the assignees of Mann were purchasers for value, the question of notice of the assignments in fixing the order of priority does not arise, and they must take in the order of the dates of their respective assignments, so far as respects those appealing. As to the others not appealing, we do not disturb the order of the circuit court. The order appealed from must be reversed upon the appeals of the several appellants in respect of their claims, and the cause remanded, with directions to allow them.

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## MERCANTILE NAT. BANK OF CLEVELAND v. HUBBARD, County Treasurer.

(Circuit Court of Appeals, Sixth Circuit. December 10, 1900.)

No. 817.

1. TAXATION—ASSESSMENT OF BANK SHARES—INCREASE OF VALUATION WITHOUT NOTICE.

   Rev. St. Ohio, §§ 2808, 2809, which require the state board of equalization for incorporated banks to meet annually on a fixed date, to examine the returns of said banks to the county auditors, and the value of their shares as fixed by the auditors, and to hear complaints and equalize the value of said shares "according to the rules prescribed in title 13 for valuing and equalizing the values of real and personal property," when read in connection with the provisions of said title 13, confer no power on the board to change the valuation of bank shares without reasonable notice to the parties interested and an opportunity for a full hearing; and an increase in the valuation of the shares of a national bank made by such board at a subsequent meeting, to which no adjournment was shown by its records, and without notice to the bank or its shareholders, is not merely irregular, but is void for want of jurisdiction.

2. SAME—NATIONAL BANK SHARES—ENJOINING COLLECTION OF ILLEGAL TAX.

   A national bank may maintain a suit in a federal court to enforce the right given by Rev. St. Ohio, § 5848, to enjoin the collection of taxes levied on an illegal assessment.

3. RES JUDICATA—MATTERS CONCLUDED BY JUDGMENT—MISTAKE AS TO QUESTIONS IN ISSUE.

   Upon a certificate of division from a circuit court the supreme court held, incidentally, that shareholders in national banks in Ohio were entitled to deduct their indebtedness from the value of their shares for pur-

poses of taxation. Such decision, however, was based on the assumption that the state statutes allowed such deduction from all moneyed capital other than national bank shares, and thus illegally discriminated against such shares, whereas in fact, and as shown by the pleadings in the case, it was only allowed from "credits," which were defined in the statute, and included only a limited class of moneyed capital. The court in a subsequent suit, in which the question arose under the same statute, refused to treat it as having been determined by the former opinion, and, on a consideration of the statute, reached a contrary conclusion. *Held*, that under such facts the first judgment did not render the question res judicata between the parties, as affecting their rights under subsequent assessments.

4. SAME.

A decree adjudging, upon pleadings distinctly presenting the issue, that the system of taxation provided by the statutes of a state illegally discriminated against shares in national banks, by refusing to the holders the right to deduct their bona fide indebtedness from the value of such shares, while permitting such deduction from other forms of moneyed capital, renders such judgment res judicata between the parties, as applied to assessments for subsequent years under the same statutes.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

For opinion below, see 98 Fed. 465.

The bill in this case sought to restrain the collection of certain additional taxes imposed on shares of stock in the bank by virtue of an order of the state board of equalization for the state of Ohio for the year 1897. It was also sought to enjoin the collection of the tax levied upon said shares held by certain stockholders upon the ground that the stockholders named were on the taxing day of that year lawfully indebted to others in bona fide debts in excess of all their other credits in a sum equal to or exceeding the value of the shares of appellant's stock so held by them. It is also claimed that the refusal to permit such reduction was a violation of section 5219 of the Revised Statutes of the United States, restricting the rate of taxation on shares of national banks to that assessed upon other money capital in the hands of individual citizens of the state. It was further alleged that said shareholders were entitled to such deduction on the ground that their right thereto had theretofore been adjudicated by the circuit court in actions between the appellant and the then treasurers of Cuyahoga county, which adjudications were in full force and operation, were between the same parties, and involved the same subject-matter. The case was referred to a special master, and his report is fully set forth in the record. Upon this appeal two propositions are urged upon the attention of the court: (1) Alleged error in the action of the circuit court in holding that the increase by the state board of equalization without notice afforded no ground of relief. (2) Error in the failure of the court to sustain the bill on the ground of former adjudications, as set up in the record and disclosed in the testimony. As to the claim of res adjudicata, the facts sufficiently appear in the opinion of the court upon that subject. As to the claim that the state board of equalization met and acted without notice, the master finds the following facts:

"Sixth. Said county auditor made out and transmitted to the annual state board of equalization for incorporated banks a copy of the report so made by the cashier of complainant bank, together with the valuation of such shares as so fixed by him, on the 19th day of July, 1897. There was attached to said report a copy of the report of the Mercantile National Bank of Cleveland, Ohio, to the comptroller of the currency, made next prior to the second Monday of May, 1897, to wit, May 14, 1897.

"Seventh. That the said board of equalization for incorporated banks, composed of the governor, auditor of state, and attorney general, convened on the third Tuesday, being the 15th day of June, 1897, at the office of the state auditor, as required by section 2808, Rev. St. Ohio, and organized by the election of the governor as president of the board, and G. W. Taylor, chief clerk,

in the office of the auditor, as secretary, and adjourned at the call of the secretary, transacting no other business at that meeting. That the members composing said board next met on the 7th of September, 1897, but took no action relating to the valuation of shares of the plaintiff, and adjourned. That two members of said board, with said secretary, met on the 10th day of September, 1897, but took no action relating to the shares of the plaintiff bank, and adjourned. That on the 20th day of September, 1897, the members of said board met, but took no action relating to the valuation of the shares of plaintiff, and adjourned. That on the 4th day of December, 1897, the members of said board next met at the call of the state auditor to consider unfinished business. The record of the meetings of said board, as originally made by the secretary, shows that at the meeting held June 15, 1897, September 10, 1897, September 20, 1897, the 'board adjourned.' At the meeting held December 4, 1897, the secretary was directed to amend the record as to each of said above-named adjournments by adding these words, 'Amended to read, "adjourned to meet at the call of the president of the board, Asa S. Bushnell, governor of the state,"' and thereupon said board adjourned sine die. Some time after December 4, 1897, the record was amended by the secretary as directed by said board. At none of said adjournments was a day named for the next meeting.

"Eighth. At said meeting on December 4, 1897, without complaint from any one, the members of said board, assuming to act as a board, increased the valuation of the shares of the plaintiff from $519,320, so fixed by the county auditor, to $642,320, and on the 6th day of December certified said valuation to the auditor of Cuyahoga county, to be by him placed on the treasurer's duplicate, which was accordingly done. That neither of said meetings of the members of said board following the third Tuesday of June, 1897, was called by said secretary, and no notice or information of any kind or opportunity to be heard was given by said board, its secretary, or any other person, to said bank or any of its officers, directors, or shareholders, of any or either of said meetings, except such as the statute gave them, to wit, section 2808, Rev. St., and succeeding sections; nor did they, or either of them, have any notice of any of said meetings, or appear thereat, and the first information that said bank or any of its shareholders had or received of any action of the board, or of the purpose to increase the value of the shares so fixed by the auditor, was on the 7th day of December, 1897, after the action of the board was had; and such information was conveyed by letter from the auditor of the county to the cashier of the plaintiff, notifying him of the completed action of the board. That thereupon said bank and its shareholders, through the officers and agents of the bank duly authorized, applied to the members of said board for a hearing, and was notified that two of the members of said board were out of the state, and that December 28th was as early as the bank officers could be received. That on said day the officers of said bank, on behalf of said shareholders, duly authorized, met the members of said board at Columbus, and made application for a hearing respecting the valuation of said shares and the action of said board, and notified said members of said board that such increase made on the shares of said bank was excessive and unwarranted, and protested against the same, but said hearing was denied, the members of said board declaring that the board had adjourned sine die, and could not reconvene as a state board of equalization for banks, to consider any claim or application respecting the value of said shares. At the time the persons who had composed the state board of equalization for banks, and who are the same persons required to act under section 167 of the Revised Statutes of Ohio, offered to convene and organize under said section 167 to consider the case of the various plaintiff banks at such time as might be convenient for the representatives of the Cleveland banks to appear. Some doubt was expressed by some of the members of the committee that the board would not have the power, under section 167, to afford as full relief as the board of equalization, and only one of the Cleveland banks appeared before the board when organized under section 167, viz. the First National Bank. The others declined to appear.

"Ninth. That the said auditor of said county of Cuyahoga upon the receipt of the certificate from said state board of equalization entered said valuation

of $642,320 upon the tax duplicate of said county for the year 1897, and assessed against the same taxes at the rate of 3.03 cents on each dollar, and which amounted, on said valuation, to $19,462.30. The taxes on said bank shares at the said rate of 3.03 on each dollar, if assessed on the valuation of $519,320, as fixed by the auditor of Cuyahoga county, would have amounted to the sum of $15,735.39."

The master reported, as his conclusion of law, that the attempted increase was void for want of notice to the taxpayer of the meeting at which the increase was ordered by the board.

W. W. Boynton, for appellant.
Smith W. Bennett, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

The learned circuit judge, in disposing of the matter of the increase of the valuation of the stock in complainant bank made by the state board of equalization for incorporated banks, expressed the opinion that the tax actually assessed being no greater than ought to have been assessed, considering the market value of said stock, the complainant was not in a position to ask a court of equity to intervene; and he therefore declined to consider the irregularity in the action of the state board. The statute of Ohio (section 2808) fixes the time for the meeting of the state board. This board is required to meet on the third Tuesday of June, annually, at the office of the auditor of state, and examine the returns of said banks to the county auditors, and the value of said shares as fixed by the county auditors, as the same shall have been reported by the county auditors to the state auditor. At this meeting it was provided (section 2809) that said board shall hear complaints and equalize the value of said shares according to the rules prescribed in title 13 for valuing and equalizing the values of real and personal property. Looking to the other sections of the statute contained in this title, we find that it is provided in section 2804 that the annual county board shall not increase or reduce the valuation of any real estate except in cases of gross inequality, and then only upon reasonable notice to all persons directly interested, and an opportunity for a full hearing upon the question involved. Section 2807 provides, speaking of the powers of city boards to hear complaints, that:

"No such addition shall be made to such list returned under oath without the board having first given reasonable notice to the person or persons whose personal property is sought to be added to, or the valuation thereof increased, to appear before said board at a time and place to be fixed by said board, and show cause why such addition should not be made, or why such valuation should not be increased."

These statutes, construed together, we think, require that the state board of equalization, before it can increase the value of shares of incorporated banks, shall give notice to persons affected by its action. Undoubtedly the notice prescribed by the statute for the meeting of the board on the third Wednesday in June is sufficient notice to the parties that the board will meet on that day, and taxpayers are bound to take notice of the time and place fixed by law. This was

the holding of the supreme court of Ohio in the case of Hambleton v. Dempsey, 20 Ohio, 168. But in the present case it appears from the finding of the master that, on a day appointed by law for the meeting of the board, it convened at the office of the state auditor, but took no action at that meeting except to adjourn to meet at the call of the secretary. Subsequent meetings were held on the 7th, 10th, and 20th of September, at none of which was any action taken as to the valuation of the shares of complainant bank. At none of these meetings was an adjournment had to a day certain. At the meeting of December 4th an amendment of the record was made to show that adjournments were to meet at the call of the president of the board. At the meeting of December 4th the valuation of the shares of the bank was increased from $519,320 to $642,320, and no notice was given of any of these meetings. We are of opinion that the statutes of Ohio requiring notice must be complied with, in order to give jurisdiction to such a tribunal as the state board of equalization to act upon the property rights of holders of bank stock. An examination of the board record before December 4th would have shown the taxpayer that the board had adjourned without action upon his stock. Nothing recorded notified him of any time or place where he might appear and present his case to the board. In the absence of a statutory requirement, we are of opinion that such action could not be taken as would affect a citizen's property rights by increasing the value of his property for taxation without giving him an opportunity to be heard. In 1 Desty, Tax'n, at page 597, it is said:

> "It is a fundamental principle that before a person can be deprived of a right, even by a judicial suit, he must have notice and reasonable opportunity to be heard in defense of his rights. A tribunal invested by law with power to affect the property of a subject is bound to give such subject an opportunity of being heard before it proceeds. The rule is of universal application, and is founded on the plainest principles of justice."

In Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215, Mr. Justice White said:

> "Wherever one is assailed in his person or his property, there may he defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Numerous other authorities might be cited to sustain this proposition, but we deem it unnecessary to amplify the opinion upon this branch of the case. It is an elementary principle of law that tribunals vested with power to affect the property of citizens must act with notice. He must have opportunity to be heard, and a statute which undertakes to give the right to such tribunals to interfere with property of citizens without hearing deprives him of a privilege long secured by the common law, and does not afford him due process of law. Nor do we think it an answer to this proposition to say that the assessed value was no higher than the true value of the shares in money. No increase in the value of shares already assessed can be made without jurisdiction of the party affected. Sec-

tion 5848 of the Ohio Statutes expressly provides that the illegal levy of taxes and assessments, or either, may be enjoined. Rights conferred by the statute will be enforced in the federal courts. Cummings v. Bank, 101 U. S. 153, 25 L. Ed. 903; Grether v. Wright, 23 C. C. A. 498, 75 Fed. 742. The statute gives the board no jurisdiction to increase the assessment without notice. Therefore the collection of the tax levied as a result of the board's action is illegal, and, under the Ohio statute, can be enjoined. We are of opinion, therefore, that, for want of notice to the taxpayer, the action of the state board of equalization in increasing the valuation of the shares of complainant for taxation was illegal and void, and the circuit court erred in reaching the opposite conclusion.

As a further ground for reversal it is claimed that the matter in controversy between the parties as to the right of stockholders in the complainant bank to set off indebtedness against their holdings of stock is res adjudicata between the parties, and to establish this proposition the record in the case of Mercantile Nat. Bank of Cleveland, Ohio, v. Whitbeck is introduced, in which a final decree was entered in the circuit court of the United States for the Northern district of Ohio on the 8th day of April, 1887. It is alleged that in that case the question was made as to the right of the stockholders to set off their indebtedness against their stock holdings, and was conclusively determined, it having been therein held that the tax laws of Ohio, permitting holders of other moneyed capital to set off their indebtedness, was a discrimination against the holders of national bank stock, within the meaning of section 5219, Rev. St. U. S. Since the decision of the supreme court in the case of Chapman v. Bank, 56 Ohio St. 310, 47 N. E. 54, and the decision of the supreme court of the United States in the same case, affirming the decision of the supreme court of Ohio (Bank v. Chapman, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669), it is settled that the holder of national bank shares, in the absence of proof of discrimination in favor of capital coming into competition with that invested in shares in national banks, has no right to deduct the amount of his bona fide debts from such shares, but is legally bound to pay the tax upon the assessed value thereof without deduction on account of such debts. No attack upon this position is made in the argument of this suit in behalf of the appellants, but it is insisted that the matter is res adjudicata, because of the decision in the suit of appellant against Whitbeck, treasurer. That case is reported in 127 U. S. 193, 8 Sup. Ct. 1121, 32 L. Ed. 118. The bill in the case was based on two grounds,—to restrain the treasurer from collecting taxes because bank shares had, in the county of Cuyahoga, by certain means set forth in the bill, been assessed at 65 per centum of their value, whereas other capital of citizens in that county was assessed at 60 per centum of its value. This the supreme court held to be unlawful discrimination against the holders of such shares. Upon the question raised here, it is necessary to examine the manner in which it was made, and the nature of the decree granting a perpetual injunction. From the record in evidence in the Whitbeck Case we find that the bill avers, among other things:

"Your orator further avers that by section 2730 of the Revised Statutes of Ohio it is enacted that 'the term "credits" shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due to, or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state, other than such as are held to be money as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) over and above the sum of legal bona fide debts owing by such person'; and by section 2736 of the Revised Statutes of Ohio it is provided that every person required to list property for taxation shall deliver to the assessor annually a statement of all personal property, money, and 'credits' and other property in his possession or under his control on the day preceding the second Monday of April of that year, which he is required to list for taxation; and by section 2737 it is provided that such statement, among other things, shall truly set forth the amount of 'credits' possessed by such person, as that term is by the above recited statute defined. Your orator says that a large amount of moneyed capital in the hands of individuals, invested in promissory notes and other obligations and credits, is by the aforesaid provision, allowing deduction of legal, bona fide debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares, as to which no exemption or deduction is provided for by the laws of the state, which discrimination is in direct violation of the restrictions of said section 5219 of the Revised Statutes of the United States."

Then follow allegations as to the indebtedness of certain shareholders. The right is claimed to deduct the same from the value of their shares of bank stock. Again, in summing up the grounds of relief, complainant says:

"Your orator avers and insists that the taxes so levied and assessed against it on account of its said shares of stock are unjust, illegal, and void, for the following among other reasons: (1) That said tax is levied and assessed against your orator directly, and is in violation of the act of congress under which your orator is incorporated. (2) That the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him, and require him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the state, and that under the laws of the same state the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but is required to list for taxation the whole number of shares owned by him, and not simply the excess over his indebtedness; and your orator insists that such discrimination results in the taxation of your orator's stock at much greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio."

In this statement we find the averment that the owners of credits are permitted to deduct their indebtedness, while the owners of bank stock are not thus favored. But the term "credits," as used in this part of the bill, must be taken in connection with the allegations of the bill which state the definition given by the statutes of Ohio of the term "credits," which shows such term to include the excess of sums of a limited class of moneyed capital over and above the indebtedness of individuals, and not to include moneyed capital in general. Upon this branch of the bill the question presented was whether the deduction permitted for the purpose of taxation of indebtedness from the limited class of capital named in the statute was an unlawful discrimination against the shareholders in national banks, within the meaning of the federal statute. The record shows that the decree making a general finding in favor of complainant in the Whitbeck Case was based on the

answers made to a certificate of division of opinion in the circuit court, certifying certain questions to the supreme court,—among others, whether the taxation of national bank shares in the state of Ohio in 1885, without permitting the shareholder to deduct from the assessed value of his shares the amount of his bona fide indebtedness existing on the Wednesday next preceding the second Monday in April, 1885, is a discrimination forbidden by act of congress, the said shareholders not having deducted said bona fide indebtedness from any credits owned by them at either of said dates; and whether the demand for such deduction, first made on the 17th day of December, 1885, was sufficiently early to entitle complainant's shareholders thereto. In this certificate of division of opinion it is also stated that the laws of Ohio make no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock, and provide no means by which said deduction can be secured. Upon this certificate of division of opinion Whitbeck v. Bank was decided in the supreme court. It was therein held that the increase of valuation of the shares of stock of complainant from 60 per centum to 65 per centum was a discrimination such as is forbidden by section 5219 of the Revised Statutes of the United States. In deciding the other proposition the supreme court, assuming that the Ohio statute regulating assessments for taxation allow an owner of moneyed capital other than shares in a national bank to have a deduction equal to his bona fide indebtedness from the amount of the assessment of the value of such moneyed capital, but that no similar provision was made in favor of shares in a national bank, held the owners of such shares are entitled to a similar reduction, and that the right to make the demand therefor was not lost because of the delay in making the demand until after the process of equalization of the value of the shares for taxation is completed, and the tax duplicate is delivered to the treasurer for collection. The question made in the bill was whether the deduction of indebtedness from a limited class of capital, as defined in the Ohio statute, was an unlawful discrimination. The proposition decided by the supreme court was, assuming the Ohio statute to be different from what the bill declared it to be, and that it provided that moneyed capital, with the single exception of national bank shares, might have such deduction, it afforded an unlawful discrimination against such shareholders, within the meaning of the federal statute. In other words, the supreme court decided the question upon an erroneous assumption, not based on the allegations in the bill of complaint or certified in the questions submitted. The general decree in favor of the bank in that case can be supported by the unlawful discrimination in the increased valuation of the shares of the bank. The real question made under the statutes of Ohio, as they in fact existed, was not passed upon by the supreme court of the United States in that case. We think we have a right to look to the opinion to ascertain what was decided by the supreme court. Closing the same, Mr. Justice Miller says:

"These principles require the affirmance of the decree of the circuit court, and, while there will be found in them a sufficient answer to the questions

certified by the judges of that court, we do not think it necessary to make a more specific answer to each of them. The decree is affirmed."

The decree could stand, under the finding, in favor of the bank upon the other proposition. We think the supreme court has decided a proposition not made in the bill, and not set forth in the certificate of division of opinion. While it is said in that certificate that the laws of Ohio make no provision for deduction of debts by shareholders of national banks, there is no statement that such holders are the only owners of moneyed capital not entitled to such deduction. In the case of Bank v. Chapman, 173 U. S. 219, 19 Sup. Ct. 413, 43 L. Ed. 675, the supreme court say of the Whitbeck Case:

"It is stated, however, that this specific question has been otherwise decided in Whitbeck v. Bank, 127 U. S. 193, 8 Sup. Ct. 1121, 32 L. Ed. 118. If this were true, we should be guided by and follow that decision. Upon an examination of the case it is seen that the court gave chief attention to the question whether an increase in the value of the shares in national banks made by the state board of equalization, from 60 per cent. of their true value in money, as fixed by the auditor of Cuyahoga county, to 65 per cent., as fixed by the board (other property being valued at only 60 per cent.), amounted to such a discrimination in the taxation of the shareholders of such banks as is forbidden by the federal statute. It was held it did. Coming to the question of the deduction of bona fide indebtedness of shareholders, the court assumed that, under the statute of Ohio, owners of all moneyed capital, other than shares in a national bank, were permitted to deduct their bona fide indebtedness from the value of their moneyed capital, but that no provision for a similar deduction was made in regard to the owner of shares in a national bank; and it was held that the owners of such shares were entitled to a deduction of their indebtedness from the assessed value of the shares, as in the case of other moneyed capital. The point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness. It was held that it was made in time, for the reason that the court below expressly found that 'the laws of Ohio make no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock, and provide no means by which such deduction could be secured.' As a demand at an earlier period would have been useless, the court held it unnecessary. An examination of the statute of Ohio in regard to taxation shows that debts can only be deducted from credits, and how much of credits is moneyed capital is unknown. The case is not authority adverse to the principle we now hold. For the reasons already stated, we think the judgment in this case should be affirmed."

In view of the foregoing comments on the decision in the Whitbeck Case, and the erroneous assumption therein of the character of the Ohio statute, we are not prepared to say that the judgment in that case was res adjudicata as to the rights of complainant's stockholders to deduct their debts from their shares of national bank stock.

A different question is presented by the allegations of former adjudication in the bills filed in 1893 and 1894. In those bills it was sought to enjoin the treasurer from collecting taxes upon the shares of complainant bank without permitting deduction for bona fide debts; it being averred that by section 2730 of the Revised Statutes of Ohio it is enacted that the term "credits" "shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable things or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state other than

such as are held to be money as hereinafter defined, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal bona fide debts owing by such persons."

"The complainant further says that a large amount of moneyed capital in the hands of individual citizens of the state, and of said county of Cuyahoga and state of Ohio, city of Cleveland, invested in promissory notes and other legal obligations, securities, claims, and demands, is by the aforesaid provision, allowing a deduction of legal, bona fide debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares, as to which no exemption or deduction is provided for by the laws of the state, which discrimination is in direct violation of the restrictions of section 5219 of the Revised Statutes of the United States, which provides that 'the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state.'"

This is a distinct allegation that this statute works an unlawful discrimination in favor of the holders of credits under the laws of Ohio, in permitting the holders of a class of capital to have a deduction denied to holders of shares in national bank stock. It was further alleged in those bills as follows:

"The complainant further avers that heretofore, to wit, at a date prior to the April term of this court, in the year 1887, the complainant brought suit against Horatio N. Whitbeck, as treasurer of said Cuyahoga county, who then held such office, to enjoin the collection of the excessive taxation of shares of said complainant growing out of the refusal of the taxing officers of said county to allow the deductions of bona fide debts of stockholders from the assessed value of said shares, said Whitbeck then representing the same interest, sustaining the same relations, and charged with the same duties to the public as does the present defendant; and in said suit this complainant alleged by its bill the refusal by the then auditor of said county to allow a deduction of bona fide debts of the shareholders from the value of shares of stock of said complainant owned in large part by the same stockholders as those above named, and in which action said treasurer of said county, admitting said refusal to allow said deduction, so joined issue as to present the question of the rights of said owners of said shares to said deduction, in view of the laws of Ohio; and the said laws being the same as the present laws of the state, and those under which the taxing officers of said county acted in 1892 and 1893, in making assessments and in refusing deductions to be made of bona fide debts of stockholders from the valuation of said shares; and the complainant says that, upon the issue so joined, the said court, at its April term, A. D. 1887, held and determined that said shareholders were by law entitled to said deduction of bona fide debts from the value of their said shares to an equal amount fixed for taxation; and in said action the court gave judgment perpetually enjoining said treasurer from collecting or attempting to collect any tax or assessment on the valuation of said shares to an amount equal to said debts from which said deduction was sought to be made and disallowed by said auditor, on the ground that said disallowance was a discrimination against money invested in national bank shares, prohibited by the act of congress; and the complainant alleges that said issue, so determined and adjudged, was between the same parties, involved the same subject-matter and legislation, and the judgment therein given remains wholly unreversed, and is still in full force and operation."

The treasurer demurred to this bill, and the demurrer was overruled. The defendant electing to stand by his demurrer, a final decree was given, enjoining the tax levied on the amount assessed equaling the shareholders' indebtedness; the allegations of the bill having been found to be true. The bill above quoted from was

brought to enjoin the collection of the June taxes for 1893, and a like bill was filed to enjoin the collection of the December tax of the same year. A similar course of procedure was had, and the court found each and every allegation of the bill to be true, and entered a decree accordingly. The learned judge in the circuit court held that the former adjudications depended upon the discriminations of those years sued upon, in view of the taxation levied in each particular year upon bank shares and other capital in this state, and consequently the adjudications were only as to conditions of fact existing in those years, respectively. But these bills made the question as to the effect of the Ohio statute permitting indebtedness to be deducted from credits, as the same were defined therein. The attack under those bills was upon the Ohio system of taxation, as authorized by section 2730. It was set up that the statute, which was copied in the bill, discriminated against the holders of national bank stock, in permitting indebtedness to be deducted from the demands named in the statute, and not against national bank stock. Credits, which are arrived at by permitting the debts to be deducted from certain capital, exist in the state every year. A discrimination as alleged was not based upon the operation of the law for any particular year, but upon the system of taxation applicable to every year. It would make no difference that in some years credits would make a greater volume of taxable property than in others, so far as the allegations of the bill in this respect are concerned. It is true, since the decision in the Chapman Case, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669, it is established that the taxation of national bank shares in the same manner as other shares of capital stock in state banks, not giving them the privilege of deducting their indebtedness, as is given to a limited class of capital in arriving at taxable credits, in the absence of a showing that such credits constitute so great a portion of the taxable property of the state in capital coming into competition with that invested in national bank shares as to amount to a discrimination against holders of such shares. But the principle of the decision in the Chapman Case must not be confused with the right of a person to plead a former adjudication, if the former adjudication has the identical parties and questions determined to make it res adjudicata. We have shown what the allegations in respect to the permitted deduction under the Ohio law were in the bills filed in 1893 and 1894. In the present case the bill claims this discrimination in favor of the holders of credits, and is ample to permit proof and finding of facts which would support the allegations of the former bill. In the present case the master expressly finds:

"In the year 1897 a large amount of moneyed capital in the hands of individual citizens of the state, invested in promissory notes and other obligations and credits, was by section 2730 of the Revised Statutes of Ohio authorized to be exempted from taxation through the deductions therefrom of legal bona fide debts."

We may take judicial notice of the fact that the statute, at the time of the filing of the present bill, and the report of the master upon which the decree was entered, is the same as it was when

the former decrees were given upon the bills of 1893 and 1894. Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; Gormley v. Bunyan, 138 U. S. 623, 11 Sup. Ct. 453, 34 L. Ed. 1086. The United States statute (section 5219) preventing discrimination against holders of shares of national bank stock is the same now as then, and has remained unchanged. We find that upon this branch of the case the allegations and findings of the master bring the case within the allegations of the bills of 1893 and 1894. It is true, the master finds other facts, from which he states he is unable to reach a conclusion which would show discriminations against national bank stock in favor of the classes of capital which come in competition therewith so as to give the complainant the right to an injunction, within the principles laid down in the Chapman Case. This does not affect the fact that he makes a finding which fully supports the allegation of the bills filed subsequent to the Whitbeck Case, and before the Chapman Case was decided. We then have a former adjudication in which it was held, upon this branch of the bill, that the deduction allowed under section 2730, Rev. St. Ohio, worked a discrimination against the holders of national bank shares. This being the effect of that adjudication, it is decisive between the parties when applied to subsequent years; the statute remaining the same, and the right of the party to the deduction being based upon the same principle, and arising from facts and conditions bringing the case within the right determined in the prior adjudication. This conclusion is supported by the decision of the supreme court of the United States in the case of City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202. In that case it was held that the judgment of a court in Louisiana of superior jurisdiction upon the issue, duly raised by the pleadings, whether the bank was exempt by contract with the state from taxes assessed against it for particular years, concluded that question, as between the same parties and their representatives, in respect of taxes assessed against it for subsequent years. The court said:

"The proposition that, because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore res adjudicata cannot apply, while admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties and their privies."

The opinion of Mr. Justice White in that case is a thorough and elaborate discussion of the doctrine under circumstances closely akin to those of the present case.

One ground of relief in the bills of 1893 and 1894 was predicated upon the former adjudication set forth in that respect in the parts above quoted. The demurrer confessed the allegations of the bills. Judgment rendered upon demurrer has been held by the supreme court of the United States as decisive as a verdict upon the same facts would be. Facts established by such an adjudication

are conclusive between the parties and those in privity with them. Bissell v. Spring Valley Tp., 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411. It is true that estoppels must be certain, and, if the confession of the demurrer left other parts of the bill not available here as a plea of res adjudicata which could support the former decree, the estoppel would not be shown. We have seen that the facts pleaded in the former bill as a basis of relief are identical with the facts as found by the master in this case. As to the plea of former adjudication, the bill distinctly alleged that the decree in the Whitbeck Case had held the discrimination made by the Ohio statute to be unlawful, within the statute of the United States, and that it had been adjudicated therein that national bank shareholders were entitled to deduct their debts from the value of their shares for the purposes of taxation. The treasurer saw fit to stand upon his demurrer. Within the principle established in the Chapman Case, he might have made issues which would have produced a different result; but the question now is, is this former judgment in full force so identical with the present case that the judgment therein is decisive upon the parties here? We think it is. It is said in Bigelow, Estop. (3d Ed.) p. lxi., quoted with approval by Mr. Justice White in City of New Orleans v. Citizens' Bank of Louisiana, supra:

"Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous, and liable to and certain of reversal in a higher court."

We, therefore, cannot escape the conclusion that the former adjudications in the cases of 1893 and 1894 are conclusive between the parties, notwithstanding the subsequent decision of the supreme court in the Chapman Case. In reaching a contrary conclusion, we think the master, as well as the circuit court, erred. The judgment will be reversed, and the cause remanded, with instructions to enter a decree in favor of complainant in accordance with the views herein expressed.

## KIDDER et al. v. FIDELITY INS., TRUST & SAFE-DEPOSIT CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 589.

1. APPEAL—NECESSARY PARTIES.

Where one of several interveners appeals from a decree in equity after the term in which the decree was rendered, and cites only the complainant and the receiver of one of several defendants, the appeal will be dismissed, as it was necessary to include in the appeal and serve with notice all parties of record whose interests are directly involved in the appeal.

2. SAME—INCONVENIENCE OF NOTICE.

That it would be an intolerable burden in some instances to give notice of appeal to all parties of record interested does not affect the rule, since the burden may be avoided by an appeal taken in open court at the term when the decree was rendered, which is effective without such notice.

3. SAME.

Where an appeal from a decree in equity fails for lack of notice to all parties interested, no notice which the court might order after the time for appeal had gone by could be effective to bring the absent parties within its jurisdiction.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

The motion to dismiss this appeal for the lack of necessary parties was argued at the May session of the court in 1899, and since that time has been under advisement. The material facts are these: On August 19, 1898, a decree of foreclosure and sale was entered in the case of the Fidelity Insurance, Trust & Safe-Deposit Company against the Litchfield, Carrollton & Western Railroad Company, the Litchfield, Carrollton & Western Railway Company, and the Mercantile Trust Company of New York, wherein it was ordered that the proceeds of the sale be applied first to the payment of the costs of the cause, including allowances to be made by the court to the parties and their solicitors and counsel and to the receiver, his solicitor and counsel, and the balance first to the payment of all indebtedness of the receiver, including receiver's certificates and all claims allowed priority to the mortgages, and the remainder, if any, to the discharge of the mortgage indebtedness. On November 8th ensuing an order was entered making specific allowances to the parties, to the receiver, and to their respective solicitors and counsel, each by name; and on November 14th an amended decree of foreclosure was entered, but without change affecting the present inquiry, the order for the distribution of the proceeds of the sale remaining substantially the same as in the first decree. The sale was made on November 26, 1898, and of the proceeds, amounting to $85,000, which on confirmation of the sale had been paid into the registry of the court, the clerk paid the allowances mentioned and other preferred claims to an amount which left a balance of $29,442.93 in the registry. In pursuance of an order of January 31, 1899, the master, on the ensuing February 9th, reported a classification of the debts declared entitled to preference by the decrees of foreclosure. Two days thereafter the appellants, Kidder and Wiggins, as holders of receiver's certificates to the amount of $24,000, filed an intervening petition, which was referred to the master, who reported thereon to the effect that the certificates issued for money advanced to the receiver should have preference to the mortgages, equally with other debts of the receiver, but that certificates issued for indebtedness incurred before the receivership, while entitled to preference over the mortgages, should be postponed to the receiver's indebtedness. Other intervening petitions were filed by the T. J. Moss Tie Company, the Frost-Trigg Lumber Company, the Detroit Bridge & Iron Works, and the Jacksonville & St. Louis Railway Company, and on March 14, 1899, an order was made, wherein, after reciting the payments made under previous orders, it was directed that the sum of $29,442.93 remaining in the registry be paid pro rata and without distinction upon the claims reported by the master to be entitled to preference over the mortgage indebtedness. The names of the holders and the respective amounts of their claims, aggregating $105,887.70, were set out in the order, except that to the amount of $14,164.73 the nature of the claims is stated, but the names of the owners not given. On April 3, 1899, the appellants and the other interveners named above severally prayed and were granted "leave to file exceptions to the decree of distribution heretofore entered in this cause on the 14th day of March, A. D. 1899, as of that date, nunc pro tunc," and thereupon the appellants (and each of the other interveners named, separately) filed exceptions to that decree or order; and afterwards on the same day the appellants filed a petition for an appeal from the decree of November 14, 1898, and therewith filed an assignment of errors, the specifications of which are all directed to provisions of that decree. The citation was directed to and served upon the Fidelity Insurance, Trust & Safe-Deposit Company and Joseph Dickson, receiver of the Litchfield, Carrollton & Western Railroad Company, and there seems to have been no intention to include other parties. The motion to dismiss was made by the Fidelity Insurance, Trust & Safe-Deposit

Company, and, excepting that company and the appellants, there has been no appearance in this court by or for any person, company, or corporation. The ground of the motion to dismiss is that the other interveners decreed to be entitled to payment in preference to the mortgage indebtedness, the purchaser at the sale, the railroad company, the railway company, the mortgagors and the mortgagee, the Mercantile Trust Company, as a subsequent incumbrancer, and Alexander H. Bell, the priority of whose allowance of $10,000 as special counsel for the complainant the appellants challenge, are interested in the appeal, and should have been made parties thereto.

W. L. Patton, for appellants.

Samuel P. Wheeler and Bluford Wilson, for appellees.

Before BROWN, Circuit Justice, and WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The general proposition is familiar that on a writ of error to a judgment at law or on appeal from a decree in equity all the parties against whom the judgment or decree was jointly rendered must join in the writ of error or appeal, unless good reason for the nonjoinder be shown. Williams v. Bank, 11 Wheat. 414, 6 L. Ed. 508; Owings v. Kincannon, 7 Pet. 399, 8 L. Ed. 727; Wilson's Heirs v. Life & Fire Ins. Co., 12 Pet. 140, 9 L. Ed. 1032; Todd v. Daniel, 16 Pet. 521, 10 L. Ed. 1054; Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953; Simpson v. Greeley, 20 Wall. 152, 22 L. Ed. 338; Feibleman v. Packard, 108 U. S. 14, 1 Sup. Ct. 138, 27 L. Ed. 984; Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39, 36 L. Ed. 933; Inglehart v. Stansbury, 151 U. S. 68, 14 Sup. Ct. 237, 38 L. Ed. 716; Davis v. Trust Co., 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563; Hamrick v. Patrick, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396; Estis v. Trabue, 128 U. S. 225, 9 Sup. Ct. 58, 32 L. Ed. 437; Mason v. U. S., 136 U. S. 561, 10 Sup. Ct. 1062, 34 L. Ed. 545; Sipperly v. Smith, 155 U. S. 86, 15 Sup. Ct. 15, 39 L. Ed. 79; Elevator Co. v. Nichols, 34 C. C. A. 90, 91 Fed. 832; Hook v. Trust Co., 36 C. C. A. 645, 95 Fed. 41. The question here, however, though in the main so presented, is not one of joinder in the appeal, or of notice and severance for failure or refusal to join therein. As joint intervening petitioners the appellants had a right, without joining others as appellants, to appeal from any final decree against them. The true objection is that they have not joined as appellees the other interveners and parties whose rights are so involved as to be affected by the result of the appeal. In its essential features the case is like that of Gray v. Havemeyer, 10 U. S. App. 456, 3 C. C. A. 497, 53 Fed. 174, decided in the Sixth circuit. In Milner v. Meek, 95 U. S. 252, 24 L. Ed. 444, the decree determined the amount and priority of the respective liens upon the estate of a bankrupt. One of the lienholders appealed, and there was a motion to dismiss because the other lien creditors who were parties to the proceedings below were not parties to the appeal. In response to that objection the supreme court said:

"It is sufficient to say that the appeal was allowed in open court during the term at which the decree was rendered. No citation was, therefore, neces-

sary. Brockett v. Brockett, 2 How. 241, 11 L. Ed. 786. Milner alone appealed, but his appeal brings up so much of the case and such of the parties as are necessary for the determination of his rights."

Accordingly this court has held that an appeal taken in open court at the term when the decree was rendered brings within its jurisdiction all of the parties whose presence is necessary to a determination of the rights of the appellant. McNulta v. Commissioners, 39 C. C. A. 545, 99 Fed. 328. If, therefore, these appellants had appealed from the decree of March 14, 1899, to which they obtained leave to file exceptions, instead of appealing from the decree of November, it would have been an appeal in term, of which, without citation, all the other interveners and the original parties to the suit for foreclosure would have been bound to take notice. In respect to the distribution of the fund then remaining in the registry the decree of March alone was final, and the appeal should have been therefrom. In respect to the foreclosure and sale the decree of November was, of course, final; but, in so far as it defined the basis or rule for the distribution of the fund to be realized between creditors whose claims had not been presented and proved, it was necessarily and could reasonably have been understood to be only preliminary and advisory. The appellants chose, however, to appeal from that decree, acting presumably upon the theory that the declaration of priorities there made was conclusive, not only upon those to whom prior allowances had been made and paid, but upon subsequent interveners whose rights were determined by the decree of March. That theory can hardly be true; but, if it be assumed to be true, then, the decree appealed from having been rendered at a term of court which had passed, it was clearly necessary to include in the appeal and to serve with notice all parties of record whose interests or rights were directly involved. The receiver was made a party, but he did not appear, and, if he had appeared, plainly it would not have been his duty or right to undertake to represent the conflicting claims of the intervening creditors as between themselves. Bosworth v. Association, 174 U. S. 182, 19 Sup. Ct. 625, 43 L. Ed. 941. The mortgagor railroad company and its successor, the railway company, were not necessary parties, since they had practically become extinct by the foreclosure and sale, and had no interest in the proceeds. Mercantile Trust Co. v. Adams Exp. Co., 16 U. S. App. 37, 7 C. C. A. 3, 58 Fed. 6. The purchaser took free from all incumbrances, and, of course, is not concerned in the appeal; and the receiver himself, without a personal interest to protect, is not a necessary party. Edgell v. Felder, 39 C. C. A. 540, 99 Fed. 324; Railway Co. v. Jackson, 37 C. C. A. 165, 95 Fed. 560. It seems equally clear that no assignment of error upon the decree appealed from could reach or directly affect the allowance ordered and paid to Bell before that decree was entered; but, if it be assumed that it could, then it was certainly necessary to make him a party to the appeal. The order making and directing the immediate payment of that allowance was in itself a final decree for the purpose of appeal, and therefore not challengeable indirectly by an appeal from another decree.

The inconvenience of requiring notice of an appeal by one intervener to all others has been suggested. There may be many hundreds of them, and, if notice must be given to every one, the burden, it is urged, would be intolerable, and practically would put a stop to appeals by interveners. It is deemed a sufficient answer that, as decided in Milner v. Meek, supra, an effective appeal may be taken at the term at which a decree is entered without a citation or other form of notice; and, even when taken after the term, if the parties interested are very numerous, notice to a few of each class, who should appear in good faith in defense of the interests of that class, would be deemed sufficient. That is the known practice in the circuit court (McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; Bank v. Taylor, 4 C. C. A. 55, 53 Fed. 854, 9 U. S. App. 406), and, since an appeal from a decree in such a case must necessarily be prosecuted upon that theory, no good reason is perceived against a like course when the parties actually present in the circuit court are too numerous to be joined in the appeal. The time for appeal having gone by, no notice which this court might now order could be effective to bring the absent parties within its jurisdiction. Any attempt at such a departure from the known methods of procedure would introduce into the practice an uncertainty and confusion the consequences of which could not be foreseen. The motion to dismiss is sustained.

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## JAMES H. RICE CO. v. LIBBEY et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 542.

1. APPEAL—PARTIES—ALLOWANCE IN OPEN COURT.
   An appeal allowed in open court at the term when the decree was rendered, and duly perfected, brings into the appellate court, without citation, all the parties whose presence is necessary to a determination of the rights of the appellant.

2. CORPORATIONS—SUIT AGAINST OFFICERS—PARTIES.
   A suit in a federal court by a creditor of a corporation, in behalf of himself and all other creditors, against officers of the corporation, to charge them with liability under the Illinois statute (Rev. St. c. 32, § 16), which makes all directors and officers of a corporation personally liable for its indebtedness in excess of the amount of the capital stock, created with their assent, is one to which neither the corporation nor its assignee in insolvency is an indispensable party, and their joinder will not be required where it would defeat the jurisdiction of the court.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

The bill was filed by the appellant, a citizen of Illinois, and judgment creditor of the Farson & Libbey Company, and in behalf of all other creditors of that company who might join in the suit against the appellees, citizens of Wisconsin. The object of the bill was to hold appellees responsible to the appellant and the creditors joining him for the debts of the Farson & Libbey Company assented to by the appellees in excess of its capital stock. The statute of Illinois upon which the claim of liability is based is as follows: "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of

such corporation." Section 16, Rev. St. Ill. The further facts necessary to the determination of the questions involved are as follows: In 1883 there was organized under the general incorporation laws of the state of Illinois the Hintz & Baker Company, with a capital stock of $50,000, divided into shares of $100 each. Its business was the buying and selling of sash, doors, blinds, and like commodities. In 1893 its name was changed to the Farson & Libbey Company, and it continued doing business in the city of Chicago under that name until the 30th of December, 1895. Prior to his death, in January, 1895, Daniel L. Libbey was the owner of 240 shares of the capital stock of such corporation, and was the president and a director of the company. December 15, 1894, Frank H. Libbey, his son, became a director of the company, and in January, 1895, succeeded his father as president. Previous to his father's death, he had 10 shares of the stock. December 30, 1895, the Farson & Libbey Company made a voluntary assignment, under the assignment laws of the state of Illinois, for the benefit of its creditors, to Charles E. Pain, a citizen of the state of Illinois, who, being duly qualified as such assignee, entered upon the performance of his duties. At the time of the filing of the bill below he was still such assignee. The administration of the estate under the Illinois insolvent laws had proceeded so far in the county court of Cook county when the bill was filed that the time had elapsed for all creditors to file their claims; that the total liabilities were found to be about $200,000; and that a dividend of 10 per centum to the creditors had been paid. July 23, 1896, the appellant recovered in the circuit court of Cook county a judgment against the Farson & Libbey Company for the sum of $7,513.82, upon which execution had been returned unsatisfied, no part of such judgment having ever been paid except the 10 per centum dividend paid by the assignee. The original bill was filed in the court below July 29, 1896. April 2, 1897, the American Glue Works and 27 other creditors, none of whom had obtained judgment, intervened, accepting the terms and conditions of the original bill, and adopting it as their own. April 5, 1897, the Prairie State National Bank intervened upon like terms. Answers were filed by the appellees in the court below to the original bill, and also to the intervening petitions, in effect denying that they, or either of them, had assented to any indebtedness in excess of the capital stock of the Farson & Libbey Company; and much evidence upon the issue thus raised is embodied in the record. Upon the view taken, however, by the court, this evidence need not be set out at large. The evidence introduced without contradiction showed that from January, 1889, to the assignment the indebtedness exceeded the capital stock by more than $100,000, rising in 1895 to more than $200,000. There was evidence tending to show that Daniel L. Libbey had assented to the creation of from thirty-five to fifty-five thousand dollars of this indebtedness, and that there was some indebtedness, the creation of which was assented to by Frank H. Libbey. February 21, 1898, the court below dismissed the bill for want of equity, based, as shown in the opinion, upon the conclusion that a bill would not lie against the appellees in the absence of the corporation and the assignee as parties to the suit. 85 Fed. 82. March 5, 1898 (and during the same term of the court that the decree was entered), an appeal to the circuit court of appeals was allowed upon the motion of the appellant. This appeal was at the same term perfected by the filing of the required bond and an assignment of errors.

Clarendon B. Eyer, for appellant.

Fred Belinger and Charles Barber, for appellees.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

PER CURIAM. Within the authority of McNulta v. Commissioners (recently decided in this court) 40 C. C. A. 155, 99 Fed. 900, and Kidder v. Safe-Deposit Co. (this day decided) 105 Fed. 821, the motion to dismiss the appeal for the reason that it was not joined in by the intervening creditors must be overruled.

The principal inquiry on this appeal is, did the circuit court for

the Eastern district of Wisconsin err in refusing to entertain jurisdiction of the cause without the presence of the Farson & Libbey Company or its assignee as parties thereto? Parties to a bill in equity have been divided by the supreme court in several decisions, and by this court in Ziegler v. Railroad Co., 39 C. C. A. 431, 99 Fed. 114, into the following classes: (1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties in order that the court may act according to the rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed "necessary parties"; but, if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. The statute on which this case is predicated has been construed by the supreme court of Illinois in Low v. Buchanan, 94 Ill. 76, and Woolverton v. Taylor, 132 Ill. 197, 33 N. E. 1007. In the latter case it is said:

"The statute certainly does not mean that the officers shall only become liable for one act of assenting to excessive indebtedness during the life of the corporation. The amount in excess may continue to be increased from time to time by different officers, running over a period of years. By a single bill for the benefit of all the creditors against all these officers that excess may be recovered, and made a fund for the payment of all the debts. * * * The officers, if liable at all, are liable to all the creditors of the corporation,—those existing prior to the contract creating the excessive indebtedness, those whose debts are created thereby, and also those who may afterwards become its creditors. As to the subsequent creditors, could it be said the cause of action accrued before they became creditors? The action must be for their benefit as well as that of all others, and yet they may not have become creditors of the corporation until more than five years after the first assenting to the excessive indebtedness."

We are bound by the construction put upon the statute by the supreme court of Illinois. It is our opinion, in the light of this decision, that the case under consideration is an equitable suit for the benefit of all the creditors, and that the fund recovered would be distributed ratably among all the creditors. To such a suit the corporation or its assignee is not an indispensable party. Without their presence, complete justice can be done as between the creditors and those charged with statutory liability. It might be convenient that they should be made parties in order to ascertain more readily the indebtedness of the corporation. But that can be done without their presence. So, also, it might be convenient to have them before the court in the ascertainment of the facts if indebtedness in excess of capital stock was created, and when; but the court can ascertain those facts without their presence. No right of the corporation or its assignee is to be determined or affected, and, while they may come within the class designated as necessary parties, they need never be summoned as parties, if by so doing the jurisdiction of the

federal court would be ousted. Ziegler v. Railroad Co., supra. The liability here, if any, is not to the corporation or to its assignee, and its enforcement neither increases nor discharges any liability of the corporation. If the directors have incurred the liability of the statute, and should discharge that liability, they might possibly be subrogated to the right of the creditors to assets of the corporation after the creditors' debts are paid. But the corporation and its assignee have no interest in the enforcement of this statutory liability. This results in a reversal of this case upon the only question upon which the judgment of the court below was given.

The court below made no inquiry upon the merits of the case. A right decision involves a close examination of the evidence relating to each indebtedness of which it is averred that the appellees assented to its creation. We think that the case ought to go back to the court below for this inquiry and judgment. The decree will be reversed.

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## FLANAGAN et al. v. DUNNE.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1901.)

No. 954.

1. TAXATION—ASSESSMENT—VALIDITY.

   Laws Fla. c. 4115, §§ 21–23, require the owner of real property or his agent to return the same for taxation, and the property to be assessed against the owner, or to the unknown owner if no return is made and the owner is unknown. Rev. St. Fla. § 1982, provides that a mortgage creates a specific lien on real estate, and does not convey the legal title. The mortgagee of real estate, who was not in possession, made a return to the assessor showing that it was the mortgagee of the lands, and they were appraised to it. *Held*, that the purchaser at a tax sale thereunder acquired no title to the property as against a foreclosure purchaser, since the assessment was invalid.

2. SAME—ESTOPPEL.

   Where the property was sold at a mortgage foreclosure to the mortgagee, but before the confirmation of the sale the bid was assigned to plaintiff, the latter is not estopped by the return of the mortgagee from denying the validity of the assessment and the sale thereunder, since he does not hold under the mortgagee, and is not bound by his acts.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

This is a bill brought by the appellee in the court below to have declared void certain tax sales made in 1895 for unpaid taxes of 1894, under which the respective appellants claim title to or interests in various parcels of land in Pasco county, Fla., alleged to be the property of the appellee. After several amendments to the bill, the cause was put at issue, and referred to a master of the court to state the facts. The master reported the facts of the case to be as follows: "(1) That in 1891 one Franklin L. Chase was the owner of the lands in controversy, and that in January of that year he executed a mortgage on these lands to the Florida Land & Improvement Company, and afterwards transferred all of said lands; and in the year 1893 the Florida Land & Lumber Company became the owner of them, and remained the owner until the foreclosure proceedings hereinafter set forth. That subsequently proceedings were instituted in this court to foreclose said mortgage. That on the 15th day of July, 1896, a decree of sale was entered in said cause in which decree one certain parcel of land was described as 19,919.80 acres, and W. A.

Carter was appointed master to make sale of the mortgage property. That on the 7th day of January, 1897, said master filed his report of sale in said cause, and attached thereto a copy of the advertisement of sale, in which one parcel of the land was advertised as containing 19,919.80 acres, and in the description by the numbers in the advertisement attached to the report the lands in controversy were included; said master reporting that the parcel containing 19,919.80 acres had been sold to the Florida Land & Improvement Company, it having bid therefor one-tenth of a cent per acre. That on the 11th day of February, 1897, said master filed a supplementary report in said cause, stating that he had had delivered to him, by the attorneys for the bidder, an assignment of the bid of the said Florida Land & Improvement Company for said 19,919.80 acres to John J. Dunne, and an acceptance of said assignment by him, attaching thereto said original assignment and acceptance, and asked that the original report of sale be amended so as to constitute the said J. J. Dunne as the purchaser of said tract. That on the 11th day of February, 1897, the court rendered a decree, reciting therein the sale of the said 19,919.80 acres to the Florida Land & Improvement Company, and that the Florida Land & Improvement Company had 'duly assigned its bid for the said 19,919.80 acres of land last mentioned to J. J. Dunne, Esq., Philadelphia, Pa., and that the said J. J. Dunne had duly accepted said assignment,' and ordered the said master to execute the deed to the said Dunne for said 19,919.80; and I further find from the pleadings and the agreement of the attorneys filed before me that said deed was duly executed and delivered by the said W. A. Carter, special master, to J. J. Dunne, the complainant. (2) That the lands in controversy on the 1st day of January, A. D. 1894, were not the property of the Florida Land & Improvement Company, but that on said date the Florida Land & Improvement Company was the mortgagee of the same, and that it was not in actual possession thereof. (3) That the Florida Land & Improvement Company made to the tax assessor of Pasco county, Florida, J. S. Flanagan, one of the respondents in this sale, a tax return for the year of 1894 as follows: 'Tax Assessor, Pasco County: I herewith return the following list of land held by the Florida Land & Improvement Company, as mortgagee, in Pasco county, January 1st, 1894, at a valuation of 40 cents per acre, amounting to $32,282.00,'—in which list were included the lands in controversy; and no other return for taxation was made of said lands for that year. (4) That said lands in controversy were assessed for taxation for the year 1894 to the Florida Land & Improvement Company, and that the respondents claim under tax deeds based upon the tax sale of the unpaid taxes for that year. (5) That there was no signature, name, or designation of the tax collector of Pasco county, Florida, following the list of lands advertised for sale for taxes in said county for the year 1894, according to the form given in section 51, c. 4115, of the Laws of Florida; but there was a proper signature and designation attached to the notice preceding the list of lands advertised. (6) I find that the tax collector of Pasco county filed in the office of the clerk of the circuit court of that county a proper list of the lands sold for the unpaid taxes for 1894, accompanied by the proper certificate, as provided by section 56, c. 4115, of the Laws of Florida, and that the clerk of the circuit court entered said list in the book provided by the county commissioners for said purposes, but that he failed to enter or record the certificate of the tax collector to said report; and to said entry, as recorded, there is no signature or verification of any kind by the tax collector. (7) That the assessor of taxes of Pasco county, in making up the assessment roll of said county for 1894, set down opposite the descriptions of lands in said roll, as the valuation thereof, and the amount of taxes thereon, certain figures intended to represent the valuation and amount of taxes thereon in dollars and cents, but there is no dollar mark affixed to said sums, or any of them, but at the top of the lines wherein the amount of taxes are enumerated there is given the amount of millage on $100. (8) That the lands in section fourth (4), township twenty-five (25) south, range twenty (20) east, and the north half of the northwest quarter of section thirty-two (32), township twenty-five (25) south, range twenty (20) east, had been boxed for turpentine prior to the commencement of this suit; and the lands in section eight (8), township twenty-five (25) south, of range twenty (20) east, had been used for sawmill purposes, and a large part of the timber

thereon cut down and cut into sawlogs. (9) That the remainder of the lands described in the bill were, at the time of the bringing of this suit, wild, uncultivated, and unoccupied, and were in the actual possession of no one. (10) That the timber on the said lands constitutes the principal value of the lands described in the bill of complaint. (11) That the complainant never held these lands in trust for the Florida Land & Improvement Company. (12) That the complainant was not in 1894, nor at the commencement of this suit, an officer of the Florida Land & Improvement Company, and has not, since 1891, been a stockholder in said corporation." No exceptions were filed to the master's report, and thereupon a final judgment was entered adjudging the assessment of 1894 and the sale thereunder in 1895 void, and otherwise granting full relief to the plaintiff below. In this court the appellants assign errors as follows: "(1) The court erred in not dismissing the bill of complaint of the complainant on the ground that the findings of fact of the master, which were not excepted to, failed to set forth any error or irregularity in connection with the assessment or sale of the lands described in the bill of complaint, which was sufficient to avoid the tax sales and the deeds in pursuance thereof sought by the bill to be declared void, and clouds upon the title of complainant. (2) The court erred in its final decree rendered in said cause in decreeing that the assessment to the Florida Land & Improvement Company of the lands described in the bill of complaint was void, because the findings and report of the master, which were not excepted to, presented no basis upon which the court could decree the said assessment to be void. (3) The court erred in its said final decree in decreeing that the equities were with the complainant, and in granting the complainant the relief prayed, because the findings and report of the master, which were not excepted to, furnished no basis upon which a decree could be rendered in favor of the complainant. (4) The court erred in its said final decree in decreeing that Florida Land & Improvement Company made no return of the lands described in the bill of complaint for taxation, because the findings and report of the master, which were not excepted to, showed that the Florida Land & Improvement Company did return the said lands for assessment and taxation. (5) The court erred in its said final decree in decreeing that the notice of sale published by the tax collector was not signed in compliance with law, and that the tax sale in pursuance thereof was thereby illegal on the ground that the report of the master, which was not excepted to, showed that the said notice of sale was properly signed by the said tax collector in compliance with law."

Hugh C. Macfarlane, T. M. Shackleford, and J. F. Glenn, for appellants.

L. J. Starbuck, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The second assignment of error presents the main question on this appeal, and it is whether the assessment made in 1894 of the property of the Florida Land & Lumber Company in the name of the Florida Land & Improvement Company as owner was a valid assessment. The law of the state of Florida providing for the manner of making assessments on lands is as follows:

"Sec. 21. The lands in each county in this state, subject to taxation and not included in the limits of incorporated towns and cities and laid off in lots and blocks, shall be assessed by townships; and in making the assessment the assessor shall begin with the lowest numbered section in each township, and shall assess each lot, tract or parcel of land therein, in accordance with the description as returned for taxation by the owner or agent: provided, the assessor may correct any errors in the description so returned, and if the owner or agent fails to make such returns the assessor shall assess all lands not returned, according to the government survey, and can assess in one assessment all the lands in a section belonging to the same owner, or

assessed as 'unknown'; and the assessor shall continue in his assessment roll the description and assessment of the remaining sections in the township in the order of their numbers, and in the same manner he shall then assess all the other townships in his county in like manner: provided, that when private surveys of land or descriptions by metes and bounds have taken the place of government surveys, and the land is known, designated, and described only by such private surveys or metes and bounds, the description in the assessment shall be made in accordance with such surveys or descriptions as recorded in the office of the clerk of the circuit court; and when Spanish grants or donations exist in any county in this state which have not been surveyed and platted, or which plats are not recorded in the office of the clerk of the circuit court, the assessor for such county shall assess the several tracts of land owned in such grants, not platted as above, describing the same by reference to deed of record, giving the book and page of record as appears in the office of the clerk of the circuit court, and if the deed conveying such tracts is not recorded upon its production to the assessor he may describe the land as being that tract, lot, piece or parcel described in a deed executed by the grantor, (naming him) to the grantee (naming him) therein, and bearing date (giving the date shown by deed), and such description shall be valid and sufficient for all purposes of the assessment. The county commissioners of each county in this state shall purchase and have mounted on cloth, and then bound in volume or volumes, two complete sets of photo-lithographed township maps in their respective counties, one to be kept in the office of the clerk of the circuit court and the other in the assessor's office in their several counties, and all these maps, and all maps and information which may come into the hands of the several assessors, which may be used in preparing the assessment roll, shall remain in the assessor's office and be delivered to his successor in office: provided, that any maps now owned by any tax assessor may be purchased at their discretion by the county commissioners at a reasonable price. And should any assessor so fail to deliver said maps as above provided, his bond shall be responsible to the value of said property, as required for the faithful discharge of his duty. He shall make the assessments of real estate in cities and towns, by lots and blocks, in regular order, throughout the original plan of the city or town, and all additions thereto, all the lots of a block to be listed in their regular order under the letter, number or other designation of the block as filed and recorded in the office of the clerk of the circuit court, blocks also to follow in their regular order, (and all lots or sub-divisions of a block, when belonging to one owner and being numbered consecutively and lying contiguously, may be assessed together and the taxes extended on one line,) each of the smallest sub-divisions of such block to be entered and the taxes thereon to be extended separately.

"Sec. 22. The assessor shall ascertain by personal inspection, where not already sufficiently acquainted therewith, the value of the lands, and assess them at their full cash value, and set down in the assessment rolls following and opposite the description of the lands, the name of the owner or person in whose name the return is made, and when the land has not been returned and when the assessor has no means of discovering the name of the owner the assessor shall enter the word 'Unknown' in the column of the assessment roll provided for the name of the owners or persons making the return. The assessment books as provided by the comptroller shall contain an alphabetical index in which the assessor shall be required to indicate the name and the post-office address, if it can be ascertained, of each person whose name appears upon the assessment roll, and shall indicate opposite such name, as indexed, the pages upon which any tax or taxes may be found to be assessed.

"Sec. 23. In order to facilitate the assessor in ascertaining the names and post-office address of owners of real estate, the several clerks of the circuit courts in each county of this state, shall be required to furnish to the assessor of his county, on the first day of January of each year, an abstract showing the names of grantors and grantees, and description of land, and their post-office address, (if it can be ascertained), with date of transfer of deeds and conveyances which have been filed for record in his office during the previous year; which abstract of transfers shall guide the assessor in entering the

names of owners of real estate on the assessment roll for the ensuing year. The clerk of the circuit court in compensation for his services shall be allowed ten cents for each instrument of conveyance filed for record in his office, which amount he shall add to his legal costs for recording the same." Laws Fla. c. 4115.

The intent of the lawmaker unquestionably was to have the assessments of lands in the names of the owners, and that the land should be assessed otherwise only when the assessor could not, with diligence and the means at hand, obtain the name of the owner, in which case the assessment could be entered "Owner Unknown." To find the name of the owner, the assessor was to look to the records, the returns, if any, made, and other information at hand. Under former statutes, very similar as to the duties of assessors, the purpose to assess the land in the name of the owner has been clearly decided. Thus, in L'Engle v. Railroad Co., 21 Fla. 353, it was held that an assessment in the name of one who claimed on a master's deed based upon the foreclosure of a mortgage, the mortgagor not having a good title, was void. And in L'Engle v. Wilson, Id. 461, it was held that an assessment to Parkhurst, when the land belonged to Wilson, the executor of the estate of Parkhurst, was void. See, also, to the same purport, Brown v. Castellaw, 33 Fla. 204, 210, 14 South. 822. In Stackpole v. Hancock, 40 Fla. 362, 384, 24 South. 914, 921, where lands belonged to W. P. Stackpole and J. L. Connor, and J. L. Connor made a return for taxation, yet the assessor returned the lands in the name of W. L. Connor, the assessment and all proceedings thereunder were held void. We quote from the case as follows:

"The evidence introduced by the complainants was sufficient to prove, in the absence of a counter showing, that the land was returned to the assessor for the year 1888 in the name of J. L. Connor, who was an owner to the extent of an undivided half interest, and that the assessor undertook to base his action in assessing the property upon this return. It was his duty to make the assessment to the owner or person making the return, but this was not done. The assessment was to a person not the owner, nor to one making the return, and in this respect it was clearly in violation of the statute."

The assessment law given supra authorizes returns to be made by owners and agents, and declares the consideration to be given by the assessor to such returns; and we are clear that when, by the law, the assessor is authorized to assess property in the name of the person who makes the return, the return referred to is the return authorized by the law,—the return made by the owner or agent, a legal return. And it is on this line that we understand the court in Stackpole v. Hancock, supra, where it was said, "It was his duty to make the assessment to the owner or person making the return." To hold otherwise would be to permit the assessor, who does not know the owner, and has no means of discovering the name of the owner, to receive and act on a return made by any one merely reciting that he was not the owner. In the present case no return was made by any owner or agent, nor purporting to be by any owner or agent. The return made and presumably acted upon shows on its face that it was by one who not only had no title, but did not claim any. Under the law of Florida a mortgage is a specific lien on the property therein described, and not a conveyance of the legal title or of the right of

possession. Rev. St. Fla. § 1982. See Pasco v. Gamble, 15 Fla. 562; Jordan v. Sayre, 24 Fla. 1, 3 South. 329. The return in question, so far as the assessment of the land to the owner was concerned, was wholly outside of the matter, and for the assessor to have taken it to make his tableau of assessment was unlawful, and invalidated the assessment. All proceedings on a void assessment are void. L'Engle v. Railroad Co., supra; L'Engle v. Wilson, supra; Brown v. Castellaw, 33 Fla. 204, 14 South. 822; Daniel v. Taylor, 33 Fla. 636, 15 South. 313. And see Stackpole v. Hancock, supra.

This decision renders it proper to affirm the decree of the court below without the necessity of considering other assignments, unless there be merit in the third assignment, which is so general in its character that it might be wholly disregarded under our rules. Under this assignment the appellant undertakes to raise the question that, as the Florida Land & Improvement Company made a return to the assessor that it held a mortgage upon the lands in controversy, upon which return the assessor assessed the lands in the name of the Florida Land & Improvement Company, and thereafter, on the foreclosure of a mortgage and the decree of sale thereunder, the Florida Land & Improvement Company became the successful bidder for the said lands, and before confirmation and deed assigned the bid to the present complainant, the present complainant is estopped from denying that the lands in controversy were not properly assessed to the Florida Land & Improvement Company as the owner. We have found that the act of the assessor, on the return of the Florida Land & Improvement Company, in assessing the lands to the company was illegal and void. The present complainant does not hold title under the Florida Land & Improvement Company, and is neither by deed, record, nor en pais estopped by any of the acts and declarations of said company. So far as this record goes, we doubt if there would be any estoppel as against the Florida Land & Improvement Company, if that company were before the court asking relief. In short, we find none of the elements of an estoppel as against the complainant, and hardly consider the argument made on that line as serious. The decree of the circuit court is affirmed.

## GROSS v. PALMER et al.

(Circuit Court, N. D. Illinois, N. D. November 8, 1900.)

No. 25,050.

DEPOSITIONS—LETTERS ROGATORY.

Letters rogatory may be issued from a circuit court, where testimony cannot otherwise be obtained in foreign jurisdictions, but it must be shown with certainty that a commission is not adequate, preferably by the issuance of such commission and its return, showing the impossibility, after proper efforts, of obtaining the desired testimony thereunder.

Application by Complainant for Issuance of Letters Rogatory.

F. F. Reed, for complainant.

Wilson, Moore & McIlvaine, for defendant.

KOHLSAAT, District Judge. In this matter I am of the opinion that the authorities sustain complainant's contention that letters rogatory should issue where the desired testimony cannot otherwise be obtained. A commission is, as a rule, the more expeditious, comprehensive, and satisfactory means of procuring evidence outside the jurisdiction of the court, and this means of taking such testimony is favored by the courts where it is adequate. Complainant seeks to establish the fact that this means is not adequate in this instance by his affidavit made upon information and belief only. This showing I do not deem sufficient. I am of the opinion that the impossibility of obtaining the testimony sought by ordinary procedure under a commission should be established with certainty; the most satisfactory method being the issuance of such commission, and its return showing the impossibility, after proper efforts made, of obtaining the desired testimony thereunder. There seems to be no direct authority for defendant's contention that oral examination may be had under letters rogatory. In this case the application now made for the issuance of letters rogatory will be denied, with leave to renew should a commission fail to afford complainant adequate relief.

McCLAIN v. PROVIDENT SAVINGS & LIFE ASSUR. SOC. OF NEW YORK.

(Circuit Court, E. D. Pennsylvania. January 9, 1901.)

No. 55.

LIFE INSURANCE—AVOIDANCE OF POLICY FOR MISREPRESENTATION—WARRANTIES IN APPLICATION.

Where a policy of life insurance states that it is issued in consideration, inter alia, of the "statements and agreements" contained in the application, and the application closes with the declaration: "I hereby declare that I have read and understand all the above questions and the answers thereto, and they are hereby made part of my application for assurance, * * * and I hereby warrant said answers as written to be true,"—the answers to the questions in such application are warranties, and not merely representations, and, if any of them are untrue, it avoids the policy, without regard to the question of their materiality, or the good faith of the insured.

On Motions for Judgment upon Special Verdict and Motion for New Trial.

Joseph H. Brinton, for plaintiff.
Francis Rawle, for defendant.

J. B. McPHERSON, District Judge. At the trial I was disposed to give the jury binding instructions in favor of the defendant, but, in order that certain controverted questions of fact might be determined in case it should be important or desirable to have such determination, I asked the jury to find a special verdict upon these questions, and to submit to the court the legal effect of the facts so found. This was done by the jury, and the case is now before me on a motion by the plaintiff for judgment in her favor, a similar motion on behalf of the defendant, and a motion by the defendant for a new trial. I should grant a new trial with little hesitation if I did not

think that the case could properly be ended now (so far as this court is concerned) by the entry of judgment in favor of the defendant on the special verdict.

In two respects, as the jury have found, the answers of the insured in his application were untrue. He had had the disease of dyspepsia before April 27th, the day when the application was made, and he had been attended by a physician before the same date, although the application denied that he had ever had dyspepsia, and contained the answer, "Had no medical attendance," in reply to the question, "When and by what physician were you last attended, and for what complaint?" In my opinion, the insured warranted these answers to be true, and therefore their materiality, or the good faith of the insured in making the answers, is not to be considered. Accordingly, the finding of the jury upon these two points—materiality and good faith—may be properly disregarded. Moulor v. Insurance Co., 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447, was cited as a decisive authority in favor of the plaintiff's position that the answers in controversy are representations only, and not warranties. I cannot assent to this view of that case. The policy there expressly declared the answers to be "representations," while the application itself only warranted "that the above are fair and true answers"; adding: "It is acknowledged and agreed * * * that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of facts," the policy should be null and void. This was evidently a warranty of fairness and good faith only, and such a warranty is equivalent to a mere representation. In the case in hand, however, the policy refers to the "statements and agreements"—not to the "representations"—in the application, and neither "statement" nor "agreement" is opposed to "warranty," or qualifies it in the least. A warranty is an agreement; an answer is a statement; and the policy therefore says, in other words, that in consideration, inter alia, of the answers and warranties of the application, the contract is made. "Representation" has a technical meaning; "statement" is a colorless word. Neither does the application warrant fairness merely, but warrants that "all the statements contained in part 1 and part 2 of this application * * * are * * * full, true, and complete"; adding also the unnecessary clause, "and that, if any concealment or fraudulent or untrue statement be made," the policy shall be void. Even if this cumulation of provisions—one being a clear warranty, and the other being, therefore, a superfluous addition—should be thought to reduce the warranty so as to make the answers merely representations, there still remains the concluding sentence of the application, separated by many questions and answers from the provisions I have just been considering. I think this sentence should be taken as the final word of the parties on the subject, the final explicit declaration of the insured: "I hereby declare that I have read and understand all the above questions, and the answers thereto, and they are hereby made part of my application for assurance by the Provident Savings & Life Assurance Society of New York, and I hereby warrant said answers as written to be true. * * *" This is an unqualified agreement, and, to my mind, is

decisive. It follows immediately the answers complained of, and, in my opinion, makes them warranties.

But, if this construction of the contract should be wrong, and if these answers are held to be representations only, it may be proper to suggest to the court of appeals that the plaintiff should not be allowed to have judgment upon the special verdict, but that the case should be sent back for a new trial. As it seems to me, the weight of the evidence is against the verdict, and ought to have led to a different result.

Judgment may be entered in favor of the defendant upon the special verdict.

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## CALM et al. v. DOLLEY.

(Circuit Court, E. D. Pennsylvania. January 7, 1901.)

No. 19.

PROMISSORY NOTES—ACTIONS—DEFENSES.

In an action on a promissory note by plaintiffs who allege that they are bona fide indorsers for value before maturity, an affidavit of defense which does not deny such allegation, but sets up an oral agreement between defendant and the payee at the time the note was signed that defendant should not be held liable thereon, and that the payee then stated that such arrangement was satisfactory to his brother (one of the plaintiffs), is insufficient, even conceding that such agreement could be proved, to affect the note, since it fails to show that plaintiffs were parties to the agreement, or to aver that they had notice of it before acquiring title to the note.

Rule for Judgment for Want of a Sufficient Affidavit of Defense.

Jacob Singer, for plaintiff.

Albert B. Weimer, for defendant.

J. B. McPHERSON, District Judge. The plaintiffs in this suit aver themselves to be bona fide indorsees for value, before maturity, of a promissory note of which the defendant is the maker, and the pending motion raises the question whether the following affidavit of defense is sufficient to prevent a summary judgment:

"I, Charles S. Dolley, defendant above named, have a full, true, and complete defense in the above suit, as follows:

"I filed in the United States patent office on October 21, 1896, an application for a 'process of tanning' (No. 609,600), which application was thrown into interference with several other applications covering closely allied processes. Among these was one for 'the treatment of hides,' by Edward Calm, of New York, filed November 19, 1896 (No. 612,701).

"These interferences were contested, and gradually overcome, the one with Calm being dissolved by decision of the commissioner of patents on May 23, 1899, whereupon Mr. Calm entered a new and amended application, which was in turn thrown into interference with my pending application.

"On December 4, 1897, I sold to Mr. James F. Crank, of the city of Los Angeles, California, an undivided one-half of all my right, title, and interest in and to the said pending application and to certain foreign patents covering the same process. Mr. Crank covenanted to 'use the utmost diligence in procuring purchasers for said patents and applications, and to pay all expenses necessary for the speedy and successful sale of said applications and patents.'

"In June, 1899, Mr. Crank had, as he thought, perfected arrangements for the sale of the process in the United States, and was anxious that the pending

interference should be dissolved, and the patent be issued, as promptly as possible. He thereupon opened up negotiations with Mr. Edward Calm, one of the parties to the interference, and arranged terms with him according to which Calm should concede priority of invention, and allow my application to go to issue.

"On or about June 29, 1899, Mr. Crank and Mr. Franklin H. Hough, of Washington, D. C., patent attorney in charge of my application, met Mr. Edward Calm in New York City, and between that date and July 8, 1899, closed an agreement with Mr. Calm, whereupon he conceded priority, giving the papers to Mr. Crank, who forwarded them to Mr. Hough's brother in Washington, by whom they were filed with the examiner of interferences on July 10, 1899. The interference was then dissolved, and on July 13th my patent was formally allowed, and was issued August 8, 1899 (No. 630,494).

"On July 10, 1899, I went to New York City, and, together with Mr. Crank and Mr. Hough, met Mr. Edward Calm at the office of his attorney, Mr. J. E. M. Bowen, where Mr. Crank paid Mr. Calm the sum of $2,500, one-half of the consideration for his concession, and where the note in suit for the balance of $2,500 was prepared, which I was requested to sign with the understanding that my signature was necessary, owing to my being the party to whom the concession of priority had been made, but that Mr. Crank, who had made the negotiation, and who had paid Mr. Calm $2,500, was to be responsible for the payment of the note.

"I stated clearly at the time, and it was understood by all parties, that I was unable to pay this note, and that they were to look to Mr. Crank for payment.

"In accordance with this understanding, no references were asked of me, but Mr. Edward Calm requested Mr. Crank to accompany him to his brother's office, stating that, if he satisfied his brother of his (Mr. Crank's) responsibility, he would be satisfied.

"Whereupon Mr. Edward Calm and Mr. Crank went together to see Mr. Maximilian Calm, one of the plaintiffs above named, and certain parties to whom Mr. Crank referred as to his business standing and ability to pay the note. During their absence I remained in Mr. Bowen's office. They returned in the course of an hour, and I was assured by Mr. Edward Calm that everything was satisfactory, and that both he and his brother, Maximilian Calm, were content to look to Mr. Crank for payment of the note.

"Under these conditions I signed the note, which was indorsed by Mr. Crank, and, but for this understanding, I would not have been induced to sign the note.

"All of which I expect to be able to prove at the trial."

The affidavit does not deny that the plaintiffs are bona fide holders for value, before maturity, and this must, therefore, be accepted as true. The essential averments of the affidavit are that, when the defendant signed the note, it was "understood by all parties that [he] was unable to pay this note, and that they were to look to Mr. Crank for payment"; and, further, that the defendant was assured by Edward Calm, who is not one of the plaintiff firm, that "everything was satisfactory, and that both he and his brother, Maximilian Calm, were content to look to Mr. Crank for payment of the note. Under these conditions I signed the note, which was indorsed by Mr. Crank, and, but for this understanding, I would not have been induced to sign the note."

In my opinion, neither of these averments is sufficient to prevent judgment, even if the Pennsylvania decisions were binding on this court upon a question of general commercial law. Both averments are fatally defective, because the first does not declare that the plaintiffs were parties to the understanding that the defendant was not to be bound by his contract of indorsement, and because the second

does not declare that the plaintiffs, before acquiring title, knew that the note had been signed with such an understanding. The affidavit shows clearly that the plaintiffs were not present when the alleged understanding was entered into; and the averment that Edward Calm, who was not a member of the plaintiff firm, informed the defendant that the plaintiffs would look to Mr. Crank only for payment of the note is an averment of incompetent hearsay evidence that cannot be considered. The defendant nowhere alleges that the plaintiffs had notice of the understanding that he was not to be called upon to pay the note, but only makes oath that he was informed that they had received such notice; and this is, of course, a different matter. I think it cannot be denied that without actual notice the indorsees could not be bound by an unknown agreement of the original parties. None of the cases cited by the defendant goes so far as to hold that a bona fide indorsee, for value, of negotiable paper, before maturity, can be affected by an agreement of which he had no notice that was intended to relieve the maker from liability. How extensive the scope of the Pennsylvania rule may be that permits evidence to be given concerning a parol agreement made at the time a written instrument was executed, when such agreement was the inducement that led to the signing of the instrument (Iron Co. v. Willing, 180 Pa. St. 165, 36 Atl. 737), it is unnecessary now to decide; for I think it is clear that such a parol agreement as is now set up cannot be proved in the federal courts at all (Martin v. Cole, 104 U. S. 30, 26 L. Ed. 647), and, if provable in Pennsylvania, can only be enforced in an action between the parties to the parol agreement, or in an action brought by a subsequent holder with notice.

The rule for judgment is made absolute.

## LOWNDES et al. v. UNITED STATES.

(Circuit Court, D. South Carolina. January 4, 1901.)

EMINENT DOMAIN—TAKING OF PROPERTY FOR PUBLIC USE—DESTRUCTION OF EASEMENT.

Owners of land lying on a stream, who, with their ancestors, have used the waters of such stream for nearly 100 years for flowing the land in the growing of rice, have acquired an easement therein which constitutes property, within the meaning of the fifth amendment to the constitution, and they are entitled to maintain an action against the United States to recover just compensation for the taking of property for public use upon an allegation that the federal authorities, in the exercise of their lawful power to improve navigation, have diverted the waters of the stream, and thereby destroyed such easement, and the value of the land to which it was appurtenant.

On Demurrer to Petition.

A. D. Cohen and Legare & Holman, for petitioners.

Abial Lathrop, U. S. Atty.

SIMONTON, Circuit Judge. This is a petition addressed to this court exercising the jurisdiction of the court of claims. It seeks

compensation for property of the petitioners, taken by the government for public purposes. The fifth amendment to the constitution provides: "Nor shall private property be taken for public use without just compensation." When such property is so taken without previous contract, an implied contract arises that just compensation will be given therefor. On this implied contract this petition proceeds. An answer has been filed to the petition. The petition having been read to the court, at the call of the cause for trial the government, under the Code Practice of South Carolina, interposes the demurrer that the petition and complaint do not state facts sufficient to constitute a cause of action. This demurrer is what was known in Code pleading as an oral demurrer. It can be made notwithstanding that an answer has been filed. It is now required to be in writing. This is not a general demurrer to the merits. It is addressed to the sufficiency of the complaint. It will not avail to dismiss the complaint, unless it shall appear that the complaint cannot be amended so as to state a cause of action. The present question is, does this petition or complaint state facts sufficient to constitute a cause of action? The gravamen of the petition is the destruction of two rice plantations of the petitioners situate on Mosquito creek and Santee river, in South Carolina. The petition states the location of said plantations and their boundary on Mosquito creek, and their use as rice plantations by petitioners and their ancestors for nearly 100 years, dependent for flowage and drainage on Mosquito creek; that the government of the United States, in the lawful exercise of its authority, made a short cut from Santee river to Winyah Bay by means of a cut or canal; that this cut receives the waters of Mosquito creek from the Santee river, and conducts them by said canal to a tributary of Mosquito creek, destroying the natural ebb and flow of Mosquito creek, and the use of its waters for the said plantations. Here is the allegation that the petitioners and their ancestors for nearly 100 years have enjoyed an easement in the waters of Mosquito creek (Lyon v. Fishmongers' Co., L. R. 1 App. Cas. 663), and that by the action of the government, for public purposes, and as the direct result of such action this easement has been impaired,—it may be destroyed (Lewis, Em. Dom. §§ 83, 84). If this be so then it may be that the property of the petitioners has been taken from them for public purposes. The language of the constitution is, "Nor shall private property be taken for public purposes without just compensation." An easement may be the subject of property as well as land (U. S. v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; Great Falls Mfg. Co. v. Attorney General, 124 U. S. 597, 8 Sup. Ct. 631, 31 L. Ed. 527); and perhaps this may be a physical invasion of a hereditament of private owners and a practical ouster of their possession (U. S. v. Alexander, 148 U. S. 191, 13 Sup. Ct. 529, 37 L. Ed. 415; Lewis, Em. Dom. § 84). For the purposes of this demurrer, this is enough to sustain the petition. It sets forth a cause of action. Whether it can be sustained when the answer is considered and the testimony taken, is another question going to the merits. The demurrer is overruled.

## SILVER v. KENT et al.

(Circuit Court, E. D. Pennsylvania. January 31, 1901.)

No. 23.

1. Bills and Notes—Guaranty—Construction.

Defendants executed the following instrument: "As security for the attached note, the undersigned hold claims amounting to more than the amount thereof; and, for valuable consideration, we agree, if the above-described note is not paid at maturity, to collect said claims, and to pay the full amount due on said note to the holder thereof, without any deduction or charge." *Held*, that the instrument was an absolute, unconditional guaranty to pay the note, and not merely an agreement to collect the claims mentioned and pay the note therefrom.

2. Same—Defenses.

Where one who has signed a contract reciting a consideration, and guarantying the payment of a note given for a loan made in reliance on his guaranty, is sued on his contract, he cannot set up the defense that he has received no consideration for his guaranty, and no notice of its acceptance.

Conard & Middleton, for plaintiff.
Read & Pettit, for defendant Samuel L. Kent.

DALLAS, Circuit Judge. The plaintiff's statement of claim sets out a promissory note which, as it alleges, he received from the Columbia Navigation Company for $5,000 loaned by him to it, and that, at the time this note was given, the defendants, who were connected with that company, guarantied the payment of it by a certain undertaking in writing, of which the following is a copy:

"As security for the attached note of the Columbia Navigation and Trading Company, dated December 13th, 1897, and due September 13th, 1898, for the sum of $5,000, the undersigned hold claims for labor, materials, supplies, etc., against the steamer City of Columbia, amounting to more than the amount of said notes. For the sum of one dollar to us in hand paid, and receipt of which is hereby acknowledged, and for other valuable consideration, we, the undersigned, agree, undertake, and bind ourselves, if the above-described note is not paid at maturity by the Columbia Navigation and Trading Company, to collect said claims, and to pay the full amount due on the attached and above-described note, on or before December 13th, 1898, to the holder thereof, without any deduction or charge whatever. In witness whereof, we have hereunto attached our seals and affixed our signatures this 13th day of December, 1897.

"[Signed] Max Levy.
"[Signed] Samuel L. Kent.
"[Signed] Harrington Emerson.

"Witness to all three signatures:
"G. P. Armstrong."

The present action is brought upon this instrument, and the defendant Kent has filed an affidavit wherein he defends upon two grounds, namely: (1) That it was not intended to guaranty the payment of the note, "but the intent, meaning, and purpose of said writing was only to pledge as collateral security for the payment of said note all the claims held against the steamer City of Columbia, as therein set forth, and to provide that out of the amount collected thereon said note would be paid, without any charge to the holder"; (2) that he, the defendant Kent, "never received any consideration

for the said guaranty, nor any notice from the said plaintiff of the acceptance thereof."

1. What was intended by the defendant is not a permissible subject of inquiry by a jury. The true question is, what is the correct construction and legal effect of the writing? and that question is for the court. Its language is that of the defendant, and he is strictly bound by it. I am not at liberty, at his suggestion, either to add to it, or to indulge in conjecture concerning its meaning. He expressly agreed to pay the amount of the note, without any deduction or charge whatever, and I do not think it incumbent upon the holder of the note to explain why he also undertook to collect the claims mentioned in the first paragraph of the writing. If the intent was, as is now contended, that the payment referred to should be made only in case those claims were collected, nothing could have been easier than to have plainly said so. It would, I think, have naturally occurred to the draftsmen to insert, after the words "to collect said claims, and to pay," some such word as "therefrom," "thereout," or "therewith." Not only, however, was this not done, but the separateness of the obligation to pay from the undertaking to collect was further indicated by a word which was used; the phrase employed being, not "to collect said claims and pay," but "to collect said claims, and to pay."

2. In my opinion, the second defense is clearly inadmissible. The instrument in question, if a guaranty,—and I have held that it is,—is an absolute and executed one. It recited consideration, and it is not denied that in point of fact the plaintiff's money was loaned in reliance upon it. Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686. The plaintiff's rule for judgment is made absolute.

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## WRIGHT v. SMITH.

(Circuit Court of Appeals, Second Circuit. January 29, 1901.)

No. 38.

1. STATUTE OF FRAUDS—CONTRACT RELATING TO LAND.

A parol agreement by defendant, after conveyance of land to him by plaintiff without consideration, and without agreement as to the future disposition of the land, to enter into the management of the same, and divide the net avails of receipts from rents or sales, is not a contract for sale or purchase of an interest in land, within the statute of frauds of Massachusetts.

2. PAROL AGREEMENT—BREACH—REMEDY.

The remedy for breach of parol agreement of defendant to divide with plaintiff the net avails of receipts from land conveyed by plaintiff to defendant without consideration, and into the management of which defendant was to enter, is by action at law.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This is a writ of error to review a judgment of the circuit court for the Eastern district of New York upon a verdict in favor of Justus L. Smith, the plaintiff in the circuit court, against Joseph R. Wright, the then defendant, in an action at law upon a parol contract. The complaint alleged that on or

about the spring of 1881, which was in fact on August 4, 1880, the plaintiff conveyed to the defendant certain real estate, known as "Hotel St. Botolph," in the city of Boston, state of Massachusetts, and that in or about the spring of 1883, which was in fact on August 3, 1882, and November, 1882, the plaintiff conveyed to the defendant other real estate in said city of Boston, known as the "Willard Place"; that "upon or about the time of the last conveyance" the defendant went into the possession and management of both said properties, and, in consideration of said conveyances and giving said possession and control, promised to pay to the plaintiff one-half the net income and one-half of all net moneys realized from said properties. The complaint alleged a sale of each parcel of real estate, the receipt by the defendant of net income and net proceeds other than income, and a breach of the parol agreement.

The principal question in the case was the validity of the alleged parol contract under the statute of frauds of the state of Massachusetts, which was at the time of the conveyances, and still is, as follows: "Section 1. No action shall be brought in any of the following cases, that is to say: * * * Fourth, upon a contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them; or, fifth, upon an agreement that is not to be performed within one year from the making thereof; unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

The record shows that Smith, the plaintiff, resided in Boston from at least 1879 till January, 1883, when he removed to the city of New York, and that Wright, the defendant, continually resided in Boston from 1879 to the time of the trial. They were intimate and were cousins. In August, 1880, Smith conveyed to Wright, without consideration, the St. Botolph Hotel, which property and the Willard place Smith had mortgaged to a savings bank on July 22, 1880, to secure $24,000. Nothing was said at the time of the conveyance about the future possession or management of the property, but Smith remained in possession and control and collected the rents. In August, 1882, the conveyance of the Willard place was made, and also without consideration. Smith borrowed some money from Wright to pay the taxes and interest, and testified that the arrangement made at the time of the conveyance was that if he went away Wright could collect the rents and take care of the property, and that the future net income and avails were to be equally divided. Smith continued to collect the rents until he went away. In answer to the defendant's question: "Tell me what the conversation was that took place between you and the defendant when you made the agreement that you allege in your complaint. What was he to do and what were you to do, and what did he say and what did you say?"—the plaintiff replied: "I said to Mr. Wright that I was going to leave Massachusetts; that he had the title to the property; that, if he sold the property, that it was his. I wanted him to take care of it, collect the rents, pay all the expenses, if there were any that he had to pay, and do it as carefully as he could; and he could have one-half of the result, and the other half give to me. Q. What did he say? A. He thought that was satisfactory, and said he would do it." Wright gave a different version of the reason for the conveyances, and denied the parol agreement, or any agreement of a similar kind; but the jury found in favor of the plaintiff, and by their verdict answered in the negative the question whether the conveyances were in fraud of creditors.

Wm. R. Baird, for plaintiff in error.

Robert J. Mahon, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). From the foregoing statement it appears that the jury found in accordance with the plaintiff's testimony, which was that his equity in the hotel property was conveyed without consideration or parol agreement,

and without change of possession or control; that this state of affairs continued until about January, 1883; that the Willard place was conveyed in the same way in August, 1882, with the exception that Smith said that he contemplated leaving Boston, and, if he went away, Wright was to have charge of the property, and divide the net avails. The actual arrangement was entered into after the conveyance when he determined to leave Massachusetts, and was that Wright was to take the control of both properties, collect the rents, sell and convey either or both, and that the net proceeds should be divided. It is evident that at this time Smith was closely pressed for money, that the properties were heavily incumbered, that he was to leave the state and enter into business elsewhere, and that it required an expenditure of time and skill, and perhaps of money, to obtain a profit from the properties. The jury found a readiness on his part to cast the burden upon his friend, and a willingness on the part of the friend to assume it.

The parol agreement was not a part of the agreement under which either the St. Botolph property or the Willard place was conveyed to the defendant. The title to the two properties had been placed in the name of Wright for the convenience of Smith, to save his tenants from annoyance, and without fraud as against creditors. Subsequently the defendant went into the occupancy and management of the two parcels, with the agreement for a division of the net profits from rents or sales. It was not an agreement for the sale of the lands or of an interest therein to the plaintiff or to any one. The promisor did not undertake to sell at all, but simply to divide the net avails of the receipts from rents or sales, if sales or leases were made. The oral agreement related, not to land, but to the profits arising from the promisor's care and ownership of lands previously conveyed. If any statute of frauds has relation to this oral contract, it is the statute of the state of Massachusetts, and the construction of that statute by the courts of Massachusetts is of controlling importance. Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 336; Burrell v. Root, 40 N. Y. 496. So far as the decisions of that state throw light upon the subject, the contract is not within the statute. In Trowbridge v. Wetherbee, 93 Mass. 361, the plaintiff had agreed with Robbins and the defendant that they should take a conveyance of a tract of land; that it should be transferred by joint arrangement of the three persons, and when it was sold the proceeds should be equally divided between them. The plaintiff was not to contribute money, but his skill and services. Robbins sold his interest to the defendant, who agreed to become responsible to the plaintiff for his third part of the net proceeds. The land was subsequently sold, and the action was brought for the plaintiff's one-third of the net profits. The court held that a parol promise to pay another a portion of the profits made by the promisor in a purchase and sale of real estate is not within the statute of frauds; that the defendant's promise to sell the land was within the statute, but, having been performed, an action would lie upon the promise which was without the statute if the promises were separate. The conclusion that a separate parol promise to pay a part of the

profits arising from the sale of land is not within the Massachusetts statute of frauds is based upon the principle that a right to share in the profits of a particular adventure does not give the party any interest in the property itself. Smith v. Watson, 2 Barn. & C. 401. The principle has been, in different jurisdictions, applied to parol agreements to share in the profits and losses of a contemplated purchase of real estate, with the same conclusion that such agreements are without the respective statutes of frauds. Dale v. Hamilton, 5 Hare, 369; Bunnell v. Taintor's Adm'r, 4 Conn. 568; Babcock v. Read, 99 N. Y. 609, 1 N. E. 141. It is true that in the opinion of Justice Story, as contained in Smith v. Burnham, 3 Sumn. 435, Fed. Cas. No. 13,019, a parol partnership for the purchase and sale of lands in the state of Maine for the joint account of the partners was a parol contract respecting an interest in lands. He thought that the agreement contemplated that upon every purchase under the contract of partnership the plaintiff was to have an interest in the lands purchased, to the extent of his share in the partnership, and construed the partnership agreement to be the "declaration or creation of a trust or confidence in lands not arising or resulting by implication or operation of law." The statute of frauds of the state of Maine was the same as that of Massachusetts. If the facts had been as claimed in the bill in equity for an accounting, there is no apparent doubt that the learned justice thought that the parol agreement of partnership for the future purchase of lands attaches to the land when it is purchased, and therefore is a contract for an interest in each purchased parcel. It is also apparent that the supreme judicial court of Massachusetts was not, in an action at law for an account of the profits of the land sold by the defendant upon a parol agreement for the division of contemplated profits, controlled by the views of Judge Story. Trowbridge v. Wetherbee, supra. In this case the parol contract was made after the deed to the defendant, and the consideration for it was the agreement of Wright to enter upon the management of the properties, and use his time and skill in their profitable development. If a distinction of importance exists between an agreement in view of a contemplated purchase, and an agreement subsequent to and not a part of the agreement of purchase, the difference is favorable to the conclusion that the agreement in this case was not a contract for the sale or purchase of an interest in lands. The cases heretofore cited from Connecticut, Massachusetts, and New York are to the effect that an action at law is the proper remedy for the breach of the parol agreement. The judgment is affirmed, with costs.

## BISHOP v. AMERICAN PRESERVERS CO. et al.

(Circuit Court, N. D. Illinois, N. D. October 19, 1900.)

No. 22,273.

MONOPOLIES—ANTI-TRUST LAW—ACTION FOR DAMAGES.

Section 7 of the anti-trust act (26 Stat. 209), giving to any person injured by any other person or corporation by reason of anything forbidden in the act the right to recover treble damages, does not authorize an action against an alleged trust corporation, by one who was a party to its organization and a stockholder therein, to recover damages resulting from the enforcement by defendant of rights given it by the alleged unlawful agreement.

On Demurrer to Amended Declaration.

Lynden Evans and Frederick Arnd, for plaintiff.
Moran, Mayer & Meyer, for defendants.

KOHLSAAT, District Judge. This matter comes on to be heard upon demurrer to the declaration herein as amended. A demurrer was sustained to the original declaration in 1892 by Judge Blodgett (51 Fed. 272), and the suit seems to have remained dormant since that year. The suit is for the purpose of recovering treble damages under section 7 of the Sherman act, the facts set forth in the declaration on which plaintiff seeks such recovery being substantially as follows: That plaintiff was prior to the year 1888 engaged in the business of manufacturing preserves, etc.; that in said year he entered into an agreement with certain of the defendants and others to form a trust or combination, which combination was subsequently formed, and to which he conveyed his said business; that defendant American Preservers Company was subsequently organized under the laws of the state of West Virginia for the purpose of acquiring title to the property controlled by said trust, and for the purpose of forming a channel through which said trust could purchase and control the business of plaintiff, and purchase and control the entire manufacture of preserves, etc., in the United States; that plaintiff was forced to execute a bill of sale of his said manufacturing plant and business to said American Preservers Company, but continued to conduct said business under the name and style of A. D. Bishop & Co.; that subsequently differences arose between him and the managers of said trust, and thereupon the said American Preservers Company brought a suit in replevin against plaintiff, and by means thereof obtained possession of plaintiff's entire plant, stock in trade, and business, and still retains the same. In the amended declaration it is averred that the products so controlled by said trust are products used in trade and commerce among the several states of the United States and with foreign nations, and that such products constitute articles of interstate commerce. It would seem that this case would come within the rules of law established by the supreme court in United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, although it might be a debatable question as to whether or not the question could be determined on demurrer. However, I am of the opinion that the demurrer should

be sustained on the ground that the damage which plaintiff claims to have suffered is not of the nature contemplated in section 7 of the Sherman act, when considered in connection with the remaining sections thereof. Whatever damages plaintiff may have sustained in the premises are the result, not of the alleged unlawful combination, but of the exercise of the right, which every citizen possesses, to bring a lawsuit. There is another ground which might well be considered as placing plaintiff without the provision of said act, to wit, the fact that plaintiff was himself a party to the unlawful combination, and was injured by reason of his illegal connection therewith. The demurrer is sustained on the ground that the declaration as amended states no cause of action.

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## WILSON v. CLONBROCK STEAM-BOILER CO.

(Circuit Court, E. D. Pennsylvania. January 10, 1901.)

No. 9.

CONTRACT—CONSIDERATION.

Plaintiff's promise to advertise defendant's manufactures in certain papers, the amount of advertising to be optional with plaintiff, is, after he has advertised therein, a sufficient consideration for defendant's agreement, appointing plaintiff its agent for a definite time for sale of the manufactures on commission.

Motion by Defendant for Judgment upon Reserved Point.

Robert B. Kelley, for plaintiff.

N. Dubois Miller, for defendant.

J. B. McPHERSON, District Judge. In April, 1895, the plaintiff and the defendant entered into a contract of which the following is a copy, one or two unimportant provisions being omitted:

"This agreement, made and concluded this 10th day of April, A. D. 1895, between the Clonbrock Steam-Boiler Company, of Brooklyn, New York, party of the first part, and Joseph R. Wilson, of the city of Philadelphia, party of the second part:

"Whereas, the said party of the first part is engaged in the manufacture and sale of the steam generator called the 'Morrin Climax Steam Generator,' and the said party of the second part desires to sell the said steam generator within the states of Pennsylvania, Maryland, and Delaware:

"Now, this agreement witnesseth that the said party of the first part, for and in consideration of the undertaking and agreement hereinafter contained upon the part of the said party of the second part, to be kept and faithfully performed, do constitute the said party of the second part their selling agent for the states of Pennsylvania, Maryland, and Delaware, giving and granting unto the said party of the second part the exclusive right to sell the said Morrin Climax steam generator within the said states of Pennsylvania, Maryland, and Delaware, with full power to appoint subagents.

"And the said party of the first part agrees to give the said party of the second part catalogues, photographs of plants, etc., of said generator, for office use, or for whatever purpose they may be needed.

"The said party of the first part further agrees that all orders received by it from or through the said party of the second part will be filled as speedily as the facilities of the said party of the first part will permit. It being expressly understood and agreed that in the event of any order being countermanded, after having been accepted by the said party of the first part, because of the failure of the said party of the first part to promptly fill the said order,

the said party of the second part shall in that case receive his full credit on the said sale, in the same manner as though the order had been properly filled and paid for.

"The said party of the first part expressly reserves to itself the right to reject any orders submitted where the responsibility of the purchaser seems to be doubtful.

"The said party of the first part shall have the privilege to make such changes from time to time as the established list of prices and other exigencies in their business shall make necessary.

"The said party of the second part, for and in consideration of the foregoing, agrees to advertise the said generator in trade journals in the abovementioned territory; the amount of such advertising to be optional with the said party of the second part.

"The said party of the second part further agrees that he will in no case sell any generator or generators at a discount greater than the established percentage or percentages from the established list price without express consent of the said party of the first part in writing first had and obtained.

"It is mutually understood and agreed that all sales to be made by the said party of the second part shall be for cash or promissory notes payable in accordance with agreement for sale, and shall be first approved by the said party of the first part.

"It is further understood and agreed that, in all cases where the said party of the second part sells or contracts to sell any generator or generators as such agent as aforesaid, they shall require and take from the purchaser an agreement that the steam generator or generators sold remain and be the property of the said party of the first part until the settlement for the same is made by the purchaser with the said party of the first part.

"The said party of the second part shall take such precautions as may be requisite in various parts of his territory to give validity and effect to such contract; it being understood and agreed, however, that this provision is to be enforced only when deemed necessary by the said party of the second part to secure the said party of the first part, but in that event the said party of the first part shall be communicated with, and its written consent obtained.

"It is mutually understood and agreed that for all services and disbursements made by the said party of the second part, as such agent, in carrying out the provisions hereof, he shall be entitled to and receive compensation as follows:

"(1) A commission of ten per cent. (10%) upon the established list price of said generator and accessories, as fixed by the said party of the first part, upon all sales made by the said party of the second part in the said territory of Pennsylvania, Maryland, and Delaware.

"(2) A commission of ten per cent. (10%) upon all sales which may be made by the said party of the second part, either by influence, correspondence, or personal interview, or otherwise, in any of the territory in which the said party of the first part may not have an agency.

"(3) Such commissions as may be mutually agreed upon by the said party of the second part and any other state selling agent of the said party of the first part on any sales which may be made by the said party of the second part in any territory of the said state selling agent of the said party of the first part.

"Such commissions, however, shall not be due the said party of the second part until the said party of the first part have received payment in full for generator, either in cash or notes, or both.

"In case the said party of the second part should sell or contract to sell any steam generator or generators at less than the established list price of the said party of the first part, without the consent of the party of the first part, the difference between the list price and the price at which the generator is sold shall be deducted wholly from the compensation or commission of the said party of the second part.

"It is mutually agreed and understood that this agreement shall continue for the term of ten years, subject, however, to cancellation by the said party of the first part upon six months' notice in writing to the said party of the

second part, in case the total sales for the first six years shall average less than fifty thousand dollars ($50,000.00) per annum; it being understood and mutually agreed that the sales made in Pennsylvania previous to the signing of this contract by the party of the second part shall be credited to the said party of the second part on account of the first year's sales under this agreement.

"It being also understood that this agreement shall in all respects be binding upon the successors and assigns of the said party of the first part."

In March, 1897, the defendant rescinded the contract, and took this step without just cause, as the verdict of the jury has established. This suit was brought to recover damages for the rescission, and the plaintiff has recovered a verdict. The defendant now asks that judgment may be entered in its favor upon the reserved point, presenting as the reason that the contract was void for want of mutuality,—that no consideration moved from the plaintiff to the defendant, and therefore that the contract cannot be enforced. I am unable to assent to this proposition, for reasons that I shall briefly state. If the contract contains a promise by the plaintiff, and if the testimony shows that the promise was performed before the rescission, then a sufficient consideration for the defendant's promise to pay commissions has been shown, and the plaintiff is entitled to recover. The adequacy of the consideration is a matter for the parties themselves. It is only necessary now to inquire whether a consideration of some value, even if the amount be small, had passed from the plaintiff to the defendant before the rescission took place.

It will be seen by an examination of the contract that the plaintiff's promise was to advertise the defendant's boiler in certain journals; and, if this promise had been without qualification, I suppose the defendant would hardly have denied that the promise to advertise was a valid consideration for the promise to pay commissions, and that, whenever the plaintiff carried out his promise and actually did advertise, the obligation of the defendant to pay commissions would become absolute. The defendant argues, however, that the promise to advertise furnished no consideration whatever, because the amount of advertising was optional with the plaintiff, so that if he had not advertised at all the defendant would have had no legal ground of complaint. This is the precise point of the case, and I think the defendant's argument may perhaps be sufficiently answered in Mr. Pollock's words, taken from his Principles of Contract (Wald's Ed., p. 160):

"The consideration for a promise may well be contingent; that is, it may consist in the doing of something by the promisee which he need not do unless he chooses, but which being done by him the contract is complete, and the promise binding."

See, also, note "b," and cases cited.

To use the language of Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 375:

"Nor is it necessary that the consideration should exist at the time of making the promise; for if the person to whom a promise is made should incur any loss, expense, or liability in consequence of the promise, and relying upon it, the promise thereupon becomes obligatory. Thus, if A. promise B. to pay him a sum of money if he will do a particular act, and B. does the

act, the promise thereupon becomes binding, although B. at the time of the promise does not engage to do the act. In the intermediate time the obligation of the contract or promise is suspended; for until the performance of the condition of the promise there is no consideration, and the promise is nudum pactum, but on the performance of the condition by the promisee it is clothed with a valid consideration, which relates back to the promise, and it then becomes obligatory."

See, also, Cherry v. Smith, 3 Humph. 19, 39 Am. Dec. 150.

In the note to the report in 39 Am. Dec. 152, it is said:

"It has been doubted in many cases whether a contract in which one person has an option to do a certain thing, or not, is binding upon the other party. The objection to such contracts is that there is no mutuality of contract between the parties. It is said that one party is bound, while the other may do something or nothing. An able writer, speaking of this apparent want of mutuality, says: 'This is a mistake. The party making the promise is bound to nothing until the promisee, within a reasonable time, engages to do, or else does or begins to do, the thing which is the condition of the first promise. Until such engagement or such doing the promisor may withdraw his promise, because there is no mutuality, and therefore no consideration for it. But, after an engagement on the part of the promisee which is sufficient to bind him, then the promisor is bound, also, because there is now a promise for a promise, with entire mutuality of obligation. So, if the promisee begins to do the thing in a way which binds him to complete it, here, also, is a mutuality of obligation. But if, without any promise whatever, the promisee does the thing required, then the promisor is bound on another ground. The thing done is itself a sufficient and a complete consideration, and the original promise to do something if the other party would do something is a continuing promise until that other party does the thing required of him.' 1 Pars. Cont. 451."

It seems to me to be unnecessary to elaborate these statements of the rule. Doubtless, if the plaintiff had not advertised, the contract to pay commissions would not have been binding upon the defendant; but, as the undisputed testimony shows that the plaintiff did advertise, and in so doing expended money and incurred pecuniary obligation, the case, as it seems to me, falls distinctly within the rules stated in the foregoing quotations. In none of the decisions cited by the defendant had the promisee made any reciprocal promise, either optional or unqualified, and in each case, therefore, the promisor's engagement was properly held to be without consideration.

I think the defendant's motion for judgment notwithstanding the verdict cannot be granted, and that the plaintiff is entitled to retain the fruits of his victory. Judgment may be entered for the plaintiff upon the verdict.

## SANDERS et al. v. GRAVES.

(Circuit Court, D. Montana. January 29, 1901.)

No. 515.

ATTORNEY AND CLIENT — VALUE OF SERVICES — EXPERT TESTIMONY — TRIAL — QUESTIONS FOR JURY.

Where, in an action by an attorney for value of services, there was evidence of the nature and character of the services rendered, and the evidence established by practicing attorneys as to the value was that the services were worth $5,000, it was error to instruct that, if the jury found for plaintiff, he was entitled to recover in that sum, as the jury were not

bound by the evidence of the experts, but were entitled to find the value from their own opinion, considering the nature of the services and the time expended.

Walsh & Newman, for plaintiffs.
Clayberg & Gunn, for defendant.

KNOWLES, District Judge. This action was brought by the plaintiffs against the defendant to recover the sum of $25,000, alleged to be due as the reasonable value of professional services as attorneys at law performed for the defendant at his special instance and request. There was evidence introduced of the nature and character of these services and of the time occupied in performing the same. There was also the evidence of practicing attorneys, who gave their opinions as to the value of the services of the plaintiffs upon the facts stated, and the plaintiffs also testified as to such value themselves. There was no evidence as to the value of said services on the part of the defendant. The evidence as to the value of said services was that the same, upon the facts stated, were of the reasonable value of $5,000.

The court gave to the jury the following instruction:

"You are instructed that you are the judges of the credibility of the witnesses and of the weight of the evidence, and, if you find that the testimony of the witnesses that the reasonable value of the services performed was the sum of $5,000 is false, then you will find for the defendant; but, if you believe that evidence, then find for the plaintiffs for the full sum of $5,000."

The defendant excepted to this instruction. The jury found for the plaintiffs in the sum of $5,000. The defendant now comes before the court and petitions for a new trial, upon the ground that the above instruction was error.

The defendant relies upon the case of Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028. It is contended that this case supports the position that in estimating the value of the plaintiffs' professional services the jury were not bound by the evidence of the experts as to the reasonable value of said services, but could find from their own judgment, considering the nature and character of said services, and the time occupied in their performance, the value thereof, and were not bound by the opinion of the experts in regard thereto. I find that this contention is supported by the case of Head v. Hargrave, supra. This view is also sustained by the following decisions: Leitensdorfer v. King (Colo. Sup.) 4 Pac. 39; Bentley v. Brown (Kan. Sup.) 14 Pac. 434; Kilpatrick v. Haley (Colo. App.) 41 Pac. 508; Willard v. Williams (Colo. App.) 50 Pac. 208; Arndt v. Hosford, 82 Iowa, 503, 48 N. W. 981; In re Dorland's Estate, 63 Cal. 282; Whitney v. City of New Orleans, 4 C. C. A. 521, 54 Fed. 617. The court feels bound by the case of Head v. Hargrave, and must, therefore, grant defendant's petition for a new trial. In doing so, however, I wish to express my dissent from the views expressed in that case. In its opinion therein the court says:

"The only question presented for our consideration is whether the opinions of the attorneys as to the value of the professional services rendered were to control the judgment of the jury so as to preclude them from exercising their own knowledge or ideas upon the value of such services."

In speaking of the instructions asked by the defendant in that case, the court says, "Those instructions correctly presented the law of the case." In turning to these instructions, I find the following:

"In determining the value of the plaintiff's services the jury are not bound by the testimony of the expert witnesses. That testimony may be considered by the jury; but if, in their judgment, the value fixed by those witnesses is not reasonable, they may disregard it, and find the amount which, in their judgment, would be reasonable."

Considering this language, I think it is held by the supreme court that a jury may take the facts as to the character of professional services, the time occupied in performing the same, and determine their value from their own general knowledge upon the subject. It is stated "other persons besides professional men have knowledge of the value of professional services." There are statements in the opinion which would indicate that this general knowledge which the jurors possess concerning such professional services should be considered in weighing the testimony of the experts. There certainly is no objection to this. The objectionable feature is that the jury itself, under the rule laid down, may determine itself, from the facts in the case, from their own knowledge or ideas, the value of such services. This would, in effect, constitute the jurors themselves as experts. If the value of professional services lies within the common experience and ordinary intelligence of men, then it is improper to admit expert testimony as to their value.

In the case of Ferguson v. Hubbell, 97 N. Y. 513, it is said:

"Where the facts can be placed before the jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them as witnesses, then there is no occasion to resort to expert or opinion evidence." It is also stated "that it is not sufficient, to warrant the introduction of expert evidence, that the witness may know more of the subject under inquiry, and may better comprehend and appreciate it than the jury."

In Rog. Exp. Test. this view is approved. See page 26. In his book the author says:

"If the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them, then the opinions of experts cannot be received in evidence."

This view is supported by Lawson, Exp. Ev. p. 96. In discussing the mode of proving the value of attorneys' fees, Lawson, Exp. Ev. p. 442, says:

"There is no fixed standard by which their value can be determined. Their value and reasonable price vary with the magnitude and importance of the particular case, the degree of responsibility attaching to its management, the difficulty of the questions involved, the ability and reputation of counsel engaged, the labor bestowed, and other matters which will readily occur to the profession. The experience and knowledge of ordinary jurymen do not qualify them to form an opinion as to the value of services of this kind. The case is not one where the opinions of witnesses should be excluded because they are no better than the opinions of the jurymen themselves."

The author further states that practicing lawyers are peculiarly qualified to give opinions as to the value of such services. This view is sustained in Rog. Exp. Test. pp. 380, 381. He says:

"The opinion of one who is not an attorney is incompetent to prove the value of an attorney's services." Hart v. Vidal, 6 Cal. 56.

If jurors are competent to take the facts in evidence in a case and fix the value of attorneys' fees, I can see no necessity for calling in attorneys as experts to give their opinions in regard thereto.

In the case of Wood v. Barker, 49 Mich. 295, 13 N. W. 597, the court had occasion to consider the action of a jury in valuing the fees of a physician. The lower court charged the jury that, if they were not satisfied with the testimony of the experts, they were at liberty to use their own judgment on the question of value of the physician's services. The supreme court of Michigan, in reviewing this instruction, said:

"There can be no presumption of law concerning the value of a surgeon's services, and there is no presumption that a jury can ascertain it without testimony of some kind from persons knowing something about such value. As already suggested, there was positive testimony of value not discredited, and, in the case of Dr. Harding, given by a disinterested witness called for important purposes by the defendant himself. We can see no sufficient reason for the suggestion that all this testimony might be disregarded, and there is no rule which would allow the jury to entirely ignore the testimony, and at the same time form an independent conclusion without testimony upon a matter which required proof beyond their conjecture or their opinion. We do not say that the value of a physician's services at a given time and place may not be known to other persons than physicians if they have been in a position to learn the customary or proper rates. But there is no legal presumption, and no reasonable probability, that all jurymen have this knowledge. And there can be no safety to any one if juries are to use their own unguided views on such matters."

I do not see why the views here expressed should not apply to attorneys' fees, especially in a case like this, where there was no conflict among the opinions of the experts as to the value of the services rendered. I conceive that jurors have more knowledge of the value of physicians' services than that of attorneys. As a rule, the charges of physicians in general practice are very near the same. It is only when we come to noted experts, and men of great reputations and ability, that they are changed materially. There are elements that always enter into the value of an attorney's services which are not the subject of common knowledge. His ability, his peculiar adaptability for his profession, his general standing before the courts of the country, are matters best known to his professional brethren. The supreme court evidently thought that the same rule should be considered as pertains in cases for damages. It said:

"If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty, and probably come to a wrong conclusion, if, controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damages sustained, they should ignore their own knowledge and experience of the value of a sound limb."

A physician would be disqualified under the rules of law from giving any such opinion. The question as to damages for personal injuries is peculiarly within the province of a jury. The jury itself, unaided by the opinions of experts, must ascertain and fix the damages in such a case. In doing this it is guided by the character and extent of the injury received. "We find it laid down generally

in the authorities that on question as to the amount of damages resulting from a particular transaction, witnesses, whether experts or not, cannot express an opinion, but are confined to a description of the injuries; it being the duty of the jury to estimate the damages from the facts proven as to the nature and character of the injuries." See Rog. Exp. Test. § 154, and cases there cited; Railway Co. v. Haynes, 47 Ark. 497, 1 S. W. 774; Norman v. Wells, 17 Wend. 136. The case of Patterson v. City of Boston, 23 Pick. 425, cited by the supreme court, I find, upon examination, was a case where a jury was called upon to assess damages for the taking of private property for a public use. By referring to Parks v. City of Boston, 15 Pick. 209, 210, I find that this estimate of damage for such taking was made under and by virtue of a statute which required the jury to view the premises; and the court said:

"The jury must, therefore, I think, exercise their own knowledge and experience fully; and perhaps, in most instances, with a competent and intelligent jury, such judgment could not be much aided by the estimates of others, though under oath, and in the form of testimony."

It is evident that the jury were required to perform the same services as were required of a committee under a previous statute. Such a committee was required to go upon the premises, and from its own knowledge and judgment assess the damages. In the case of Murdock v. Sumner, 22 Pick. 156, cited by the supreme court, there were facts presented to the jury upon which they could estimate the value of goods without resorting to their personal knowledge or the testimony of experts. There was evidence of the cost, quality, and condition of the goods; and the court says, "The jury might have found its verdict upon these facts." That is not a case like Head v. Hargrave, where, unless we consider the evidence of the experts as to the value of the services of plaintiffs, there was no evidence upon which to find their value, unless the jury was competent to find the value from the nature of the services and the time occupied in their performance. All the authorities admit that the question of the value of professional services is the subject of expert testimony. If a jury is at liberty, after considering the evidence upon the services of an attorney, to form its own judgment as to the value thereof, expert testimony might as well be dispensed with. A jury is sworn to decide a case according to the evidence, and the authorities are numerous that, if the jury fails to consider the evidence before it, its verdict should not stand. I think that in a case for the recovery of the value of professional services, if it should be left to a jury to determine the value of such services from its own knowledge and experience, the result would be most unsatisfactory to the profession. For the reason that I feel bound by the rule established in Head v. Hargrave, supra, it is ordered that a new trial be granted in this case.

## CORLEY v. TRAVELERS' PROTECTIVE ASS'N.

(Circuit Court of Appeals, Sixth Circuit. December 10, 1900.)

No. 805.

1. ACCIDENT INSURANCE—LAW GOVERNING CONTRACT—PLACE OF EXECUTION.

Ky. St. § 679, relating to life insurance, provides that "all policies or certificates hereafter issued to persons within the commonwealth by corporations transacting business therein under this law" which contain any reference to the application or constitution or by-laws of the corporation as part of the contract shall have attached a copy of such application or the provisions of the constitution or by-laws referred to, otherwise such provisions shall not be received in evidence or be considered as a part of the contract. An accident insurance association, having its national headquarters in another state, was composed of divisions and local posts; and one of such divisions, having subordinate posts, was located in Kentucky. Benefits were paid through the posts, which also received applications for membership and dues, and forwarded them to the division, which passed upon the eligibility of the applicant, subject to approval by the national office. Certificates were issued by the national secretary and sent to the division, through which they were received by the members. *Held*, that such association was transacting business in the state of Kentucky, within the meaning of the statute, and a certificate so issued and delivered therein to a person residing in the state was subject to its provisions.

2. SAME—FOREIGN COMPANIES—DOING BUSINESS IN STATE.

Where an insurance association in fact does business in a state by soliciting members and issuing policies therein, its contracts so made are governed by the laws of the state, regardless of whether or not it applied for the privilege of doing business therein as required by the statute.

3. SAME—CHARACTER OF COMPANY—FRATERNAL OR ASSESSMENT COMPANIES.

An association having a membership of traveling men issued certificates to its members which entitled them to benefits in case of death or injury from accident; the same being paid from a fund created primarily by the membership fees and annual dues, but for which assessments were to be made if required. There was a central or national organization, with state divisions and local posts, although members were received through the divisions where there was no post. The benefit or indemnity feature seemed to be the principal purpose of the association, and the annual dues were divided between the post, if any, the division, the central association, and the indemnity fund. *Held*, that such association was not a secret or fraternal organization under the supervision of a grand or supreme body, and whose members were received "through the lodge system exclusively," within the meaning of Ky. St. § 641, but was an insurance organization on the co-operative or assessment plan, as defined in sections 664, 665, and subject to the provisions applicable to such associations.

4. SAME—KENTUCKY STATUTE—SPECIAL LIMITATION OF ACTION.

Under the provision of Ky. St. § 679, requiring all policies or certificates issued to persons within the state by any corporation transacting business therein to have attached thereto a copy of any provision of the constitution or by-laws of the corporation referred to therein, or which is made a part of the contract, where such a corporation issued a certificate to a member which entitled him "to all the benefits accruing from such membership under the provisions of the constitution and by-laws of their association, * * * which are made a part of this certificate," the benefits in case of the death of the member to be paid to a beneficiary named, but no copy of any part of the constitution or by-laws was attached, the association cannot plead in bar of an action by the beneficiary after the death of the member a special limitation of six months contained in the constitution, but which was not shown by the certificate.

5. SAME—EFFECT OF FAILURE TO COMPLY WITH STATUTE.

In such case, however, the constitution may be looked to for the purpose of ascertaining the amount of the benefits recoverable, since the provision fixing such amount adds no new element to the contract, and the association will not be permitted to avoid the contract by its own wrong, in failing to comply with the statute.

6. SAME—DEATH FROM ACCIDENT—KILLING BY INSANE PERSON.

A provision of a policy insuring against death by accident, exempting the company from liability for death from "intentional" injury inflicted by the insured or any other person, does not preclude a recovery where the insured was killed by an insane person, incapable of forming a rational intent.

In Error to the Circuit Court of the United States for the District of Kentucky.

This action was brought to recover upon a certain certificate of membership issued by the Travelers' Protective Association of America, a corporation of the state of Missouri. The certificate was issued to J. W. Corley, dated October 8, 1894. Corley was shot and killed on June 24, 1897. Proofs of death were furnished in July, and in August of the same year the defendant company declined to pay the claim. This action was brought in the circuit court on the 10th day of June, 1898. The certificate is as follows:

"By this certificate of membership certifies that J. W. Corley, of Louisville, Ky., is a member of the Travelers' Protective Association of America, and is entitled to all the benefits accruing from such membership, under the provisions of the constitution and by-laws of this association, subject to the conditions printed on the back hereof, and the application for membership, all of which are made a part of this certificate. Benefits, in case of death, payable to Miss Sallie H. Corley, his adopted daughter. In witness whereof, this association has caused this certificate to be signed by its president and secretary, under the seal of the association, at St. Louis, Mo., this eighth day of October, A. D. 1894."

Rules.

"The member hereby agrees that the following rules shall be observed: That the Travelers' Protective Association of America shall not be liable for injuries incurred by a member in occupations more hazardous than specified in his application for membership; or in case of injuries, fatal or otherwise, wantonly or intentionally inflicted upon himself while sane or insane; or in case of disappearance, or injuries of which there is no visible mark upon the body (the body itself not being deemed such a mark in case of death); or in case of injury, disability, or death happening to the member while intoxicated, or in consequence of his having been under the influence of any narcotic or intoxicant; or death or disability when caused wholly or in part by any bodily or mental infirmity or disease, dueling, fighting, wrestling, war, or riot; injury resulting from an altercation or quarrel, unnecessary lifting, voluntary overexertion (unless in a humane effort to save human life), voluntary or unnecessary exposure to danger or to obvious risk of danger, or by intentional injuries inflicted by the member or any other person; injury received while avoiding or resisting arrest, while violating the law or violating the ordinary rules of safety of transportation companies, or riding on a locomotive; or to cases of injury caused by the disease of epilepsy, paralysis, apoplexy, sunstroke, freezing, orchitis, hernia, fits, lumbago, vertigo, or by sleepwalking, voluntary inhalation of any gas or vapor; injury, fatal or otherwise, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled; disease, death, or disability resulting from surgical treatment (operation made necessary by the particular injury for which claim is made, and occurring within three calendar months from the date of accident excepted). Any advisory surgeon, physician, or other authorized representative of this association shall be allowed to examine the person or body of an injured member as often as may be necessary, in regard to any alleged injury or cause of death, and a refusal to allow such examination shall forfeit any and all claims under this

certificate. Beneficiaries can be changed only on application to the secretary at St. Louis. Any member meeting with an accident must notify the state secretary of the division of which he is a member, and the national secretary, immediately, of said accident, giving full particulars of same, and name of attending physician. In case of failure to so notify, except because of unconsciousness or physical inability, the member shall forfeit all right to insurance benefits."

The application for membership is in the form following:

"Any white male person of good moral character, not under the age of eighteen years or over 60 years, engaged as a commercial traveler, as buyer or seller for wholesale or commission house or manufacturer, or any wholesale dealer, importer, commission merchant, or manufacturer, is eligible to membership in this association.

"Instructions to Applicants.

"When desirous of dividing the amount due your beneficiary, you must do so in fractions, viz. one-fifth, one-fourth, etc., as you desire. The beneficiary's Christian name must be given in all cases, and the beneficiary must be a member of the family of the applicant. Applications must be accompanied with five dollars, which pays the semiannual dues. The annual dues are ten dollars, payable either annually or semiannually, in advance, on July 1st and January 1st, as the applicant may direct, one dollar of which goes to the state division, one dollar to the post (where there is no post, two dollars to the state division), two dollars to expense fund, and six dollars to benefit fund.

"Objects.

"(1) To secure the repeal of all municipal, county, state, or territorial laws imposing or enforcing a license tax on commercial travelers. (2) To secure recognition from railroads, and obtain as favorable terms on transportation and baggage as are given to any other class of travelers, and to adjust all differences between railroads and commercial travelers on a fair, equitable basis. (3) To secure hotel accommodations commensurate with price paid. (4) To elevate the social and moral character of commercial travelers as a profession, and to bring about the better acquaintance of members. (5) To provide a benefit fund in case of death by accident or injury by accident. (6) To secure business connections for unemployed members.

"I, ——, being desirous of becoming a member of the Travelers' Protective Association of America, inclose herewith a membership fee of five dollars, and do warrant the following statements to be true: I do hereby certify that I am engaged in the capacity of a commercial traveler, salesman, or buyer, wholesale dealer, importer, commission merchant, or manufacturer, engaged in a legitimate commission, wholesale, or manufacturing business, and that I will comply with all the requirements of the constitution and by-laws of said association, and the terms of the certificate of membership to be issued to me, and that I have answered all questions asked in this application truthfully and to the best of my knowledge and belief, and I hereby agree that any misstatement or concealment of any facts will cause a forfeiture of membership in said association, and that this application is a part of my certificate with the Travelers' Protective Association of America; and I hereby expressly waive any and all provisions of law now existing, or that may hereafter exist, preventing any examining or attending physician from disclosing any information acquired while acting in a professional capacity or otherwise, or rendering him incompetent to testify as a witness in any way whatever.

"Benefits.

"Five thousand dollars in case of death by accident. Twenty-five dollars weekly indemnity, not to exceed fifty-two weeks, in case of accident. Two thousand five hundred dollars, loss of both legs or arms. Two thousand five hundred dollars, loss of one arm and one leg. One thousand dollars, loss of one hand or one foot. Five thousand dollars, loss of both eyes. One thousand dollars, loss of one eye.

"(1) My full name is J. W. Corley. (2) My age is 52. My height is 5 feet 7½. My weight is 165. (3) My address for mail, 635 W. Main. (4) Name of firm, Steng & Thalheimer. Business, boots and shoes. (5) Location of firm, Louisville, Ky. (6) My occupation is salesman. (7) The duties of same are salesman. (8) In case of death the benefits of my certificate shall be payable to: (a) Give individual name in full: Miss Sallie H. Corley. (b) Residence, 635 W. Main street. (c) Relationship, if any, adopted daughter. (9) What state division do you wish to be placed in? Kentucky. What post? D. (10) Are you now, or have you ever been, a member of any other state division of this association? No. (11) Have you ever had, or are you now subject to, fits or any disorders of the brain, or any mental or physical infirmities, which would thereby render you liable to personal injuries? No. (12) Do you drink wine, spirituous, or malt liquors to excess? No. (13) Do you understand that in case of accidental injuries, or death resulting from intoxication, you or your beneficiary will receive no benefits? Yes.

"This is to certify that I have carefully read the application herewith presented, and have answered all the questions herein contained truthfully, to the best of my knowledge and belief."

The association was composed of certain divisions and posts, there being a division known as the "Kentucky Division," which had a post known as "Post D," located at Louisville, Ky. This post has a president, vice president, secretary and treasurer, and board of directors. The applications of a number of persons were made at the same time as that of Corley, and the amount of money required for the dues was forwarded to the state board of directors, who pass upon the eligibility of a member. The applications were then forwarded to St. Louis, the national headquarters of the organization, where the members, including Corley, were accepted. The money which was required to accompany the application was paid to the post secretary, who forwarded it to the state secretary, who in turn forwarded it to the national secretary. Upon the election of the applicant, the national secretary notifies the secretary of the division. The national secretary issues the certificate of membership, which is forwarded through the secretary of the division to which the member belongs. Corley had paid his dues up until the time of his death, and was not in default. The testimony tended to show that Corley was killed by an insane person, incapable of forming intent to take life at the time of the shooting. The constitution contains a provision that "no action against this association for the recovery of any claims arising under the certificate of membership, or the constitution and by-laws, shall be sustained unless commenced within six months after the refusal of the association to pay the same, and the lapse of such period shall be conclusive evidence against the validity of any claim asserted if an action for its enforcement be subsequently commenced." This limitation was relied upon by the company. For the plaintiff, it was claimed it could have no effect, because of the Kentucky statute cited in the opinion.

W. W. Thum, for plaintiff in error.

Clarence Dallam, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

The learned judge who tried this case directed the jury to return a verdict in favor of the association, being of the opinion that the contract of insurance was made in Missouri, and therefore not controlled by the Kentucky statute, and consequently the action was barred by the contract of limitation of the action entered into by the association and member, because of failure to bring the suit within six months after the claim was rejected. The Kentucky Statutes (section 679) provide:

"All policies or certificates hereafter issued to persons within the commonwealth by corporations transacting business therein under this law, which policies or certificates contain any reference to the application of the insured, or the constitution, by-laws or other rules of the corporation, either as forming part of the policy or contract between the parties thereto or having any bearing on said contract, shall contain or have attached to said policy or certificate a correct copy of the application as signed by the applicant, and the portions of the constitution, by-laws or other rules referred to; and unless so attached and accompanying the policy, no such application, constitution, by-laws or other rules shall be received as evidence in any controversy between the parties to or interested in said policy or certificate, and shall not be considered a part of the policy or of the contract between such parties. The said policy or certificate, application, constitution, by-laws or other rules shall be plainly printed, and no portion thereof shall be in type smaller than brevier: provided, however, that nothing in this section shall be construed as applying to health certificates or constitutional receipts, or other evidences used in reinstatement of a policy or certificate."

The purpose of this statute is apparent, and requires that the portions of the constitution and by-laws or rules of the association which are to form part of the policy or contract between the parties, or to have any bearing upon the same, shall be plainly printed and attached to the certificate. It has become so common as to have occasioned judicial comment in more than one instance, that parties obtaining insurance may be misled from the failure to read the many conditions and stipulations inserted in fine-print clauses of policies or embodied in the provisions of lengthy constitutions. This statute is designed to place the conditions upon which the policy is issued in plain and direct form upon the certificate or policy, in order that the policy holder or member may become acquainted with the provisions of his contract, and leave no room to claim that he has made any other or different contract. The present case is a good illustration of the fairness and wisdom of such a course. Upon the face of the certificate issued to a member, it is apparent that the constitution and by-laws contain a statement of the measure of obligation undertaken by the company to the assured; yet this constitution is not set forth, and there is nothing upon the certificate to indicate to the member the short period of limitation within which an action must be brought. The beneficiary, finding a certificate among the effects of the deceased person, but not discovering the constitution, may have no notice of this short period of limitation, and be led to rely upon the general law of the state, which in the present case, we are advised, is five years from the time the cause of action accrued. The purpose and meaning of the statute are plain. Does it apply to this case? The statute, in terms, seeks to regulate certificates issued to persons within the commonwealth of Kentucky by corporations transacting business therein. The right of a state to determine upon what terms it will permit foreign corporations to do business within its borders is too well established to need comment. Repeated adjudications of the supreme court of the United States have established the doctrine that foreign corporations do business in a state as a matter of grace, and not of right, and the state may prescribe such rules as it may see fit to regulate the privilege granted, and to protect its citizens from the abuse of corporate powers. Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup.

Ct. 281, 43 L. Ed. 552; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; Society v. Clements, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; Insurance Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116.

The learned judge, in granting the prayer for peremptory instruction in favor of the association, made the case turn upon the consideration that the certificate of membership was issued in the state of Missouri. We do not think this proposition necessarily determines the case, although in this connection it may be remarked the certificate was forwarded through the office of the company in Kentucky, first to the state division, and thence reaching Corley. The certificate was within the control of the company's agents until delivered to Corley. This statute, in using the terms "certificate issued," refers to the well-known practice of such companies to grant certificates of membership which shall entitle the recipient to the benefits of the insurance. In analogy in this respect to policies of insurance, the certificate purports to be a contract of insurance, giving the "benefits" in case of death to the beneficiary. The true test, in our judgment, is whether the obtaining of this membership—the issuing of this certificate—was transacting business within the commonwealth of Kentucky with persons therein. An examination of the facts shows that all the essential business in obtaining the memberships was transacted in Kentucky. In that state the association had established a division. There it received applications and enrolled members, and passed upon their eligibility before forwarding the application to the home office. The local post of which Corley was a member was organized and had its habitation at Louisville, Ky. There the dues of members were paid, benefits were dispensed, and, except the forwarding of the applications and money to the home office for its action, all the essential features of the business were transacted. In the light of this proof, we cannot doubt that, within the meaning of this statute, this corporation was transacting business and issuing certificates to persons within the commonwealth of Kentucky. If it were not so, the company may have all the benefits of collecting dues, organizing divisions and posts, holding meetings, and otherwise carrying on its business, and avoid the force of statutes passed to regulate business of such character in Kentucky, by simply maintaining its home office at its place of organization, and there finally passing upon applications for membership. We think this statute was passed with a view to bringing within its terms and subjecting to its provisions corporations which might avail themselves of the right to transact such business in the state. It is urged that there is no proof that the association had ever applied for the privilege of doing business under this statute, or was acting thereunder. This can make no difference, if by the terms of the law the company came within its provisions. The fact that it saw fit to transact business within the state required it to comply with the laws thereof, and, having had the benefit of such business and received the money of the assured in that state, it is deemed to have submitted to the jurisdiction thereof. Berry v. In-

demnity Co. (C. C.) 46 Fed. 439. It is further urged that this statute had no application, because the association is not of the character which the law undertakes to regulate. Section 641, Ky. St., provides:

"The words 'insurance company or insurance corporation,' as used in this article, shall be held to mean and include any association, individual, company or corporation, partnership or joint stock company engaged in or carrying on, in any manner, the business of insurance in this state, except that the provision of this chapter or article shall not apply to secret or fraternal societies, lodges or councils, which are under the supervision of a grand or supreme body, and secure members through the lodge system exclusively, and pay no commission nor employ any agents, except in the organization of and supervision of the work of local subordinate lodges or councils."

Section 664 provides:

"Any corporation, association or society which issues any certificate, policy or other evidence of interest to, or makes any promise or agreement with its members, whereby, upon the decease of a member, any money or other benefit, charity, relief or aid is to be paid, provided or rendered by such corporation, association or society, to the legal representative of such member, or to the beneficiary designated by such member, which money, benefit, charity, relief or aid is derived from voluntary donations or from admission fees, dues and assessments, or any of them, collected or to be collected from the members thereof, or members of a class therein, and interest and accretions thereon, or rebates from amounts payable to the beneficiaries or heirs, and wherein the paying, providing or rendering of such money or other benefit, charity, relief or aid is conditioned upon the same being realized in the manner aforesaid, and wherein the money or other benefit, charity, relief or aid is applied to the uses and purposes of such corporation, association or society, and the expenses of the management and prosecution of its business shall be deemed to be engaged in the business of life insurance upon the co-operative or assessment plan, and shall be subject only to the provisions of this subdivision."

Also section 665:

"Any corporation, association or society which issues any certificate, policy or other evidence of interest to, or makes any promise or agreement with its members, whereby, upon the sickness or other physical disability of a member, and not by reason of having attained a certain age, any money or other benefit, charity, relief or aid is to be paid, provided or rendered by such corporation, association or society, to such member or beneficiary designated by him, which money, benefit, charity, relief or aid is derived from voluntary donations or from admission fees, dues, assessments, or any of them, collected or to be collected, from the members thereof, or members of a class therein, and interest and accretions thereon, and wherein the paying, rendering or providing of such money, or other benefit, charity, relief or aid is conditioned upon the same being realized in the manner aforesaid, and wherein the money or other benefit, charity, relief or aid is applied to the uses and purposes of such corporation, association or society, and the expenses of the management and prosecution of its business, shall be deemed to be engaged in the business of casualty insurance upon the co-operative or assessment plan, and shall be subject only to the provisions of this subdivision."

The constitution of the association was put in evidence, afterwards excluded by the court, and was not formally offered, except the sections regarding the amount of the recovery and the limitation of the action. However, the defendant attaches to its answer as an exhibit a copy of the constitution, which, it appears, was compiled several years after the issuing of the certificate, but there is no suggestion that it is not the constitution in force at the time of the issuing of the certificate in question; and when thus introduced into

the record by the association, although the reply makes the issue that it is not a true copy of the constitution, we may look to it, so far as the association is concerned, with a view to determining the character of the organization, and we find that the annual dues of the association are $10, apportioned $1 to the post, $1 to the state division,—where there is no post, $2 to the state division,—$6 to the general indemnity fund, and $2 for general expenses. Section 1, art. 6. Further:

"Whenever the indemnity or benefit fund is reduced by the payment of indemnity claims to less than $5,000, the board of directors may order an assessment, not to exceed two dollars, upon each member of the association, a notice of said assessment to be mailed to each member by the national secretary; and all members failing to pay said assessment within thirty days shall cease to be members of this association." Section 3, art. 6.

Article 9 provides:

"Section 1. The indemnity or benefit fund shall be established and maintained out of the annual dues, as prescribed in section 1 of article 6, and the membership fee, as prescribed in section 2 of article 2."

We think the association comes within the provisions of the Kentucky statute just cited; for, while it has among its purposes the promotion of acquaintance and friendship among traveling men, and to obtain for them better railroad rates and hotel accommodations, it may be said to be its principal purpose to provide a benefit fund for members in case of death or accident. This fund is derived from dues, and when depleted is replaced by assessment upon members. The certificate of membership provides for payment of a specific sum for death by accident. Provisions are made for enforcing and collecting the payment of dues. We think this association comes under the Kentucky statute, unless it is within the exception embodied in section 641 of the statutes. We find nothing in the organization of a secret or fraternal character. We do not find the supervision of a grand or supreme body and members secured by the lodge system exclusively. Not all commercial travelers may become members entitled to the benefits of the insurance. An application is required, setting forth the willingness of each applicant to submit to a physical examination, and waiving all provisions of law now existing or that may hereafter exist preventing any examining or attending physician from disclosing any information acquired while acting in a professional capacity or otherwise, or rendering him incompetent to testify as a witness in any way whatever. The "benefits" are stated at a fixed amount in case of death, and certain specific sums for various injuries. It is evident that persons not answering these questions satisfactorily, though otherwise eligible, would be rejected as members. We do not discover in this association the features which characterize associations which the statute exempts from its provisions. We are strengthened in this conclusion by a letter from the superintendent of the insurance department of Missouri, which seems to have been admitted without objection, wherein it is declared:

"After an examination of the constitution and by-laws of the Travelers' Protective Association of America, forwarded by you to this department, I

beg leave to inform you that the association not only fails to meet the requirements of the law governing this class of organizations, in reference to having a lodge system with ritualistic form of work," etc.

We concur in the view herein expressed that the association has no lodge system, with ritualistic form of work, and, we may add, no lodge system by means of which members are exclusively secured. In order to exempt it from the requirements of the Kentucky statute above quoted, it must secure its members through that system exclusively. We are, therefore, of opinion that this association was one coming within the purview of the Kentucky statute, and was transacting business when it obtained members and issued certificates to persons within that commonwealth. The provision of the constitution relied on was therefore required to be printed upon or attached to the certificate, and for failure to comply with the law in this respect the limitation is not a defense.

It is urged that this construction will prevent the plaintiff from recovery under this certificate, as the constitution must be looked to in order to make out a recovery of any amount, and no part of it is printed upon the certificate. But we find that the certificate undertakes that the "benefits," in case of death, shall be payable to the beneficiary. It does not introduce any new element of contract between the parties to ascertain the amount of this benefit from the constitution. The purpose of this statute is to require the company, in its policy or certificate, to bring all of the provisions of the contract to the attention of the insured, and definitely fix the conditions of the insurance beyond the power of others to change or enlarge the contract after his decease. To escape payment because the certificate did not comply with the statute, by failing to print the provisions fixing the amount to be recovered in case of death, would be permitting the company to avoid the contract by its own wrong in failing to comply with the statute.

It is urged further by defendant in error that it was correct to instruct the jury for the defendant, because it appears that, Corley having been killed by a gunshot wound inflicted by another, his death was not accidental, and that the company was not liable for death by intentional injury. We think it is the true rule that if the deceased was killed by one incapable of distinguishing between right and wrong, or forming a rational intent to do the act, then the death would not be intentional, any more than it would be if it happened through some unforeseen accident. There is testimony in the record tending to show that the slayer of Corley was insane at the time of the act, sufficient to carry the question to the jury.

It is also urged that the beneficiary was not adopted in accordance with the laws of Kentucky, and therefore had no insurable interest in the life of the assured. The record of adoption, it is said, does not disclose that the wife of Corley, then living, joined in the application for adoption. We think, however, for the purposes of this case, the adoption is sufficiently shown, and against collateral attack it will be presumed that the statute of Kentucky was complied with; there being nothing in the record to exclude this conclusion.

We think, therefore, that the case should have been submitted to

the jury upon the issue of intentional killing, and that the court erred in holding the case barred by the six-months limitation contained in the constitution. The judgment is reversed, and the cause is remanded for further proceedings in accordance herewith.

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WHITCOMB et al. v. McNULTY et al.

(Circuit Court of Appeals, Seventh Circuit. January 16, 1901.)

No. 685.

MASTER AND SERVANT — RAILROADS — INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE.

A locomotive engineer, whose train was standing on a siding waiting for a passenger train, went under his engine to repair the air-brake apparatus, knowing that another freight train near him would back in on the same siding in the rear of his train in order to allow the passenger train to pass. He failed to set the brake on his engine, which would have held his train, and failed to notify either train crew that he was under his engine, and did not display any signal or warning. While thus employed, the other freight train backed against his train, forcing it forward, killing him instantly. *Held*, that he was guilty of contributory negligence.

Grosscup, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Mary A. McNulty, as administratrix of the estate of Patrick McNulty, deceased, brought suit against the receivers of the Wisconsin Central Company, then in the possession and operation of its line of railway, to recover damages for the death of Patrick McNulty, her intestate, under two statutes of the state of Minnesota,—one allowing a recovery by the personal representative of a deceased person for his death caused by the wrongful act or omission of another, where, if death had not ensued, the deceased might have maintained an action, the amount recovered to be for the exclusive benefit of the widow and next of kin of the deceased; the other imposing liability upon a corporation for the negligent act or omission of a co-servant causing injury. At the trial there was a verdict for the plaintiff below, and the cause is brought here for review. At the conclusion of the evidence the defendants moved the court to direct a verdict for the defendants. The motion was denied, and that ruling, among others, is assigned for error. The uncontroverted facts established at the trial were these: Gladstone, in the state of Minnesota, is a station on the line of the Wisconsin Central Railway. The main track of the railway there runs substantially east and west, the passenger station being on the south side of and immediately adjacent to the main track. North of and parallel to this main track, and connected with it at either end, is a siding or "passing track" 1,290 feet in length from switch to switch; but only 990 feet of it could be used by trains without interfering with the main track. At a point 98 feet west of the switch, connecting the siding with the main line west of the station, the line of railway was crossed by the main line of the St. Paul & Duluth Railway, and at a point 435 feet west of that switch there was a public highway crossing. Patrick McNulty, on the 27th day of September, 1897, was a locomotive engineer in the service of the receivers, and was in charge of an engine pulling freight train No. 22, bound eastward from Minneapolis. The train arrived at Gladstone at 2:40 p. m., where it was known that it would meet freight train No. 23 and passenger train No. 1, both westward bound, and in the order named. While train No. 22 was switching at that station, train No. 23 from the east arrived, and was stopped east of the station and for some 10 or 15 minutes, until train No. 22 had finished switching, had coupled up and backed upon the siding or "passing track," ready

to proceed eastward upon the arrival of passenger train No. 1. McNulty's train, No. 22, was composed of an engine, 17 cars and a caboose, of which 14 had air brakes connected and working. The engine was also equipped with air brakes, a pair of brakes upon each pair of driver wheels and upon both sets of tank wheels. When the train stopped upon the siding, the brakes upon the caboose were set, but not on the other cars or engine. Upon the siding. and to the westward of train No. 22, were two box cars, coupled and with brakes set, standing about 10 feet from the caboose of train No. 22, the rest of the siding or "passing track" being clear, but having space only for four or five cars. When train No. 22 went upon the siding, train No. 23 proceeded west along the main track, passing train No. 22 and the station house, and stopped when the entire train had passed beyond the west switch. Here it stood for a period of from 4 to 10 minutes, as variously estimated by the witnesses. This train was composed of about 30 cars, and was drawn by 2 locomotives, and was ordered by its conductor to pull down the main track west of the siding, or "passing track," and then back in on the siding, so far as possible, with the design that train No. 22 should proceed eastward immediately upon the arrival of passenger train No. 1, and train No. 23 would then back eastward upon the siding, allowing the passenger train to proceed westward. There would appear to have been on the part of the engineer of train No. 23 some demur to this order of the conductor on the ground that it would require them to open the train at the crossing of the Duluth Railway and at the highway beyond, and would lose time, but it is clear that the conductor adhered to the order, and left the train, entering the station house, and leaving the management of the train in the hands of the brakeman. As train No. 23 passed westward upon the main track, McNulty, the engineer of train No. 22, was standing on the ground near his engine, and between it and train No. 23. The conductor of train No. 23 left the engine of that train when near McNulty, and had some conversation with him, and, as the caboose passed, the conductor again boarded the train, and left it again at the station. This conductor testifies that he told McNulty that train No. 23 would back in on the siding in the rear of train No. 22, to be ready to follow No. 22 out after the arrival of the passenger. Others who were near to the parties testified to a conversation, but could not tell what was said. The fireman of train No. 22 thought they were joking upon some subject. After train No. 23 had passed westward, McNulty, taking a torch and a wrench, went under his engine to find and repair a leak in the air-brake apparatus, which had been noticed before leaving Minneapolis, and had increased so that the air pump worked continuously, threatening to impair the efficiency of the air brakes. It was his duty to find and repair that leak before leaving that station. To do this, McNulty lay upon the ground upon his left side with his head and arms extended under the locomotive between the rear driving wheel and the forward wheel of the tender. His fireman had gone to the front of the engine, and was occupied there a short time in some labor connected therewith. He returned on the south side of the engine, and as he mounted his cab saw McNulty lying there. McNulty had notified no one of his intention to go under the engine, and no one of either crew knew that he was in that position, except his fireman, who saw him there as he mounted the gangway. By turning a lever in the engine, McNulty could have set the brakes upon all the drive wheels and tender wheels of the engine and upon all the wheels of the 14 of the 17 cars in train No. 22, and the evidence showed that, if the brakes had been so set, it would have held the train under the circumstances. No flag was displayed, or any warning given by McNulty to any of the crews of either freight train. The fireman was not directed or requested to keep a lookout and give warning of any movement affecting McNulty's safety. The brakeman of train No. 23, upon that train passing the switch, threw the switch over, and signaled No. 23 to back in upon the "passing track," which signal was obeyed. The brakeman walked easterly searching for a link and pin to use in coupling the two detached cars, which were on the siding, and, finding none, gave the signal to stop, which was obeyed. He entered his caboose, and, finding what he wished, gave the signal to continue backing, which was done. He inserted the coupling pin and link in the easterly drawbar of his caboose, and then walked easterly ahead of the caboose to make the coupling

when the two cars should come in contact, and that he did. The recoil of the impact between the caboose and the two detached freight cars, together with the slack of train No. 23, which was in because the moving force came from the westerly end, impelled the two detached cars against the caboose of train No. 22, and drove that train forward a car length or more, leaving a space between the caboose of train No. 22 and the easterly end of the two detached cars of from 6 to 10 feet. Train No. 22, driven forward with the slack of that train, sent its engine forward upon the main line a distance of a car or a car and a half. The wheels of the tender of the engine on train No. 22 and of the front truck of the first car passed over McNulty, killing him instantly. Train No. 23 omitted to give any signal by whistle when it commenced to back, but it is claimed the bell was rung. The following rule of the company was introduced in evidence: "452. Car inspectors and others, whose duties require them to go under cars when in trains, must first position their blue signal, and give notice to the conductor and engineer of their intention. At district and division terminals and other inspection stations, the conductor of the train must see that the inspector is clear of the train before giving the signal to start."

Thomas H. Gill, for plaintiff in error.

J. V. Quarles and George Lines, for defendant in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after the foregoing statement of the facts, delivered the opinion of the court.

We assume that the question of the negligence of the operators of train No. 23 was properly submitted to the jury, and that its verdict is conclusive upon that subject. The refusal of the court to direct a verdict for the defendant below, and upon which error is here assigned, presents the question whether, as matter of law, the deceased was guilty of negligence directly contributing to his death. If the evidence upon that question is conflicting, its determination falls within the province of the jury, and we are concluded by the verdict; but where the facts are undisputed, or clearly preponderant, they are questions of law for the court. Southern Pac. Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485. If McNulty was informed that train No. 23 would back upon the siding, it was sheer recklessness to place himself in the position of peril to which he was necessarily subjected. If he was not so informed, he had no right to assume, if he gave any thought to the subject, that it would not back upon the siding, and had no right to place himself in a dangerous position without warning to any one, and without setting the air brakes, either of which acts would have rendered his person reasonably secure. The rule of the company with respect to inspectors is not, in a strict sense, applicable here; but, if applicable, it would only declare a duty which the law imposes,—that proper precautions under such circumstances should be taken. Placing himself in a position of great danger with a train near him which he knew must come upon the siding in order to allow the passenger train, upon its arrival, to move westward, he had no right to assume that it would not enter upon the siding, and possibly come in contact with his train, until the arrival of the passenger train; for, as an experienced locomotive engineer, he knew, as all trainmen know, that the actions of those in charge of trains are governed by desire to save all time possible. He was bound to know that it might come in upon that

siding in advance of the arrival of the passenger train, that it might come in contact with the rear end of his train, and in the exercise of the most ordinary care he should have provided against such contingency either by notice to the trainmen, or by the simple movement of setting the air brakes upon his own train. If it was manifest that a blow such as came would drive McNulty's engine upon or so near to the main track as to endanger the expected passenger train, that was only an additional reason why he should have taken every reasonable precaution against such a movement of his engine. There was in that situation nothing equivalent to a signal to the crew of the other freight train unless they knew of the danger involved. There is no evidence that they possessed such knowledge, and, if the air brakes had been set, such danger could not have arisen. We think that no argument could add force to the undisputed facts, which disclose incontestably the negligent omission upon the part of McNulty, clearly contributing to his tragic death. In Southern Pac. Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485, Pool, a car repairer, went under the last car of a train of 18 or 20 cars, due to leave in a short time, and the car was detached from the train. One Rice was on the watch for any coming car or engine. As an engine backed, Rice called to Kilpatrick, a switchman, to stop the train, and it did so within about six feet of the car. Kilpatrick immediately gave the signal to back again, which signal was obeyed, the caboose striking the car with considerable force. In the meanwhile, Pool, who presumably had gotten out from under the car, went back to his work. His companion saw Kilpatrick's signal to back down, and cried out to Pool, who was unable to extricate himself, and was caught and injured. The court held that the injury to Pool was the result of his own inexcusable negligence in going under the car without giving proper signal of his position, and in remaining there in the presence of impending danger. In Hulien v. Railway Co. (Wis.) 82 N. W. 710, the case is on all fours with the one we are considering. There, as here, the locomotive engineer went under the engine to perform some duty, while another freight train had backed upon the same track, and its engine was detached, and was switching upon another track. There, as here, the deceased failed to set the brakes upon his engine or upon the train, and failed to notify any of the train crew that he was under the engine, and did not display any signal of warning. In each of these cases the court ruled that, as matter of law, the deceased was guilty of negligence preventing recovery. We are unable to distinguish the case in hand from the authorities cited, and are constrained to the conviction that the court below should have directed a verdict for the defendant upon the undisputed facts of the case.

GROSSCUP, Circuit Judge (dissenting). I am constrained to dissent. The facts in this case do not result, in my judgment, in fixing upon McNulty such contributory negligence as will prevent his recovery.

It should be noted, before proceeding to the reasons for this dissent, that it was a fairly disputed question of fact whether the con-

ductor of train No. 23 notified McNulty that he intended to back in or not. The conductor so testified, but McNulty's fireman, who was within hearing distance, and says he heard all that was said, testifies to the contrary. Other witnesses fairly support him, and the conductor's testimony is impeached, by contrary declarations made by him prior to the trial. On this review I think we must assume that the jury found that no such notice was given to McNulty, and was supported in that finding by a sufficient weight of evidence.

The law, in assigning to each individual the proper measure of his carefulness, recognizes the activities of life, not as, ideally, they should be, but as actually they are. It recognizes that on all sides, in the relation of men toward each other, there is shortsightedness, and often negligence; and it requires each to bear this in mind, and to take reasonable precaution against its consequences. No one is exempt from a judgment of self negligence, simply by having acted upon the assumption that others will not act negligently. There are situations where the usual carelessness of others is such that it ought to become a part of one's habitual expectation.

Southern Pac. Co. v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485, is illustrative. Pool's duty was repair work on cars, both in the shop, and on the tracks in the yard. On the occasion of the injury he was under a car, belonging to a train of eighteen or twenty cars, standing on one of the six or seven tracks, upon which there was a frequent moving to and fro of trains, and a constant switching of cars backward and forward. There was no flag, or other signal, indicating his presence under the car, nor had the engineer any knowledge of his peril. The court held that, under these circumstances, Pool was inexcusably negligent. He had no right to assume that there would be no switching of cars—a thing to be expected—and, in consequence, no collision with the car under which he lay. A bumping together of cars in this way is one of the every day occurrences in a railroad yard.

Hulien v. Railway Co. (Wis.) 82 N. W. 710, is another illustration. Hulien, the victim of the accident, was the engineer of freight train No. 43 which, having arrived at Wittenberg, pulled in upon the passing track. Shortly afterwards freight train No. 50, arriving from the opposite direction, and passing down on the main track, backed in upon the passing track, stopping its caboose within two or three cars' length from the rear end of Hulien's train. The engine of No. 50, with several cars that had been detached, became engaged for a time in switching upon another track. In the mean time the passenger train, for which both trains were waiting, came and left.

Soon after the arrival of train No. 50 Hulien went under his engine to make some repairs. No brakes were set upon the engine, nor upon the train; nor was any notice given to Hulien's train crew, or to the crew of No. 50; nor was any signal placed at the rear of Hulien's train.

The passenger train having gone, the engine of No. 50 backed in again to take on its train of cars, and in doing so forced its own caboose against the caboose of Hulien's train, impelling it forward,

and causing the locomotive to run over the engineer, who was still under the engine.

It will be noted that the injury took place after the passenger train had left, and when, under all usual conditions, the engine of train No. 50 might be expected to couple upon the detached cars. The engineer, remaining under the engine in the face of such probabilities, is not guiltless of negligence. He ought, as a part of the usual course of events, to have expected that No. 50 would back in; and, perhaps, had no right to assume, that its momentum would be so nicely balanced, that no bumping would occur.

But while the law thus requires precaution against the foreseeable carelessness of others, it does not visit the penalties of negligence upon one who, having no reason, either in the usual course of events, or the particular circumstances of the occasion, to apprehend danger, has acted as if no danger impended. It may be carelessness to lack foresight against what, when it occurs, would not be regarded as unusual; but certainly not to lack foresight against that, which, when it occurs, comes, in the nature of things, as a complete surprise. An engineer, for instance, who sees a person walking on the track far ahead of the train is not guilty of negligence in supposing that he will get out of the way before the train reaches him. Beach, Contrib. Neg. § 38, and cases cited. One is not required to be so far seeing that nothing will surprise him. Now let us apply these distinctions to the case under review.

McNulty's engine stood as near the east end of the passing switch as would give it clearance from the incoming passenger train. The siding was too short to accommodate both freight trains at once; indeed, it could accommodate but a few cars more than McNulty's train. It was manifest that before the passenger train could obtain a right of way westward from the station, McNulty's train must have pulled out, so as to allow the other freight train to back in. The passenger train would, upon arrival, be blocked until McNulty had pulled out. It was manifest, also, that a blow on the rear, such as came, would drive McNulty's engine upon the main track; and as the passenger train was momentarily expected, might cause a collision of McNulty's engine with the incoming passenger train. I cannot escape the conviction that the incoming passenger train—momentarily expected,—with McNulty's engine carefully balanced in the clearance, was, to the crew of the other freight train, a physical situation more impressive than any signal or word of danger. Is the recklessness of the other crew that, in the face of such a danger to the passenger train, drove McNulty's engine forward, to be regarded as anything less than criminal? Is McNulty to be held to an expectation—or a suspicion—of that kind of recklessness on the part of the other crew? What use of a flag, or of verbal notice, to men whom such a situation, filled with such danger, would not deter?

The case under review is, in this respect, different from Southern Pac. Co. v. Pool, and Hulien v. Railway Co. In the Pool and Hulien Cases the law imposed a duty to take precaution against the carelessness of others, for the carelessness there complained of was

within the reasonable apprehension of the person injured. Beach, Contrib. Neg. § 38 and cases cited in note. In the McNulty Case there was no such duty, for there could reasonably be no such apprehension. The cases fall on opposite sides of the line that marks the boundary between one's duty to look out for such negligence as may, without unusualness, attend the conduct of others, and one's exemption from duty to look out for what, in the natural order of events, is not to be thought of.

The judgment is reversed and the cause remanded with directions to the court below to award a new trial.

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CRANE et al. v. C. CRANE & CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1901.)

No. 695.

1. CONTRACTS—VALIDITY—MUTUALITY.

While one may bind himself by a contract to furnish another with such supplies as may be needed during a specified period of time for some certain business or manufacture, or with such commodities as the purchaser has already contracted to furnish to others, the quantity in such cases being capable of at least approximate estimation when the contract is made, an agreement by a wholesale dealer to supply a retailer during a certain time, at stated prices, with so much of a commodity as the purchaser may require for his trade, which leaves it practically optional with the purchaser to increase or diminish his orders with the rise or fall of prices, as may be most to his advantage and the corresponding disadvantage of the seller, is void for want of mutuality.

2. SAME—BREACH—QUESTIONS FOR JURY.

In an action to recover a balance due for lumber sold and delivered, it appeared that plaintiff was a manufacturer of lumber, and defendants were dealers who had purchased from plaintiff continuously for a number of years; that there was no fixed time within which payment was required to be made, but that customarily settlement was made promptly after shipment, either in cash or paper due in 60 or 90 days. Defendants introduced evidence tending to show that plaintiff accepted an order on April 8th, for a certain kind of lumber, to be delivered within the next 30 or 60 days; that on June 3d, when a comparatively small proportion of such order had been delivered, plaintiffs refused to make further delivery until all shipments made during April and May had been paid for, about half of such shipments having been under such order; and that, the price having advanced, defendants refused to pay without assurance that the remainder of the order would be filled. *Held*, that such evidence raised questions of fact respecting the right claimed by defendants to recoup damages for breach of the contract made by the acceptance of such order, which should have been submitted to the jury, and that the direction of a verdict for plaintiffs was error.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The action in the Circuit Court was in assumpsit upon the common counts by the defendant in error against the plaintiffs in error, to recover the value of certain lumber sold and delivered by the latter to the former. The account annexed was for balances due upon merchandise sold on twenty-three different dates, running from the 22nd of February, 1898, to the 20th of May, 1898, inclusive, amounting in all to four thousand and fifty-seven dollars and twenty-three cents.

Against this the plaintiffs in error sought to recoup or set off the damages said to have been suffered by them, in the failure of the defendant in error to fill three certain orders relating to dock oak lumber of the dates of October 19th, 1897, January 31st, 1898 and April 8th, 1898; but at the conclusion of the evidence the court instructed the jury to disregard these claims, and return a verdict for the plaintiff for the full amount claimed. Error to this instruction is assigned.

It is insisted by the plaintiffs in error that in December, 1896, they made a contract with the defendant in error, resting wholly in parole, however, by the terms of which the latter was to furnish to the former all the dock oak that the former would require for their trade in the Chicago market during the year 1897, at certain prices not in dispute, and that this contract was broken in the failure to fill the order of October 19th, 1897. It is insisted, also, that in January, 1898, a like contract was made for the year 1898, except that the price was to be one dollar per thousand feet in excess of the prices for the preceding year, and that this contract was broken in the failure to fill the orders of January 1st, 1898, and April 8th, 1898 respectively.

The defendant in error had been for many years engaged in cutting, manufacturing, and selling lumber largely at wholesale with their principal place of business at Cincinnati; the plaintiffs in error had for nine years been engaged in Chicago in the business of buying and selling hard wood lumber, including dock oak. In supplying their customers in this trade the plaintiffs in error dealt largely with the defendant in error. It does not appear that the plaintiffs in error were manufacturers, or that the lumber purchased by them went into use or consumption by them, except as they resold it to their customers. They were exclusively lumber merchants, obtaining their supplies largely from the defendant in error, and reselling them to their own customers.

There was no evidence that the defendant in error accepted the orders of October 19th, 1897, or January 31st, 1898, or that, independently of the general contract relied upon, they agreed to fill them; nor was there evidence that the plaintiffs in error, in reliance upon the alleged general contract of January, 1898, had, previous to these orders, entered into any contracts that required the lumber ordered.

The order of April 8th was sent by mail. Respecting this defendant in error wrote: "We are doing all we can on all of your orders and are shipping you more lumber than to any one of our other customers. I have called the boys' attention to-night to the 24′ and will hustle it all I can."

Omer F. Crane, one of the plaintiffs in error, testifies that a short time subsequently he took this order to the defendant in error, and had the following conversation with C. Crane, its president: "He" (C. Crane) "looked it over and said he would have to have more money for this lot of stuff. I told him we had made out contracts and we couldn't stand any more money than that. He said that he wouldn't fill it. So that was about all that was said that day. The next day I said 'What are you going to do about this thing? Are you going to fill it or not? If you are not going to fill it, I am going to Parkersburg and get it filled.' He said, 'I will tell you what I will do. I will take this order and fill it, but I won't fill any more at those prices.' So he got up with the letter and I says, 'Will you sign this acceptance,' and he said 'that is not necessary. I will have it entered on the book, and will have it filled.' And we walked over to Mr. Mowbray and said, 'Fred, put this order on the book and see it is filled, and don't fill any more at those prices without first consulting me.'" This testimony is uncontradicted.

The order of April 8th was to have been filled within the next thirty and sixty days. It was but partially filled. In the meantime prices rose, and the defendant in error failed to complete the order.

In the general lumber dealings between the plaintiffs in error and defendant in error there was no particular agreement respecting the time of payment. Sometimes the lumber was paid for promptly, and sometimes by the giving of sixty or ninety days paper. On this general account the plaintiffs in error were in arrears, both for the months of April and May, amounting June 2nd, according to their own letter, to the sum of thirty-eight hundred dollars, about twenty-one hundred of which was for lumber shipped under the order of

April 8th. Respecting this arrearage the defendant in error wrote, May 31st, 1898, as follows: "I want you to send us what is due us for April at once; also the May account as soon as you get it checked up. It is just our time for laying in timber and we are using all the money we can get hold of, and we are not in shape to give long credit to anybody." Replying to this, June 2nd, 1898, the plaintiffs in error wrote: "We owe you about $3800.00 which amount we will hold until you make a showing that you are going to furnish the oak. We don't blame the firms for kicking; (the firms with whom it is claimed plaintiffs in error had contracted to furnish dock oak) they have the docks torn up, have 2 or 3 tugs and pile driver laying idle waiting for Oak. The different firms owe us about $6000.00; they say they would not pay us one cent of money until we fill their orders. The $3800. that we hold of yours will be a very small per cent. of the amount it will cost you if you don't go ahead and fill the order." To this, defendant in error, June 3rd, 1898, replied as follows: "We will not load another board of lumber until we get paid for what we have already sent you. Now, here are bills that are 60 days past due, as this lumber was all to be paid for within ten days after date of invoice less 2%. We do not care about giving credit any further than we have, and we will not send any more lumber until this is paid for."

The further facts are stated in the opinion.

Walter Olds, for plaintiff in error.

J. K. Boyesen, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

The question lying at the threshold of this case is whether the so-called contract of December, 1896, relating to the sale of dock oak lumber for the year 1897, and the so-called contract of January, 1898, relating to the same subject for the year 1898, are enforceable.

The contention is that, being in parole, the first is obnoxious to the Statute of Frauds, and both are void for want of mutuality.

It is within legal competency for one to bind himself to furnish another with such supplies as may be needed during some certain period for some certain business or manufacture; or with such commodities as the purchaser has already bound himself to furnish another. Reasonable prevision in business requires that such contracts, though more or less indefinite, should be upheld. Thus a foundry may purchase all the coal needed for the season; or a furnace company its requirements in the way of iron; or a hotel its necessary supply of ice. Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774; National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427; Railway Co. v. Witham, L. R. 9 C. P. 16; Smith v. Morse, 20 La. Ann. 220. So, too, a dealer in coal in any given locality may contract for such coal as he may need to fulfil his existing contracts, regardless of whether delivery by him to his customers is to be immediate or in the future. Shipman v. Mining Co., 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1051. In all these cases, contracts looking towards the future, and embodying subject-matter necessarily indefinite in quantity, have been upheld; but it will be observed that, although the quantity under contract is not measured by any certain standard, it is capable of an approximately accurate forecast. The capacity of the furnace, the needs of the railroad,

or the requirements of the hotel are, within certain limits, ascertainable by the vendor. He is thus enabled to make reasonably accurate calculation of the extent of his obligation. Then, too, the purchase is only an incident of the vendee's business. Presumably the business will go on irrespective of a rise or fall in the prices of subsidiary supplies. There thus remains to the vendee little or no temptation, on account of the rise or fall in prices, to greatly enlarge or diminish the quantity of his orders.

The contracts brought to our attention have no such standard of approximate certainty, and no such safeguard against opportunity to impose upon the vendor. Plaintiffs in error were at the time engaged in no manufacture or business that required dock oak lumber as an incidental supply, nor were they under any contract to deliver such lumber to third persons at fixed prices. They were lumber merchants pure and simple—middlemen between the defendant in error, and such customers as usually come to a merchant. Should the contract under discussion be upheld, the plaintiffs in error would be held to occupy this advantageous situation: If the prices of dock oak lumber rose, they would, by that much, increase their ratio of profits, and probably, coming into a situation to outbid competitors, increase, also, the quantum of orders; if, on the other hand, prices fell below the range of profits, the orders could be wholly discontinued.

On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but, should prices rise, the orders sent in would be compulsory, and the loss measured, both by the increase of the ratio of profits, and the probable increase of the quantum of orders. It is needless to say that such a contract is unilateral, and void for want of mutuality. It, in effect, binds the defendant in error alone, for it leaves the plaintiffs in error—whose whole interest is embodied in the prices obtainable—in a situation to either go on, or to discontinue, as such interest developes.

This disposes of every specification of error relating to set-off or recoupment, except such as relate to the order of April 8th, 1898. The consideration of this order involves a state of facts, and an application of the law, wholly apart from the general contracts just discussed.

There was testimony, sufficient to go to the jury, tending to show that this order was accepted by the defendant in error, and was, from the date of such acceptance, independently of any general contract, a binding obligation between the parties; that upon that date, and for years previously, the parties had had mutual dealings in the general lumber trade, including dock oak lumber; that, on account of these dealings, a mutual debit and credit account was kept; that there was no distinct understanding respecting the length of credit to be given upon the respective orders, but that, customarily, shipments of lumber were paid for, either in cash promptly, or by sixty or ninety day paper; and that on the first of June there was due to the defendant in error upon these dealings, on account of deliveries in April and May, the sum of about thirty-eight hundred dollars,

twenty-one hundred of which was for lumber delivered under the order of April 8th.

There was, also, testimony, sufficient to go to the jury, tending to show that the lumber embraced in the order of April 8th was to be delivered in thirty and sixty days; that a portion was delivered, but much the larger portion remained undelivered; that the plaintiffs in error, from time to time, until the third of June, urged more speedy deliveries; that the defendant in error, in substance, responded that it was doing all it could, to fill the order; that in this state of the transaction the defendant in error, near the end of May, began urging the payment of the arrearages; that plaintiffs in error confessed the arrearage, but countercharged the defendant in error with its failures to deliver; and that finally, but not until the third of June, five days before the defendant in error's time to fill the order would have expired, it was, for the first time, distinctly stated by the defendant in error that there would be no further compliance with the contract until the arrearages were paid. It is fairly questionable if, at this later date, the arrearages had been paid, the defendant in error could, within the time stipulated, have fulfilled its contract by the delivery of the remaining lumber.

The contract created by the acceptance of the order of April 8th was an entirety. The failure of the plaintiffs in error to pay, within the customary period, the price of each delivery did not avoid the contract until the defendant in error, by some action, distinctly and reasonably asserted, attempted a rescission. Default in respect to one several part of a contract will not entitle a party to disregard the whole as a nullity, unless there has been a renunciation of the entire contract. Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.

In some states the rule has been held that where an entire contract is made for the sale and delivery of personal property, either for a gross sum, or at a certain price per unit of its measure or weight, and it is only in part performed by the vendor, no action can be maintained on the contract for such part performance; in other states the rule is held that if the vendee retains the part delivered after the vendor has made default in respect to the residue, it is severance of the contract, and the vendor is entitled to recover the contract price for what is so delivered and retained, subject to recoupment of such damages as the vendee sustains for nonperformance of the entire contract. Suth. Dam. § 645.

Applying either of these rules to the case under discussion, it is clear that if the defendant in error had postponed until the eighth of June—the expiration of the sixty days—its announcement that the contract would not be further complied with, there could have been upon its part, either no recovery at all of the twenty-one hundred dollars due for deliveries already made under the order of April 8th; or only such recovery as remained after recouping against it such damages as the plaintiffs in error suffered by reason of the non-deliveries. Does the fact that the distinct attempt at rescission came five days before the expiration of the sixty days change the rights of the parties?

The answer to this question, we think, depends upon some questions of fact that ought to have been submitted to the jury. The evidence discloses that the deliveries actually made by the defendant in error were proportionately small, throughout the fifty-five days that the contract ran unrescinded, in comparison with the whole quantity of lumber ordered. It might have been shown that deliveries, in respect of time, were expected to take place at the option of either the vendee or the vendor, but no such testimony was submitted. In its absence, the law so construes the contract, that deliveries should run ratably through the whole sixty days allowed. In such case the act of rescission came after the great bulk of deliveries ought to have been made, and could not, therefore, affect the vendor's liability for its previous failure to deliver according to the contract.

It might be, also, that the act of rescission, coming so shortly before the expiration of the time within which deliveries could be made, evinces such a state of facts, that the jury could reasonably presume that it was not interposed in good faith on account of the arrearages in the payment, but was thrown out rather as a pretext to cover the vendor's sense of its own default. However we look at it, there should have been a submission of the questions of fact arising upon the order of April 8th, to the jury, under appropriate instructions, and for the error of the Circuit Court, in this respect, the judgment must be reversed, with directions to grant a new trial.

WOODS, Circuit Judge, concurs in the result.

## WORK v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 16, 1901.)

No. 686.

RAILROAD—PERSONAL INJURIES—CROSSING—CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK AND LISTEN.

Plaintiff, driving his team behind that of another, approached a railroad crossing consisting of three tracks, and at a place where the view was unobstructed. A train was passing, which stopped plaintiff and the team preceding him; and, after the train had passed, the flagman left the track to turn the semaphore, it being disputed whether or not he waved his flag in warning. The first team crossed the track, and plaintiff, who could not view the track, because of a canopy covering over his seat, unless he projected his head, started to follow. When his horses were stepping on the third track, the flagman ran in front, striking them with the flag, and calling to plaintiff to back them, which he refused to do, but ordered the flagman to let him off the crossing; and then, on seeing the train approaching, urged the horses forward, so that the train struck the wagon and injured plaintiff. At the time the flagman left the track the train was 1,200 feet away, and was giving loud and repeated signals. *Held*, that plaintiff could not recover, as there was no negligence on defendant's part, and plaintiff was guilty of negligence in not looking and listening.

Grosscup, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The plaintiff in error brought suit to recover for injuries sustained from collision with a train of the defendant in error at the crossing at Kedzie avenue, in the city of Chicago, on December 23, 1896, between 3 and 3:30 p. m. That avenue is laid out practically north and south, and is situated in the northwestern part of the city, remote from any business or residence district. For some distance both north and south of the crossing the country was at the time of the accident an open prairie, treeless and houseless, with the exception of a one-story lime house east of the street and south of the roadway. The railway grounds were fenced, and a flagman was stationed at the crossing. The facts with respect to the collision were testified to by the plaintiff below and by four witnesses called by him. At the conclusion of the plaintiff's case the court directed a verdict for the defendant, upon which ruling error is assigned, and to review which the plaintiff sues out this writ of error. The facts disclosed by the evidence were these: Upon the day in question Work was traveling north on Kedzie avenue, driving a team attached to a heavy two-horse tank wagon carrying oil. The tank was of quarter-inch boiler iron, bolted down on stringers running lengthwise of the wagon. The tank was about 3 feet in diameter, 10 feet in length, and contained at the time 195 gallons of oil. Over the driver's seat there was a hood or covering, like a canopy top, fastened to the seat, and which prevented the driver from looking out to his right or left, except by projecting his head beyond the hood. Upon arriving at the crossing in question, he found that a train of empty coaches was passing the crossing quite slowly to the southeast, the railway tracks running northwesterly and southeasterly across the avenue. In front of him were two men in a wagon and leading two cows, waiting for the passing of this train. Work stopped alongside and a little to the rear, 20 feet or more, from the nearest rail. After the passage of the coach train, his view of the crossing and street immediately in front of him was unobstructed. He was 40 years of age, and had been acquainted with this crossing for 2 years, passing it daily. The crossing was occupied by three tracks of the railway company, each 10 feet apart, and each 4 feet 8 inches in width. The south track was a spur or switch track; the two northerly tracks being the main tracks of the railway, on the south one of which the train of coaches was passing southeasterly. The roadway for its whole width was planked between the tracks and between the rails. The flagman's shanty was just west of Kedzie avenue and northeast of the northerly track. Two men in a wagon coming south on Kedzie avenue had stopped north of the railway to await the passing of the train, the flagman being stationed at about the center of the avenue, and just north of the most northerly rail. Upon the passing of the coach train the flagman in the street at the north of the railway track, according to the evidence of the two men waiting in the street at the north, waived his flag to stop the approach of teams from the south, and ran to his shanty to turn the semaphore to notify a passenger train approaching from the southeast that the line was clear. The two men who were in the wagon deny that the flag was waved. One of them testifies as follows: "After the last car of the coach train had gone to the southeast, and had cleared the crossing, the first thing I saw on the north of the tracks was the flagman standing in the middle of the road with his flag. After that he turned and ran over towards the shanty, and I paid no attention to him, but started up to drive across the tracks." Work testified that he first saw the flagman at the west side of the street, at or near the curb, walking towards the shanty. As soon as the coach train passed the crossing to the southeast, those in the other wagon started to cross the tracks, and Work followed. Neither those men nor Work testified that the conduct of the flagman influenced them or him to go forward. The two men and the cattle passed the tracks in safety. Work had gotten upon the middle of the three tracks when the flagman ran back along the northerly track, waving his flag to stop Work, and when in front of Work's advancing team struck the horses in the face with the signal flag, and shouted to Work to go back. One of the horses, as Work stated, "was

rather touchy about the head, and flew back. The other did not so much. I hollered at him to let me off the crossing. He did not say anything to me, but kept slashing my horses. I looked to the west, could not see anything coming, and hollered at him the second time to let me go on. Failing to do it, I just turned, and looked out to the east, and saw the train coming. My team was then on what would be the uptrack, and I seen it was either my team or I get killed or get off the crossing. I could not back up quick enough; could get across quicker than I could get either way; and hollered at my horses right sharp. They jumped, and I got almost across, and engine struck rim of hind wagon wheel and end of tank." On cross-examination he testified that when the flagman got in front of his horses and waved his flag "their front feet were then right on the north track"; that he did not attempt to obey the flagman, but hollered to him to let him off the crossing. At this time Work, as he testified, did not know—what the flagman knew, and all the other witnesses saw—that a passenger train was approaching the crossing from the southeast on the northerly track. This train announced its approach by several sharp whistles at the overhead boulevard crossing, 1,200 feet away, and at the Chicago avenue crossing, 875 feet away, and the engine bell was being constantly sounded. It does not appear that Work, either before or after he started to cross, looked or listened for a train until during his altercation with the flagman, and then he saw the train 100 to 150 feet distant from the crossing. When the flagman left the semaphore and ran upon the track towards Work, the train was at about the overhead boulevard crossing, 1,200 feet distant, and Work's team was not then upon the northerly track, the preponderance of the evidence placing them upon the middle track at the time he was stopped by the flagman and during the altercation. Work cursed the flagman, and started his horses upon the northerly track, and was injured by collision with the coming train; the flagman being compelled to leave the track to avoid the train.

Edward Ryan Woodle, for plaintiff in error.
Charles B. Keeler, for defendant in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

Without considering the objection raised to the declaration, and assuming it to be good, the three counts charge the railway company with negligence (1) in carelessly running, managing, and controlling its locomotive engine, and neglecting to keep a competent flagman at the crossing to warn plaintiff of the approach of the train while attempting to pass over; (2) in carelessly running, managing, and controlling the engine and neglecting to ring its bell; (3) the same as the first, with the addition that the company allowed the flagman to leave the crossing, so that he did not give warning when he knew plaintiff was attempting to pass over the crossing, but allowed and invited him to drive across when the train was approaching, and prevented him from leaving the crossing by stopping his horses, so that the plaintiff was compelled to remain thereon until struck, etc. With a possible exception, it is difficult for us to find in the evidence any neglect of duty upon the part of the railway company. The crossing was in the outskirts of the city, remote from business and residences; an open prairie, treeless, and, with the exception of a solitary lime house, houseless; there was no need of gates, no strenuous necessity, as in the crowded thoroughfares of a great city, for a prompt passage. Only five travelers gathered here

during the time of the approach and passage of the two trains. It is not correct to say that under such circumstances the failure of the railway company to employ two men at the crossing—one at the semaphore and one at the crossing—was a failure in duty. So to hold would impose a degree of care wholly unwarranted by the surroundings. Nor was there negligence in the management of the train. It approached with no immoderate speed, the whistle of the engine was diligently sounded, and its bell was rung, and, when danger appeared to be imminent, the train was promptly stopped. So far as the evidence discloses, a competent flagman was stationed at the crossing, and upon this occasion, with a possible exception, to be noted, diligently discharged his duty. He was at the crossing with his flag as the coach train proceeded southeasterly, giving warning to all travelers upon the highway. Immediately upon the passing of the coach train, as became his duty, he ran to turn the semaphore, giving notice to the passenger train, then coming, of a clear track. There is possible dispute among the four witnesses for the plaintiff whether before or at the time he started for the semaphore he waved his flag and gave warning to those about to cross. A careful scrutiny of the evidence satisfies us that he gave such warning. The two witnesses who were upon the north side of the street positively so assert. The two men in front of Work deny; one, however, in a qualified way. These men were in haste to cross, and seemed to have given but little attention to their surroundings upon the passing of the coach train. Work saw and heard nothing. Possibly, in this state of the evidence, notwithstanding it was all produced by the plaintiff, the case should have been sent to the jury if the sole issue was the negligence of the company and its servants. We are satisfied, however, assuming negligence of the flagman, that the conduct of the plaintiff was the producing cause of this injury. If he had the right to assume, from the fact that the two men in front of him started to cross, that the flagman had given the proper signal to cross, still he was not absolved from the watchfulness and care imposed upon one in a place of danger. He would seem to have had no comprehension of the situation, as he was not aware of the presence of the flagman, and first saw him when the latter reached the west side of the street to turn the semaphore. Work was charged with the duty, which was constant upon him until he had safely crossed, to look and to listen. When he reached the middle track, the approaching train which caused the injury was 1,200 feet away, the shrill whistle of the engine being repeatedly sounded, and its bell being rung. It is incomprehensible that in the due and vigilant exercise of his senses in a place of danger he should not have heard these signals when every other witness heard them. He would seem to have followed mechanically the team in front of him, apparently giving no attention except to his team,—"seeing my horses did not go up on the cattle in front of me." Had he been observing, he could have seen the flagman running down the track from the semaphore, waving his flag in warning of danger; but he does not appear to have noticed him until he saw him in front of his horses waving the flag in their faces. The canopy top obscured

his vision along the tracks, and to enable him to see it was necessary that he should project his head beyond the obstruction. This fact imposed upon him the greater care and vigilance. Had he listened and had he looked while still upon the middle track, and in a place where he was safe from the coming train, he could have heard and seen its approach, and have avoided the injury. Beyond all this, the evidence satisfactorily discloses to us that he was on that middle track at the time the flagman confronted him with his flag endeavoring to stop the horses and calling on him to back. He had all the warning that could possibly be given him before he had gone upon the northerly track. He had only to stop, or at most to back his team slightly, and he was safe. But either willfully or in negligent ignorance of his surroundings he entered into altercation with the flagman who had stopped his horses, called upon the flagman to let him pass, and, upon the refusal of the flagman so to do, took time to look to the west, and, seeing no train, again demanded of the flagman that he get out of the way, and, the flagman failing to comply, looked to the east, and saw the coming train within 150 feet of him. Cursing the flagman, and demanding that he be allowed to pass, he shouted to his team, and attempted to cross in front of the train. Had he obeyed the flagman, and taken note of the warning, he would have been safe. We can conceive of no excuse for his conduct. It certainly does not comport with the care which the law demands of one attempting to cross a place of danger. We perceive no failure of duty on the part of the railway company or its servants which should impose liability, unless, indeed, railway companies are to be held as guarantors of the safety of all travelers over crossings. We are satisfied that, had the case been submitted to the jury, and a verdict rendered for the plaintiff, it would have been the clear duty of the court to have set aside the verdict; and in such cases it is proper to instruct the jury to find for the defendant. Pleasants v. Fant, 22 Wall. 122, 22 L. Ed. 780; Bowditch v. City of Boston, 101 U. S. 18, 25 L. Ed. 980; Treat Mfg. Co. v. Standard Steel & Iron Co., 157 U. S. 674, 15 Sup. Ct. 718, 39 L. Ed. 853.

GROSSCUP, Circuit Judge (dissenting). I am reluctantly compelled to dissent from this opinion. The conduct of the plaintiff below, on the inquiry respecting contributory negligence, must be surveyed, not from the point of view of the flagman, or of the people across the track, but from the point of view of the plaintiff himself. It was his judgment—made up through his own eyes and ears—that governed him; and, so far as contributory negligence is concerned, he can not be held to an exercise of judgment such as might have followed upon another environment.

What, then, was the state of things occurring that day, as they presented themselves to him? Arriving at the railroad crossing, the plaintiff in error found himself behind a wagon already stopped by the flagman. A train going into the city was seen to be the cause of the obstruction. When the train had cleared the track it continued to hide the view toward the city as far as the boulevard crossing, beyond which, an embankment intervening, no further view

was obtainable. The street was itself, so far as he could see, clear for passage, and as to danger from the direction of the city, his safety, so long as the ingoing train intervened, lay either in remaining where he was, or putting faith upon the outlook of the flagman.

At this moment the flagman left the track, and proceeded toward the shanty. The occupants of the wagon in front—though no inquiry to that effect was made of them on the trial—doubtless accepted this as a signal of safety, and started to cross. The plaintiff in error followed, and though those preceding got over in safety, was caught by an outgoing train suddenly emerging from behind the ingoing train. Had he disregarded the flagman, acting wholly upon his own outlook, he probably would have remained where he was, until the ingoing train had ceased to obstruct his view, and would thus have escaped injury. Relying undoubtedly, however, upon the flagman to make up for his own defect of outlook, he was led upon the track, and received the injury.

There is no question that a traveller on the highway, approaching a railroad crossing, must use his ears, and look in both directions. The railway is itself a signal of danger. Dependent solely upon his own senses, without aid from others, he must give full exercise to his senses. Had there been no flagman—had the plaintiff in error, by being alone, been required, without aid, to look out for himself—there would be no difference between the opinion of the majority and myself.

But in the case under review the plaintiff in error did not feel himself unaided. By ordinance of the city, a protector had been placed upon the tracks. The plaintiff in error had a right to rely—at least, so far as his own outlook was obstructed—upon the outlook of this protector. The withdrawal of the flagman, as seen by him, and the people in front of him, was notice that the track was clear, and that it was safe to cross. Railway Co. v. Schneider, 45 Ohio St. 678, 17 N. E. 321; Pennsylvania Co. v. Stegemeier, 118 Ind. 305, 20 N. E. 843; Sweeny v. Railroad Co., 10 Allen, 368. I do not apprehend that the application of this rule would be disputed if the view of the plaintiff in error cityward had been cut off by some fixed obstruction. In fact the obstruction was not fixed. It was a moving train that would give a clear view as soon as it had gone a little way toward the city. But, does this fact—that the obstruction to the view was temporary—make any real difference? Had it, by reason of its temporariness, any the less an effect upon the mind of the plaintiff in error? Would an ordinarily prudent man, accustomed to rely, where his view was obstructed, upon the outlook of the flagman, stop to think that, on this particular occasion, he could, by waiting, see for himself, and thus avoid the need of reliance upon the flagman?

At most city crossings the necessity for a prompt crossing is strenuous. A long procession of vehicles awaits the opening of the gates, or the signal of the flagman. There can be no such delay—no time for that careful surveillance, on the part of each passer,—as a country crossing admits. There is pressure from both directions on the highway, and from both directions on the railroad. A

looker-out, who has no other diversion, is an essential safeguard to the passers on the highway.

The city passer, compelled, under such circumstances, to take his cue from the flagman, falls naturally into that habit. The flagman, habitually, becomes his guide. A busy crossing, in this way, works with the precision of a machine. There is not—and, in the nature of things, cannot be—a large exercise of individual judgment. It is, in my judgment, straining the actual facts to say that a prudent man, thus accustomed to feel his way across these crossings, will, his own view cut off, stop to ask himself if the obstruction is but temporary. Will he not, more naturally, press on, as he would at the other crossings? He may, in following this habit, be dull, but the ordinance is for him, as well as for the keenly alert. It is meant for the man who, on similar occasions, is invited to trust to the flagman, as well as for the man who lets no occasion escape to trust any eyes not his own. It certainly was not designed to lead the unwary into an ambushed danger—a consequence that the conduct of this flagman visited upon the plaintiff below.

Nor can I concur that the plaintiff in error's conduct, in refusing to back his team off the track, must be regarded as negligence in law. There was considerable testimony tending to show that his horses had already reached the track on which he was afterwards struck. In this situation—with his horses entering upon the track, and the flagman seen by him, for the first time, in an attempt to stop him—his conduct is described by himself as follows: "After he" (the flagman) "hollered out I looked first to the west; then I looked to the east—my horses were just then entering on the track. That was the first time I saw the passenger train. Should judge its engine was 150 feet away, may be more; could not say, because it was just a glance I got of it. I saw the position I was in and had to get out of it. Did not look for distances. I had to go ahead. Did not use a whip; I hollered at the horses, and they jumped quick." And again, describing his decision to go ahead, and the reasons for it, he said: "Yes, I must get off the track and out of danger; going ahead was the quickest I could get out of danger."

Where a traveller, through the negligence of the railway, is placed in a situation where he must adopt a perilous alternative—or where, in the terror of an emergency, he acts imprudently, even wildly—there can be no imputation of contributory negligence. Beach, Contrib. Neg. § 40. "If," as Lord Ellenborough said, (Jones v. Boyce, 1 Starkie, 493,) "I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

The negligence of the railway company consists, primarily, in requiring the flagman to perform two inconsistent functions. He could not, in the nature of things, retire to operate the semaphore, without creating such misunderstanding as would lead on, to their peril, the passers on the highway. The root of this accident is not in the plaintiff in error's failure to exercise a high intelligence, but in the defendant in error's effort to make one man fill, simultaneously, two places at war with each other.

Judgment affirmed.

## UNITED STATES SUGAR REFINERY v. EDWARD P. ALLIS CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 701.

1. SALE—ACTION FOR PRICE OF MACHINERY—EFFECT OF PROVISION REQUIRING ACCEPTANCE OR ARBITRATION.

Plaintiff built and furnished certain steam dryers for defendant, and, a controversy having arisen as to whether they fulfilled the contract, after some years a second contract for settlement was entered into, by which it was agreed that the dryers should be repaired by plaintiff, and under its direction, so as to render them steam-tight and operative; that on their acceptance by defendant, or on an award by arbitrators, which the contract provided for, finding them to meet such requirements, defendant should pay a certain sum therefor, but, in case the arbitrators should decide that they were not steam-tight and operative, it should pay nothing. *Held*, that the essential fact to entitle plaintiff to recover under such contract was its making the dryers steam-tight and mechanically operative, as therein required, and the provisions for acceptance or arbitration were merely methods for ascertaining whether plaintiff had fulfilled such requirement; hence, in the absence of an acceptance, and on the failure of an award by the arbitrators through the fraud or collusion of defendant, a court might properly proceed to ascertain by the verdict of a jury whether plaintiff had fulfilled the contract, and render judgment accordingly.

2. SAME.

While an acceptance of the dryers by defendant under such contract was suspended by the subsequent selection of arbitrators by the parties, and would have been superseded by an award fairly made, where such an award was prevented by the fraud of defendant plaintiff was restored to its rights under the acceptance, and entitled to recover thereon if proved.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The action below was on the common counts to recover for the work and labor in the construction and setting in place of three certain dryers in the refinery of plaintiff in error at Waukegan, Illinois.

The assignments of error relate to the instructions of the court to the jury; the refusal to give instructions; the admission and refusal to admit evidence; and the overruling of a motion to instruct the jury to find the issues for the plaintiff in error. The case turns largely upon the construction to be put upon a written contract of settlement between the parties.

The essential facts are as follows:

In 1889 the defendant in error (hereinafter called the Allis Company) agreed with the Rose Malt Works, predecessor of the plaintiff in error (hereinafter called the United States Company) to do the work of constructing three dryers, according to the plans furnished by the Rose Malt Works, and to set the same up in their factory at Waukegan, to be used for the purpose of drying feed and waste material. Each dryer is composed of two drums or cylinders of steel about thirty feet long, one enclosing the other, rigidly connected by jack screws. Steam is turned into the inner drum. The material to be dried is fed into the space between the drums by means of a spout at the upper end of each dryer, and is then carried forward by gravity, and a system of stationary shovels, until discharged at the lower end. The dryer being slowly revolved, the material is dried by passing over the heated surface of the inner drum.

According to the plans furnished by the Rose Malt Works each dryer ran upon trunnions, one at each end and one in the middle, and the power was applied at the periphery of the outer drum.

The dryers were constructed, set in place, and tried, but, being found unsatisfactory, a new contract was made under which they were to be recon-

structed according to plans prepared by the Allis Company. Under these plans, the dryers were to be supported at the ends, and the power applied at the center of the inner drum, the ends to rest upon piers to be constructed by the United States Company. After such reconstruction, they were again tried but the parties disagreed as to whether the test was satisfactory, or the contract had been properly performed.

Suit was then brought by the Allis Company to recover the contract price. The United States Company resisted on the ground that the dryers were not steam-tight; that there was not sufficient allowance for contraction and expansion; that, by reason of this, the dryers pulled over the piers upon which they rested; and that in their then state it was impossible to make the dryers steam-tight and mechanically operative. The Allis Company claimed that the contract had been fully performed; that the dryers were steam-tight; and that the pulling over of the piers was due to the insufficient construction of the piers themselves, a work that had been done by the United States Company.

The case, involving these issues, went to two trials, the first resulting in a judgment for the Allis Company (which was reversed for reasons not material in this review) and the second resulting in a disagreement of the jury. Thereupon, as a method of settling the controversy the following agreement was entered into:

"In settlement of all differences between the E. P. Allis Company and the United States Sugar Refinery arising out of the construction of three dryers, it is hereby agreed:

"That the United States Sugar Refinery will rebuild the west piers at its own expense, under the supervision and according to the directions of the E. P. Allis Company which last named Company assumes all responsibility for the sufficiency of the piers when so rebuilt and reconstructed.

"That upon the completion of said work the E. P. Allis Company will take said three dryers, place them in position, doing whatever work may be found necessary, either by way of repair or reconstruction, to make them steam-tight and mechanically operative as dryers.

"That upon the completion of said work and the tendering of the same to the United States Sugar Refinery, it is further agreed that if there be any dispute between the parties as to the dryers complying with the above agreement, all differences shall be arbitrated by the selection of one party by the E. P. Allis Company, and one party by the United States Sugar Refinery and if said two parties cannot agree they shall select a third, and both parties to this agreement shall abide by the decision of the majority of said arbitrators.

"Upon the completion of the work in accordance with this agreement, and the acceptance of the same by the United States Sugar Refinery, or upon the decision of said arbitrators as aforesaid in favor of the said E. P. Allis Company, the United States Sugar Refinery is to pay the E. P. Allis Company the sum of Ten Thousand Dollars ($10,000) in full for all claims and demands. If the said E. P. Allis Company fails to complete its contract according to this agreement or according to any additional requirements imposed by said arbitrators, then the United States Sugar Refinery shall pay nothing, and said E. P. Allis Company shall remove the same at their own expense.

"It is further agreed that both sides shall proceed with the execution of this work with all convenient speed.

"It is further understood that all disputes, claims or demands of either party against the other are settled and merged in this agreement, and upon the signing thereof, except as herein contained, each party releases the other of any and all claims.

"It is further understood that within ten days after the dryers have been tendered by the Allis Company to the Sugar Refinery, the latter company shall either accept the same and pay the money as above provided, or appoint an arbitrator and notify the Allis Company thereof in writing, and that the Allis Company within ten days after receiving notice of such appointment shall appoint an arbitrator on its behalf.

"Upon the signing of this agreement by the representatives of both parties,

it is hereby stipulated that all suits pending between the parties shall be dismissed without cost to either side."

A disagreement again arising respecting the performance of this agreement, the action under review was brought. On the trial in the court below testimony was offered by the Allis Company tending to show that, pursuant to this settlement contract, the United States Company had built the foundations, and the Allis Company, in the month of November, 1895, had placed thereon the dryers, repacked the steam boxes, and calked a rivet in the shell of the boiler; that upon two tests then made the dryers were found to be steam-tight and mechanically operative; that the dryers, in the opinion of experts in construction of this class of machinery, were properly constructed, and had adequate power to resist and endure the strain, both of revolution and steam pressure; and that the dryers had been accepted by the United States Company.

But payment not having been made, the following correspondence ensued:

Allis Company to United States Company, January 6, 1896. "Our Mr. Tucker returned from your place sometime ago and stated that the dryers had been thoroughly tested, and were practically all right and satisfactory to your company. In view of our having complied with the conditions of agreement made in Chicago by which these dryers were to be put in order and tested by us we have to request that you please favor us with check for $10,000, at your earliest convenience. If you can forward same so as to reach us by Saturday of this week, it will be greatly appreciated, as we have some large payments to take care of and are decidedly short of funds."

United States Company to Allis Company, January 10, 1896. "Your favor dated the 6th inst. received here on 8th, saying that your Mr. Tucker stated that 'the dryers had been thoroughly tested and were all right and satisfactory to our company,' is at least anticipating.

"Mr. Tucker was here and had steam on. We certainly hope the dryers may prove to be all right, but we have given no expression on the subject. Had the dryers been ready for test sooner, you and we could have availed ourselves of feed for drying, for a practical steam-tight, and mechanical operation of them for a sufficient time to determine, but the starch works are not grinding just now.

"If you intend to claim your letter of the 6th inst. as tender of dryers under the stipulations (which certainly is premature), do you also claim the ten days provision after tender to call for the naming of arbitrators now?

"The only real test of their being steam-tight and mechanically operative is the result obtained by their use, which obviously necessitates actual service."

United States Company to Allis Company, January 16th, 1896. "In view of the fact that we have received no reply from you to our inquiry of the 10th instant, we beg to advise you of our selecting and naming Mr. Henry Morton as arbitrator in our behalf under stipulation between yourselves, and this company, made in Chicago."

Allis Company to United States Company, January 21, 1896. "Acknowledging receipt of your favor of the 16th inst. notifying us that you have named Mr. Henry Morton as arbitrator on your behalf, under the agreement made between your company and ourselves, have to advise you that we have this day arranged with George H. Benzenberg of this City as arbitrator in our behalf under the same agreement.

"Will you kindly advise us at your earliest convenience as to the address of Mr. Morton that Mr. Benzenberg may communicate with him and arrangements be made for carrying out the agreement under which the Arbitrators have been appointed."

The ensuing correspondence between the arbitrators thus appointed, extending over a period of nearly a year, without the appointment of a third arbitrator tends to show that Morton, arbitrator for the United States Company, refused to come to Waukegan, where the mill was situated; that he refused to accept, as a test, any operation of the dryers, except such as would be involved in their continuous operation under normal conditions, that is, that the works be put in normal operation; that the works, not being then in operation, and not having been since 1891, a period of about five years, a

suggestion was made that a car-load of corn should be purchased and used for a test, but this was declined by Morton; that there was no assurance that the works would be started up in the near future, or at any time; and that, therefore, the attitude of Morton amounted to an indefinite postponement of the test, and, in consequence, an indefinite postponement of any payments due under the contract. There was testimony, also, tending to show that the attitude thus assumed by Morton was in pursuance of correspondence with the United States Company.

The claim of the Allis Company on the trial was that this testimony showed that the United States Company had, by collusion with Morton, fraudulently defeated the arbitration.

The court, in effect, charged the jury that the Allis Company was entitled to recover, if it was found from the evidence that the dryers had been accepted by the United States Company; and further, should no such acceptance be found to have been made, the Allis Company was entitled to recover, if it was found that the dryers furnished by the Allis Company were in fact steam-tight and mechanically operative, and, a reasonable effort having been made to obtain arbitration and award, they were prevented by the fraud of the United States Company, or its collusion with the arbitrator appointed by it.

The action of the court in overruling the motion to take the case from the jury; in refusing special instructions offered by the United States Company; and in excluding and admitting testimony, is challenged as erroneous, chiefly upon the following propositions:

1. "That the only promise or undertaking contained in the contract in suit made by plaintiff in error was to pay upon the acceptance by it of the dryers in controversy, or upon the decision of the arbitrators in favor of the E. P. Allis Company; and that to recover upon the contract, defendant in error was bound to show either acceptance or award, to satisfy the condition of the undertaking of plaintiff in error.

2. "That even though it be conceded that defendant in error might recover the price, provided by the contract to be paid, upon acceptance or award, the judgment of the court below must be reversed, because it instructed the jury that they might find for the defendant in error in case they found there had been an acceptance prior to the time that arbitrators were appointed by both parties.

3. "That even if it be held that defendant in error might recover under the contract in suit upon either the theory that the plaintiff in error accepted the dryers, or on the theory that plaintiff in error prevented the arbitration, and, therefore, became liable to pay the contract price, the pleadings in the case do not enable defendant in error to recover, except by showing an acceptance by plaintiff in error.

4. "That there is no evidence in the record tending to show that the plaintiff in error hindered or prevented the arbitration."

I. K. Boyesen, for plaintiff in error.

Frank M. Hoyt and Charles Quarles, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

As we construe the contract, it imposed upon the United States Company the duty of paying the Allis Company the stipulated sum when, by the completion of the work provided for in the agreement, the dryers were made steam-tight and mechanically operative. Acceptance of the dryers by the United States Company, or submission to arbitration, though provided for in the contract, are stipulated methods only of ascertaining the basic fact, namely, whether the

dryers are steam-tight and mechanically operative. The right of the Allis Company to receive, and the obligation of the United States Company to pay, the stipulated price, arises, not from acceptance or arbitration, but from the Allis Company's having performed its contract obligation in respect to the dryers. Nor can this right to receive payment be defeated, or this obligation to pay be evaded, by an unjust refusal of the United States Company to accept the work done, or its fraudulent prevention of an award under arbitration. To so construe the contract would be to put the method above the end, and to make available to the United States Company the power to nullify the contract, by taking advantage of its own wrong. Doubtless the methods provided for in the contract—determinative of whether the contract has been fulfilled—must be primarily followed; but if these methods are prevented or made unavailable by the fraud of the party to be charged, it does not follow that the hands of the courts are tied, so that they may not, as in other cases, proceed to enforce the contract, and do justice between the parties. The case under review is, in this element of prevention of arbitration by fraud, different from Milnes v. Gery, 14 Ves. 400; Scott v. Avery, 5 H. L. Cas. 811; Babbage v. Coulburn, 9 Q. B. Div. 235; President, etc., of Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250. In none of these cases is it ruled that a recovery could be permanently prevented, according to the usual method of ascertaining facts and making up a judgment in courts, should the methods devised in the contract be nullified by the fraud of the party to be charged. We are clear in our opinion that, in the absence of acceptance, and the failure of an award, brought about by the fraud of the United States Company, the court below properly proceeded to ascertain, by verdict of the jury, whether the contract had been actually performed, and to give judgment accordingly. This is simply to hold that while parties to a contract, such as the one under review, may rightfully insist upon arbitration, they can not, having obtained it, throw it away, and then insist upon the ensuing vacuum as an unchangeable legal right.

There was sufficient evidence to go to the jury, tending to show acceptance, and also sufficient evidence to show fraudulent prevention of arbitration by the United States Company. All things considered, the weight of the evidence, in our opinon, justifies the verdict returned. We are not satisfied that the court was correct in charging that acceptance alone—without any finding that arbitration was fraudulently prevented—entitled the Allis Company to a verdict. Probably if the question were raised we would hold that the resort to arbitration suspended the rights growing out of acceptance, and, had an award been fairly reached, superseded them; but when the arbitration was brought to naught by the fraud of the United States Company, it is clear that there was an immediate restoration of the parties to the previous status, so that acceptance again becomes determinative, as if no arbitration proceedings had been entered upon. Any other conclusion would give to the United States Company the advantage of its own fraud. On the whole, the possible error of the court referred to is unimportant; and as no exception

was taken at the time to this feature of the charge, and no requests were offered which would have obviated it, we are of the opinion that it is not a ground for reversal.

In view of the construction we have placed upon the contract, there is no ground for the contention that there can be no recovery under the common counts. The gist of the action is the contract price of the dryers. This, of course, is triable under the common counts. Acceptance or award are incidental features only of the contract, and though potent in given cases to defeat a recovery, do not furnish the basis of the action.

The judgment will be affirmed.

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## CURRIER v. TRUSTEES OF DARTMOUTH COLLEGE et al.

(Circuit Court, D. New Hampshire. December 26, 1900.)

COLLEGES—LIABILITY FOR INJURY TO STUDENT.

A college, by reason of its eleemosynary nature and its relation to its students, is not liable for a personal injury to a student caused by negligence of the superintendent of college buildings in clearing land owned by the college preliminary to erecting thereon a heating plant for college purposes.

Sargent & Niles and Edward S. Spaulding, for plaintiff.
Streeter, Walker & Hollis, for defendants.

ALDRICH, District Judge, in directing a verdict for Dartmouth College, said orally to the jury:

This is a suit by a student of Dartmouth College to recover $50,000 for personal injuries sustained through the alleged careless throwing down of a chimney by the superintendent of college buildings, and the suit is against both the college and the superintendent, who did the work. The injured student, upon notice by the superintendent that the chimney would fall at a given time, and that kodaks might be brought, was in the vicinity without a kodak, and by reason of curiosity merely; and neither willful nor wanton negligence is claimed against the college or its superintendent. At the conclusion of all the evidence the defendant moves that a verdict be directed in favor of Dartmouth College on the ground that it is an eleemosynary corporation, organized and managed solely for the administration of a public charity, and doing no business for private gain, and that it is not liable for negligence to a person who accepts its bounty. So far as the evidence goes in this case, the board of managers of Dartmouth College intrusted the work of clearing buildings, in connection with which there was a chimney, from a tract of land which the college owned, and on which was to be erected a heating plant for college purposes. This work was done on grounds of college health, necessity, and sanitation, and there is no question in my mind but that it was in furtherance of the chartered trust. The evidence is all one way that the trustees discharged the obligation upon them, if such obligation exists in respect to a college of this character, to select a competent servant for such purpose, because the work, under

general instructions to clear the land for a heating plant, was intrusted to their superintendent of buildings, who was a civil engineer, and had had several years' experience under the eye of the management in practical oversight of the construction and care of college buildings and other property; and the only evidence, if any, tending to show that he was incompetent or negligent relates to a detail of the work,—the particular alleged negligence, that of improperly and negligently tipping over the chimney which injured the plaintiff, who was a student. The administration of a trust like that under the Dartmouth College charter is at least in a sense charitable, and in a sense paternal. The college has existed for 130 years, during which time it has not been understood that an institution of this character is liable in tort for an injury like the one in question; at least, such liability has never before been asserted. There is no statute or judicial decision in New Hampshire declaring that public policy requires that the doctrine of tort liability should be extended to such institutions. The public policy of the state, therefore, though not so expressed, as in Massachusetts by judicial decision as to hospitals, or by legislative enactment as in Rhode Island, must be accepted, as against the liability of an institution of this character. The common law does not furnish a remedy in tort for every injury. While the general rule is recognized that all individuals and all corporations who own property and put forces in motion are liable for negligent use to the injury of others, there are several exceptions,—as, for instance, there is no remedy in tort against the federal government for negligent injury; against the state for injury resulting from negligent conditions; against towns for injuries resulting from negligence in not keeping their highways in safe condition, unless expressly made liable by statute; against a city in favor of a child injured by the unsafe condition of a schoolhouse stairway (Hill v. City of Boston, 122 Mass. 344); against a judge who, in the exercise of his duty, without investigation, directs a jury to retire to a room which may turn out to be unsafe; against an arbitrator for negligence in the discharge of his duty; against a master for the negligence of a fellow servant; and perhaps not in a case of father against members of his family, and members of a family against the father, for negligence, as for maintaining a negligent stairway. A personal injury is always a misfortune, and a personal injury is no less an injury because it results from a negligent condition of the steps of the capitol at Washington, in the post office at Concord, or on the stairways of the state capitol at Concord, rather than at a college, yet legal redress by action of tort for such negligence does not exist under the law.

In the hurried examination which I have made of this question, I cannot do otherwise than accept the reasons in the situation presented as stronger against tort liability for personal injury than those existing in hospitals; for a student who enters college submits himself, in a sense, morally, physically, and intellectually, to the college management and the college discipline,—in other words, he becomes a part of it,—while such paternal relations do not exist in the case of a hospital. It is asserted, and not denied, that there is no American

or English case where the liability of a college in tort for personal injuries has been held to exist. I have not made an examination which will verify this statement; but, if it is true, it is significant as to the understanding of the profession and the public in this country, where colleges have existed for nearly if not quite three centuries, and in England, where they have existed for centuries more. Authorities holding that there is a remedy by mandamus to compel college trustees to properly administer and execute a trust are not in point upon the question under consideration. All law is founded on supposed public policy. Public policy declares that the general government shall not be liable in an action of tort, and that a state shall not be so liable, and that, if relief is had, it shall be through the congress of the United States in the one instance, and through the state legislature in the other. This, in part, is because governments, which are run, not for money-making purposes, but for the protection of the public, should not be sued in the courts for tort, and because it would be subversive of government. Public policy declares that judges and arbitrators shall not be liable, and that members of a family, occupying the same household for the same beneficial reasons, shall not be liable one to the other. These instances are not cited as positively in point, but to show that, notwithstanding the general rule of liability, the law does not furnish redress by action of tort for every injury.

At the outset, whether a right shall be created and established, or whether a right shall be extended, depends upon the question whether rules of justice and public policy require it to be done. The first redress was to return force by force, but, as civilization advanced, legal redress was given, in the nature of damages; and, by the growth of the common law and the statutes, the right of recovery has been extended to one condition and another. If such right exists in respect to corporations like the one in question, there is legal redress. The liability, however, in a given jurisdiction, is not an inherent and natural liability, and the right of the party injured to have relief does not exist as an absolute right until created by legislative enactment or judicial decision. In the absence of a statute or a judicial decision in New Hampshire, and none being cited from other jurisdictions, and as the plaintiff relies upon the general rule as to liability and supposed analogous decisions, I do not wish to be the first judge to declare such right of recovery in New Hampshire. If the right of recovery exists in this class of cases, the right extends to place, as chapel, lecture and recitation rooms; to machinery, appliances, and materials; experiments with chemicals and electricity; conditions of the campus and the playgrounds, as to smoothness, ice, and snow, where students are invited or permitted to go for exercise and college sports and games. In my view, it is extremely doubtful whether the personal injury liability law is understood to extend to institutions of this kind. Counsel for the plaintiff in effect claim that the general rule of tort liability applies proprio vigore, or ex rigore juris, unless it clearly appears that the charterer intended otherwise. Is this so? Should the rule of liability and right of recovery be held to exist unless it clearly appears by the charter that the charterer so

intended? Do not legal history and long acquiescence fairly tend to establish the interpretation of nonliability? The acquiescence of the people of this country and of England for so many centuries would seem contrary to an understanding that such liability exists. The plaintiff seems to view a rule of nonliability as involving a further limitation upon the general rule of liability, and as furnishing another exception thereto. I do not take this view. I think I am, in effect, asked to extend the commonly accepted understanding of the rule to include situations not heretofore understood to come within the liability rule in tort for personal injuries. At least, there is a strong query whether such rule would not be subversive and destructive of the fundamental relations existing between college and student, and query whether the relation phase of the situation is not more significant and controlling than that of the trust phase of the question presented, and whether, on the whole, the true rule is not that the student, by entering college, assumes the risk incident to the quasi charitable and quasi paternal management of such institutions. How it might be with other relations, or in respect to outside college properties, like the Lowell property or the Dartmouth College grant in Pittsburg, it is not necessary to consider. I have only given this question such hurried consideration as a jury trial permits. If I am wrong, the court of appeals will set the question right.

The jury is directed to render a verdict for the college. The plaintiff excepts. That part of the motion asking that a verdict be directed in favor of McKenzie, the superintendent, is not granted, and the defendant excepts.

## In re DOW'S ESTATE.

(District Court, S. D. Iowa, Central Division. December 26, 1900.)

No. 835.

BANKRUPTCY—DISCHARGE—CREDITORS' MEETING—PERJURY.

Where a voluntary bankrupt's application for discharge was opposed by creditors on the ground that the bankrupt had committed perjury on his examination as to his assets before the referee at the creditors' meeting, such defense was not demurrable, though the bankrupt's perjured testimony could not be used against him in a criminal prosecution; a truthful and full disclosure being the condition precedent to the bankrupt's right to a discharge.

In Bankruptcy.

Cardell, Giddings & Winegar, for bankrupt.
Harvey & Harvey, for creditors.

McPHERSON, District Judge. This is a case of voluntary bankruptcy, and the bankrupt seeks a discharge. Objections thereto were filed by several creditors. To two of these objections the bankrupt has demurred, urging thereby that no good reasons are assigned for not granting the discharge. The demurrer was by the referee sustained, which ruling is before the court for review.

Mr. Dow was adjudged a bankrupt February 7, 1900. The first

creditors' meeting was February 23, 1900. At that meeting, it is alleged in the objections to a discharge, Mr. Dow was duly sworn, and testified before the referee that the reason why he had not paid his creditors was "that for nearly eight years he had had sickness in his family,—a sick wife. He had had expenses there that made it impossible for him to meet his accounts, and that was his present condition,"—and, further, when asked if he had put his money in the bank, testified under oath: "No, sir; never put money in the bank." His salary had been used, prorated as nearly as possible, for groceries, meat bill, clothing, coal, and family expenses. The creditors allege this evidence was willfully false, and so known to be by Mr. Dow when he so testified. I take it that the creditors mean to charge perjury.

I know of no question under the act of 1867, or under the law now in force, that has not been differently answered by referees and judges. And so it is with the question now under consideration. My views of the bankrupt law,—as to some phases, at least,—briefly stated, are as follows: If the law is in good faith complied with, the debtor is given the extraordinary privilege of being released from his debts by paying a per cent. thereof, and oftentimes by paying no sum. That is his right under laws specifically authorized by the constitution. The creditors must submit to that, with no just ground of complaint. But before receiving his discharge, the debtor, with no just ground of complaint, must submit to and do many things. He must file a correct list of his creditors, giving amount due each, his address, the consideration of the indebtedness, etc. He must correctly set forth his exemptions. He must truthfully schedule all his assets. He must submit to an examination, and under oath, at the meeting of the creditors. This is controverted, but the many provisions lead me to conclude that he is examined under oath. And in all respects he must be honest and fair. He must conceal nothing. There must be no unlawful preferences. When he says to the court, "I want a discharge," he must also say, "Here is my past and present condition. I have done this and that as to my creditors, and this and that with my assets." He must so say truthfully, and not with perjury upon his lips. The law for proceedings in "voluntary" bankruptcy does not exist for rascals. A dishonest debtor has no standing in such a proceeding.

It was claimed by counsel for the bankrupt, in argument before me, that at the meeting of the creditors the bankrupt could commit perjury by wholesale, and could defiantly say:

> "What are you [creditors] going to do about it? That the statute says my perjured testimony cannot be used against me in a criminal prosecution, and I not only have the right to wipe out my debts without paying them, but I will defy my creditors, and will mislead and deceive them, and will deceive the referee and the court by my corrupt perjury."

This, in substance, was not only eloquently said by counsel, but was logically said, if his interpretation of the statute is a correct one. But I do not so interpret the statute. A criminal prosecution for his false testimony is one thing. His prayer for a discharge is another matter. The referee and the bankrupt's counsel both rely upon the

opinions of Judge Evans, of the Kentucky district, in the cases of In re Marx (D. C.) 102 Fed. 676, and In re Logan, Id. 876. And those opinions do sustain their position. But they do not persuade me. Judge Evans says to hold otherwise than he does "would be to set a trap for the debtor." To hold otherwise than I do, I think, would be to set a trap for the creditors, or else to so set the trap that the debtor could get all the bait (a discharge), and yet not spring the trap. None of these suggestions are intended to reflect upon Mr. Dow. I know nothing of his conduct. I simply know that the creditors have charged him with false statements. And, having demurred, for the time being the charges against him must be taken as true, until the referee has heard the evidence. The demurrer should have been overruled.

## In re GERSON.

(District Court, E. D. Pennsylvania. January 7, 1901.)

No. 4.

BANKRUPTCY—PROVABLE DEBTS—CONTRACT OF INDORSEMENT.

The contract created by the indorsement by a bankrupt of a note which had not matured at the time of the filing of the petition against him is not a debt which is a "fixed liability * * * absolutely owing," provable against his estate, under Bankr. Act 1898, § 63a, subd. 1; but under the definition of "debt" in section 1, as "any debt, demand, or claim provable in bankruptcy," section 63a, subd. 4, allowing proof of any debt "founded * * * upon a contract, express or implied," is broad enough to permit proof of such claim as a demand founded on an express contract, where the note has matured, and the liability has become fixed, before the proof is made.

In Bankruptcy. On certificate of referee concerning allowance of claim.

Julius C. Levi, for creditor.

Jos. L. Greenwald and Clinton O. Mayer, for trustee.

J. B. McPHERSON, District Judge. The report of the referee raises again the question that I had occasion to consider recently in Re Schaefer (D. C.) 104 Fed. 973, but presents it from a different point of view. Schaefer's case was put to me simply upon the proposition that a contract of indorsement that had not become absolute before the petition in bankruptcy was filed was not a fixed liability, within clause "a" (1) of section 63, and could not be proved against the estate under that clause. I thought then, and I still think, that the proposition was sound; but I was not asked to consider, and did not consider,—the oversight was, no doubt, my own fault,—whether such a contract might not be provable under clause "a" (4) of the same section. This is the point now presented for decision, and, in my opinion, the ruling of the referee allowing proof to be made was correct.

A debt is defined by section 1 of the act to be "any debt, demand or claim provable in bankruptcy"; and section 63 sets forth in detail the classes of provable debts. They are: (1) Certain fixed liabilities;

(2 and 3) certain liabilities for costs; (4) any debt, claim, or demand "founded upon an open account, or upon a contract, express or implied"; and (5) provable debts reduced to judgment after the filing of the petition. It is the scope of clause 4 that is now in controversy, and this, I think, is broad enough to include a claim founded upon the contract of indorsement, even before the liability under such a contract has become fixed. The indorser's engagement may not be a "debt," strictly so called, until there has been demand and notice of nonpayment; but, even before demand and notice there is certainly a contingent liability, and this may fairly be embraced within the words "demand or claim." I did not consider this clause of the section when I decided Schaefer's Case; but, now that it has been brought to my attention, I cannot avoid the conclusion that clause 4 ought to have been applied in that decision, and, if applied, should have brought me to the conclusion that a contract of indorsement is a provable debt, even if the note does not fall due until after the petition is filed. It is provable, not under clause "a" (1), but under clause "a" (4). The contract of indorsement is an express contract (Martin v. Cole, 104 U. S. 37, 26 L. Ed. 647), and the holder of the note has a demand or claim founded thereon, which may ripen into a debt or fixed liability, or may be defeated by his failure to take certain steps. But it is a contingent right of some sort, founded upon the contract, and is, I think, embraced in words of such extensive scope as "demand or claim."

The inconveniences likely to result from the former decision are obvious, and, if the act permits them to be avoided, such a conclusion is to be desired. It is clear that, if the liability under the contract of indorsement is not a provable claim, it is not discharged, and therefore may remain and be enforced subsequently against the bankrupt, unless, to avoid such a result, he file a second petition in bankruptcy after all such liabilities have become absolute. Moreover, although the contract of indorsement might become absolute while the proceedings were pending, it could not be proved, and the holder of a valid claim, now become due, would not be permitted to share in the assets of the estate. It is true that an occasional difficulty may still arise in the case of notes that do not fall due for a comparatively long time,—a year or more. Whether such notes can be liquidated, so as to participate in a distribution made before they fall due, I am not now prepared to say. If they are incapable of liquidation, and for that reason cannot be fully proved, or be awarded a part of the bankrupt's estate, they may not be discharged. Upon that point it is unnecessary to express an opinion. Whatever difficulty exists in such a case, none is perceived in the ordinary case where the contract of indorsement becomes, during the settlement of the estate, an obligation to pay a definite sum.

The decision of the referee allowing the claim of the Market Street National Bank is approved.

## In re GERSON.

(District Court, E. D. Pennsylvania. January 26, 1901.)

No. 4.

BANKRUPTCY—PROVING CLAIMS—DEBTOR OF BANKRUPT.

A creditor of a bankrupt, who is also his debtor in a larger amount, will not be permitted to prove his claim against the estate so long as his own debt remains unpaid.

In Bankruptcy. On certificate of referee concerning disallowance of claim of Isaac Gerson.

Emanuel Furth, for creditor.

Julius C. Levi and Jos. L. Greenwald, for trustee.

J. B. McPHERSON, District Judge. I am entirely satisfied with the conclusion reached by the referee that this claim should, for the present, be disallowed. He believed the testimony to justify the inference that Isaac Gerson was really a part owner of the bankrupt's business, and therefore that his claim for rent should not be allowed until the other creditors had been paid. I do not dissent from that inference; but, as another ground for postponing the claim is sufficient, I rest my approval of the referee's decision upon that ground alone, namely, that Isaac Gerson is indebted to the bankrupt in a much larger sum than the rent now claimed.

The rejection of the claim is accordingly approved

## In re ENGLE.

(District Court, E. D. Pennsylvania. January 12, 1901.)

No. 800.

1. BANKRUPTCY—LIEN OF JUDGMENT—FICTITIOUS DATE.

Though, under the laws of Pennsylvania, where a judgment bond is secured by mortgage, the lien of the judgment when entered is carried back for certain purposes to the date of the recording of the mortgage, such fictitious date will not be assigned to it under the bankruptcy law, where the judgment is entered after commencement of the proceeding in bankruptcy.

2. SAME—JUDGMENT AFTER COMMENCEMENT OF PROCEEDING.

Bankr. Act 1898, § 67f, providing that all judgments obtained against an insolvent within four months prior to filing of petition in bankruptcy against him shall be deemed void if he is adjudged a bankrupt, has no application to judgments entered after the proceeding in bankruptcy has begun.

3. SAME—TITLE OF TRUSTEE.

Under Bankr. Act 1898, § 70, providing that, after the trustee is appointed, the title to the bankrupt's property shall vest in him as of the date of the adjudication, the trustee takes the property free of the lien of a judgment against the bankrupt entered after the adjudication and before the appointment.

In Bankruptcy. Petition to vacate restraining order, and to permit mortgagees to bring suit.

John A. Herman, for creditor.

Frederick M. Ott, for trustee.

J. B. McPHERSON, District Judge. The restraining order was issued to prevent further proceedings upon two executions issued on judgment bonds that had been signed by the bankrupt more than two years before the adjudication, but had not been entered of record until a few days before the appointment of the trustee. The petition was filed and the adjudication entered on November 22d, the bonds were entered and executions issued on December 4th, and the trustee was appointed on December 8th. The bonds accompany and are secured by a mortgage, and it is argued in support of the validity of the executions that the lien of the judgments is carried back by the law of Pennsylvania to the date when the mortgage was recorded, and should, therefore, be considered as if the lien had originated at that time. This may be true for certain purposes, but, under the present circumstances, I must decline to assign a fictitious date to the existence of the lien. It is no doubt true that the bonds are for the same debt that is secured by the mortgage, but the judgments are general judgments, capable of being levied upon any real or personal property belonging to the debtor, as well as upon the property mortgaged, and in all essential respects are like a judgment recovered after trial. Their lien, therefore, must be considered as beginning, if at all, upon the date of entry, and accordingly the first question is whether a judgment entered after adjudication obtains a lien upon the bankrupt's realty. It has been recently decided in St. Cyr v. Daignault (D. C.) 103 Fed. 854, that a judgment by default taken since adjudication is void, and that a permanent stay of proceedings should be granted. I have no doubt that the grant of a permanent stay was right, but, with great respect for the opinion of the learned judge who decided that case, I find myself unable to agree with the reason given therefor. I do not think that clause "f" of section 67 applies to judgments entered after the adjudication. It seems clear to me that this clause refers entirely to judgments and other liens obtained within four months preceding the filing of the petition; and, indeed, I do not find any provision in the act dealing with the lien of judgments entered after the proceeding in bankruptcy has been begun. The reason for this apparent omission may be found in the fact that section 70 expressly provides that, after the trustee has been appointed, the title to the bankrupt's property shall vest in him as of the date of the adjudication; and while it is true that during the interval between the adjudication and the appointment of the trustee the title to the property remains in the bankrupt, it is a title liable to be devested upon the appointment of a trustee, and a title upon which no permanent lien can be acquired. It may have been thought unnecessary, therefore, to pay any attention to what must be an unavailing effort to obtain a lien. A similar view concerning the scope of section 67f has been expressed in the supreme court of New Jersey. Kinmouth v. Braeutigam, 46 Atl. 769. I have been speaking of voluntary bankruptcy merely. In a case of involuntary bankruptcy a question might be presented concerning the lien of a judgment entered after the filing of the petition, but before the entry of adjudication; and this question I have not considered.

It follows, I think, that the judgments now in dispute are not liens upon the property on which a levy has been made, and, accordingly, that the restraining order should be continued. But I am also of opinion that the petitioner should be allowed to proceed upon her mortgage, and obtain judgment thereon, so that, if the court should find it more advantageous to permit her to sell than the trustee, she may be in a position to issue execution. Leave is therefore granted to the petitioner to issue a writ of scire facias upon her mortgage, and to obtain judgment thereon in due course; but no writ of execution may be issued against the mortgaged property without leave of the court. A similar leave is granted to the Harrisburg Trust Company, the second mortgagee.

The application to vacate the restraining order is denied.

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## In re McGEE.

(District Court, N. D. New York. January 12, 1901.)

No. 58.

BANKRUPTCY—ACTS OF BANKRUPTCY—PREFERENCE OF CREDITOR.

An insolvent, who was indebted to an estate, which was also liable on a note discounted for the benefit of the insolvent, transferred to the administratrix of the estate, as an individual, certain book accounts, under an agreement in pursuance of which the transferee took up the note. The fact of insolvency was known to both parties. *Held*, that the transfer necessarily operated, and must be deemed to have been made with the intent, to prefer the estate as a creditor, and constituted an act of bankruptcy on the part of the debtor, under Bankr. Act 1898, § 3a, subd. 2.

In Bankruptcy. On creditor's petition, answer, and report of referee.

The petition was filed July 9, 1900, and alleges two acts of bankruptcy based upon the transfer by the alleged bankrupt while insolvent of property with intent to prefer a creditor. The alleged bankrupt on the 26th day of July 1900, filed an answer denying the said acts of bankruptcy. The issue thus joined was referred to the referee to ascertain and report the facts under rule 8 of this court. The referee's report was filed September 6, 1900.

Lawrence Russell, for creditors.

Joseph F. Brown, for alleged bankrupt.

COXE, District Judge. It is conceded by the alleged bankrupt that for more than six months next preceding the filing of the petition she resided in the Northern district of New York; that she owes debts amounting to $1,000; that the three petitioners are creditors, having valid claims amounting to over $500; that at the date of filing the petition and for more than four months previous thereto she was insolvent and knew that she was insolvent. The only question, therefore, is whether an act of bankruptcy has been established. On the 30th of March, 1900, the alleged bankrupt was indebted to the estate of George Lawyer for more than $500. Besides this the

Lawyer estate was liable to pay a note of $225, which had been discounted for the benefit, in part at least, of the alleged bankrupt by the First National Bank of Canton, N. Y. On that day—March 30th—the alleged bankrupt transferred to Ettie A. Lawyer, who was administratrix of the estate, $300 worth of book accounts accruing from the business conducted by the alleged bankrupt and her husband. On the 14th of April thereafter Mrs. Lawyer borrowed from a third party $230, which money was given to the husband of the alleged bankrupt who took up the note and delivered it to Mrs. Lawyer.

Section 3 of the bankruptcy act, subd. 2, provides that a person has committed an act of bankruptcy when he has "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." Section 1, cl. 25, provides that a "'transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." There can be no question as to the alleged bankrupt's intent to give a preference, under the provisions of section 3. It is a cardinal principle of law that every one is presumed to intend the necessary consequences of his acts, and where an insolvent debtor transfers a large portion of his property to one creditor, to the exclusion of all the rest, such a transaction must be taken as conclusive evidence of his intent to prefer that creditor. Toof v. Martin, 13 Wall. 48, 20 L. Ed. 481. It is thought that the transfer of the accounts amounted to an act of bankruptcy. Mrs. McGee was indebted to the Lawyer estate. If the transfer had not been made the Lawyer estate would have received its share with the other creditors. Because of the transfer of the accounts the note for $225 was retired. That this result was brought about by the transfer to Mrs. Lawyer as an individual and not in her representative capacity does not seem material. The purpose of the transfer was fully known to her. If the note had been held by the estate and if the transfer had been directly to the estate and the note surrendered it is plain that the estate would have received a preference over the other creditors, and, yet, in contemplation of law, this is precisely what occurred. Assume, for illustration, that Mrs. McGee was the owner of a bond, the market value of which was $225, and that she, being insolvent, had transferred this bond to a creditor who held her note for that amount. There can be no question that such a transaction would be an act of bankruptcy. Would it be any less an act of bankruptcy if the bond had been transferred to a third person with direction to raise the money thereon and pay the note? Or assume that the $225 was borrowed of a third party and the bond transferred as security, with full knowledge of all that the money was to be paid to a favored creditor, would this change the result? It is thought not. In either instance the property, which, theoretically, at least, belongs to all the creditors, is taken from them and given to a favored creditor,—a situation which the bankruptcy act was passed to prevent. Speaking of this transaction the referee dis-

tinctly finds that "this assignment was made to carry out the verbal agreement between Mrs. McGee and Mrs. Lawyer February 22, 1900, and with the knowledge on the part of both that Mrs. McGee was insolvent and with the intent to prefer the Lawyers over other creditors." The one stubborn fact cannot be denied or explained that the proceeds of accounts on which the alleged bankrupt warranted $300 to be due have been given to one creditor to the exclusion of all the rest. It is unnecessary to discuss the question of fact arising upon the date of the transfer of the $500 Meeservy note and no opinion is expressed with reference to that branch of the case. It follows that an adjudication should be made.

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## In re KENNEY.

(Circuit Court of Appeals, Second Circuit. December 6, 1900.)

No. 21.

BANKRUPTCY—DISSOLUTION OF LIENS—PROCEEDS OF EXECUTION.

Under Bankr. Act 1898, § 67f, providing that "all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be null and void in case he is adjudged a bankrupt," where, within four months before the filing of a petition in bankruptcy against an insolvent judgment debtor, an execution has been issued and levied on his personal property, and sale made, the proceeds of such sale, remaining in the sheriff's hands at the time of the adjudication, do not belong to the judgment creditor, but to the estate of the bankrupt, and the court of bankruptcy has power and jurisdiction to order the sheriff to pay over such proceeds to the trustee when appointed.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

This cause comes here upon an appeal from an order of the district court, Southern district of New York, which directed that so much of the right under a judgment obtained by Clark against Kenney for $20,906.66, in the supreme court of New York, and the levy made by the sheriff under the execution issued to him upon the said judgment, as is represented by the proceeds of the sale made by said sheriff under said execution, be preserved for the benefit of the estate of the bankrupt, and that the same pass to, and shall be preserved by, the trustee, and further directing the sheriff to turn over said proceeds, viz. $12,451.09, now in his hands. 97 Fed. 554.

S. L. Samuels, for petitioner.

Nelson S. Spencer, for trustee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The questions arising upon this appeal have been quite fully discussed in the opinion of the district judge, and it seems hardly necessary to write more than an intimation that this court concurs in his reasoning and conclusions.

The facts disclosed upon the papers, chronologically stated, are these: On March 6, 1899, Clark recovered judgment against Kenney in the state court for $20,906.66, and execution was issued on the

same day. On March 15, 1899, the sheriff sold out defendant's stock of goods, which he had levied upon, for $12,451.09. On April 13, 1899, petition in involuntary bankruptcy was filed, and Kenney was adjudged a bankrupt on July 12th. The sheriff not having paid over the proceeds of the execution at the time petition was filed, he was temporarily enjoined from doing so, and subsequently, after a hearing in which Clark appeared, presented testimony, and was heard, the order appealed from was made and entered.

The question presented is, who is entitled to the $12,451.09,—the trustee or the judgment creditor? As the district judge has clearly pointed out, the answer to this question is to be found, not in the earlier act of 1867, nor in the decisions thereon, but in the present act, which is certainly most drastic in its provisions, as will be seen from an inspection of the particular section applicable to the facts in the case at bar:

"Sec. 67f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

There can be no doubt that it was the intention of congress by this section to prohibit creditors of a bankrupt from obtaining preferences over other creditors, as the result of any legal proceedings against him, during the period of four months prior to the filing of the petition; and apt words are used to express that intention. The property of the bankrupt is safeguarded against all such proceedings by the provision that such of them as would ordinarily be liens against such bankrupt shall be deemed null and void, and the property wholly discharged and released from the same. A broad and liberal construction of the section should be adopted if necessary to effect this intent, but no strained construction is necessary in the face of language so comprehensive. Applying it to the concrete case now before us, we find that four months before petition the bankrupt had a stock of goods worth $12,000 or more. He did not sell them, and, if nothing had happened, they would have been in his possession when his estate passed to the trustee, who might have realized the $12,000 from them to distribute among all the creditors. How has this amount disappeared? Because Clark obtained a judgment against the bankrupt, and the sheriff under such judgment made a levy, which removed the goods from the bankrupt's estate, and turned them, through sale, into money. But, under the provisions of the bankrupt act, the judgment and the levy are to be held null and void.

As a consequence, the goods have been forcibly removed, without right, from the bankrupt's possession by Clark and the sheriff, and are still to be considered a part of his estate, for the return of which the court (by explicit provision in the section) may provide summarily by order, except that the title of a bona fide purchaser for value shall not be interfered with. It makes no difference whether the creditor and sheriff, whose only title rests on "null and void" proceedings, hold the goods themselves, or the money which represents them, nor whether, as soon as the sheriff sells under execution, it is his duty to turn over the proceeds to the judgment creditor, nor whether under the law of New York the sheriff holds the proceeds as the agent of the creditor, nor that ordinarily such proceeds would be the property of the judgment creditor. They cannot be his property in this case, because the only proceedings through which he can make out title to retain their possession are such as the bankruptcy courts must hold to be null and void.

A further objection to the granting of the order, based on an alleged partnership between the bankrupt and a person who put some money in the business, is sufficiently discussed in the opinion of the district judge. The order of the district court is affirmed.

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In re SILBERHORN.

McKEY v. SMITH.

(District Court, N. D. Illinois, N. D. November 8, 1900.)

No. 2,817.

BANKRUPTCY—SUITS BY TRUSTEE—JURISDICTION.

Where a bankrupt held as collateral security for a loan a certificate of the pledgor's membership in a board of trade, a petition by his trustee for an order requiring the pledgor to apply to the board, in accordance with its rules, for the posting and sale of such certificate, is in the nature of a suit to foreclose the security, which is within the provisions of Bankr. Act 1898, § 23, and not within the jurisdiction of the court of bankruptcy, unless by consent of the debtor.

In Bankruptcy. On petition of trustee, and plea to jurisdiction.

Wheeler & Silber, for trustee.

J. M. Longnecker, for respondent.

KOHLSAAT, District Judge. This matter comes on to be heard upon a plea to the jurisdiction of this court filed by respondent to the petition of the trustee herein, in which the trustee seeks an order of this court compelling respondent to make a written application to the Board of Trade of Chicago for the posting and sale of a certificate of membership in said board in the name of respondent, which certificate respondent had pledged to the bankrupt as security for an indebtedness of $1,500. The collateral agreement gave bankrupt the right to sell said certificate upon default in payment of the indebtedness, etc., without notice to respondent. The sole question is whether or not this proceeding is a suit, within the meaning of the bankrupt act, and the decisions of the federal supreme

court construing section 23 of said act. I am of the opinion that it is in the nature of a proceeding to foreclose collateral security, in which proceeding respondent would have the right to prove, if possible, that none or only part of the indebtedness exists or is due. For this reason this proceeding must be held to be within the terms of said section 23, and the petition is dismissed for want of jurisdiction.

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## In re HARPER.

(District Court, N. D. Illinois, N. D. November 8, 1900.)

No. 355.

BANKRUPTCY—ACTS OF BANKRUPTCY—PERMITTING PREFERENCE THROUGH LEGAL PROCEEDINGS.

A petition in involuntary bankruptcy sufficiently shows an act of bankruptcy, under the bankrupt act, by suffering or permitting a creditor to obtain a preference through legal proceedings, not having vacated or discharged such preference at least five days before final disposition of the property affected thereby, where it alleges that the alleged bankrupt while insolvent permitted a judgment against him to remain unsatisfied after execution had been issued thereon and a demand made upon him thereunder, and garnishment proceedings instituted on such judgment, in which the garnishee had answered, admitting a sum to be due from him to the defendant, where more than five days had elapsed after the time when the garnishee might have answered under the statute and paid the money into court.

In Bankruptcy. On demurrer to petition in involuntary proceedings.

Charles Hughes, for bankrupt.

Emery S. Walker, Percival Steele, and Jay D. Miller, for petitioning creditors.

KOHLSAAT, District Judge. This matter comes on to be heard upon demurrer of the bankrupt to the petition herein, on the ground that the specific facts stated in the petition do not show that Harper "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference." The act complained of in the petition as in contravention of said provision of the bankrupt act was the permission by Harper of a judgment against him to remain unsatisfied after execution had been issued thereunder, a demand made upon him under said execution, garnishment proceedings instituted upon said judgment, and an answer filed by a garnishee in said garnishment suit admitting $3,255.78 as due to Harper. As a matter of practice in this state, immediately upon the commencement of a garnishment proceeding, a garnishee could answer showing the amount in his hands belonging to the judgment debtor, and could upon the filing of such answer turn over such amount to the judgment creditor to the extent of the amount due under the judgment. No period of five days would necessarily have to elapse between the creation of a preference under garnishment

proceedings and the final disposition of the property affected by such proceeding. For this reason I am of the opinion that the spirit of the act covers the facts set forth in this petition, and that the allegations thereof are sufficient. The demurrer is overruled.

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## In re CHAPMAN et al.

(District Court, N. D. Illinois, N. D. November 24, 1900.)

No. 2,144.

BANKRUPTCY—PROVABLE DEBTS—NOTES INTENDED AS GIFT.

A husband, intending to make a gift of money to his wife, loaned the money to a firm in which he was a partner, executed the notes of the firm therefor payable to his wife, and placed such notes in his private drawer in the firm safe, where they remained until after the institution of proceedings on which the firm was adjudicated bankrupt. *Held*, that there was no such delivery as to consummate the intended gift, and render the notes provable by the wife against the partnership estate in bankruptcy.

In Bankruptcy. On exceptions to allowance of claim.

C. Van A. Smith, for certain creditors.

W. D. Barge, for claimant.

KOHLSAAT, District Judge. This matter comes on to be heard upon exceptions to the allowance by the referee of the claim of the wife of one of the bankrupts, filed against the partnership estate. The transaction by which the wife claims to have acquired the money upon which is based her claim amounts in law simply to a promise of a gift to her by the husband. Instead of the gift being consummated by a delivery to her, the husband lent the sum to the bankrupt firm, executed the notes of the firm for the amount, payable to his wife, and placed said notes in his private drawer in the safe of the firm, where they remained until after the institution of these bankruptcy proceedings. In my opinion, this does not amount in law to a delivery which would render consummated and enforceable an intended gift. The ruling of the referee is reversed, and the claim disallowed

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## In re MORAN.

(District Court, W. D. Virginia. December 28, 1900.)

1. BANKRUPTCY — TITLE TO PROPERTY — HOMESTEAD EXEMPTION UNDER VIRGINIA STATUTE.

Const. Va. art. 11, § 1, relating to homestead exemptions, provides that every householder or head of a family "shall be entitled * * * to hold exempt from levy," etc., property, real or personal, not exceeding in value $2,000. *Held*, that such provision merely gives the debtor a privilege of exemption, and does not create an absolute exemption of any particular property, which will prevent the title to such property from vesting in the debtor's trustee in bankruptcy, under Bankr. Act 1898, § 70a, where the exemption is not claimed in his schedules.

2. SAME—WAIVER OF EXEMPTION IN NOTE—LIEN.

Under Code Va. 1887, § 3647, which provides that a debtor may waive the benefit of his homestead exemption, and that, where he declares such

waiver in an obligation, property which he would be entitled to hold as exempt under the law may be subjected to the payment of such obligation under legal process, a note in which the debtor waives his right of exemption creates no lien on any property which is preserved by Bankr. Act 1898, § 67d.

8. SAME—CLAIM OF EXEMPTION—RIGHT TO AMEND SCHEDULES.

A bankrupt should be permitted to amend his schedules, at any time before the distribution of his estate, to assert a further claim to exemptions allowed him by the laws of the state, where such claim is made in good faith and for the benefit of his family; but he will not be permitted to amend and assert such claim, after title to the property has vested in his trustee, where its purpose is, and its only effect will be, to give a preference to those of his creditors who hold notes in which he has waived his right of exemption.

In Bankruptcy. On question certified by referee.

Micajah Woods and George Perkins, for bankrupt.
D. Harmon and Wilson & Manson, for creditors.

PAUL, District Judge. In this matter the referee certifies to the judge of this court the question of the right of the bankrupt to amend his schedules so as to enlarge the exemptions beyond those claimed in the schedules made in pursuance of an order of adjudication in involuntary bankruptcy. On the 24th day of November, 1899, the said W. G. Moran executed a deed of trust on certain property, wherein he made one J. D. Smith, to whom he owed $900, a preferred creditor. On the 3d day of February, 1900, he executed another deed of trust, in which he gave a preference to the People's National Bank of Charlottesville, Va., for a debt of $400 due from said Moran to said bank. On the ground that these preferences had been given to the creditors named, a number of other creditors filed a petition, praying that said Moran be adjudged an involuntary bankrupt. An order adjudicating the said W. G. Moran an involuntary bankrupt was entered March 16, 1900. In compliance with the requirements of section 7, subsec. 8, of the bankrupt law, the bankrupt, within 10 days, the time prescribed, made out and filed a schedule of his property, a list of his creditors, and a claim under the homestead exemption law of Virginia of certain articles designated in detail, with the value of each, the whole amounting to the sum of $60.

The constitution of the state of Virginia (section 1, art. 11, Code 1887) provides that "every householder or head of a family shall be entitled * * * to hold exempt from levy, seizure, garnisheeing or sale under any execution, order or other process * * * his real or personal property, or either, including money and debts due him, * * * to the value not exceeding two thousand dollars. * * *" Section 3647 of the Code of Virginia 1887 provides that the debtor may waive the benefit of the homestead exemption given by section 1, art. 11, of the state constitution. The statute says:

"If any person shall declare in a bond, bill, note or other instrument * * * that he waives, as to such obligation, the exemption from liability of the property * * * which he may be entitled to claim and hold exempt, * * * the said property shall be liable to be subjected for said obligation, under legal process, in like manner and to the same extent as other property or estate of such person."

On the 8th of April, 1900, at the first meeting of creditors, the bankrupt notified the referee of his intention "to claim his homestead exemption to the extent of $2,000 out of the property involved in the bankrupt proceeding, such exemption to be paid in money from the proceeds of such portion of said property as said Moran is entitled to have exempt under the law, whether such proceeds be from sales or collections." At the first meeting of creditors the hearing of the application for leave to amend the schedules in bankruptcy, enlarging the claim of homestead, was continued to May 8, 1900, at which time the petitioning creditors filed exceptions to the petition of the bankrupt for leave to amend his schedules. The substance of these exceptions is—First, that the bankrupt having claimed in his original schedule an exemption, under the homestead law of Virginia, of certain articles of the value of $60, the title to the additional property which he sought to have set apart under the homestead exemption had vested in the trustee, and the bankrupt, having no title thereto, could not claim a homestead exemption therein, and that the schedule of the bankrupt was a waiver or abandonment of any further claim of homestead; second, that the claim of homestead exemption is not pretended to be made for the benefit of the householder and his family, but as a means of giving a preference to the waiver of homestead creditors, including the People's National Bank, the attempted preference of which was an act of bankruptcy, because it is obvious that all of the assets, including the property claimed as exempt, will have to go to pay the debts.

The referee refused to allow the schedule claiming a homestead exemption to be amended, and the bankrupt filed his petition for an appeal to the judge of this court.

The same attorney who prepared the schedules of the bankrupt, under the order adjudicating him an involuntary bankrupt, in which articles of the value of $60 are claimed under the homestead exemption of Virginia, which allows a householder or head of a family a homestead exemption of $2,000, prepared the petition for an additional allowance under the homestead exemption. No statement is made in the petition for an amendment of the schedule for additional claim of homestead as to the cause of error, or of mistake, inadvertence, or want of full information as to his rights, when the bankrupt filed his schedule in which he claimed articles of the value of $60. Order 11, General Orders in Bankruptcy (32 C. C. A. xiv., 89 Fed. vii.); Loveland, Bankr. 140, 141. The reason for this failure of the bankrupt to allege error or mistake on his part, in not claiming more than $60 in his original schedule under the homestead exemption law, will plainly appear in the further examination of the case. The right of the bankrupt to amend his schedules, where he shows an honest purpose to claim the benefit of the homestead exemption for the benefit of himself or of his family, cannot be seriously questioned. This amendment can be made at any time before his discharge, or, at least, before the distribution of the fund arising from a sale of the property surrendered. Loveland, Bankr. 342. In re Kean, 2 Hughes, 322, Fed. Cas. No. 7,630. But this must be a real, a substantial, claim to property that can be set apart under

the provisions of the homestead law, and which the bankrupt, as a householder or head of a family, is entitled to hold exempt from levy, seizure, or sale, under any execution, order, or other process. It must appear to the bankrupt court that the property claimed by the bankrupt as a homestead exemption, for the benefit of himself or his family, is such that it can be set aside for this purpose. It is not claimed by the bankrupt in this case that there is a dollar's worth of the property surrendered by him that can be set apart and vested in him as a homestead exemption or as any part of such exemption. The record shows that the homestead waiver debts proved by creditors are largely in excess of the property surrendered, and that there is nothing out of which a homestead exemption can be assigned. This fact explains the failure of the bankrupt, in his petition for additional claim of homestead, to state the cause of error in his original schedule, in which he claimed, under the homestead exemption, certain articles of the value of $60. The real object of the bankrupt in filing his additional claim of homestead exemption is shown in his petition for review of the decision of the referee. His purpose is to give to creditors holding notes waiving the homestead exemption a preference to those whose debts are not evidenced by waiver notes. He abandons the idea that the homestead he claims is for the benefit of himself or of his family. He insists that the homestead waiver notes he has given to certain creditors constitute liens on the property which he in his petition claims as a homestead exemption. The homestead waiver notes held by creditors of a bankrupt do not constitute liens on the property surrendered by him. The only superiority they have over creditors holding nonwaiver claims is that, where the bankrupt is entitled to claim property under the homestead exemption laws, he cannot hold the same against the debts as to which he has waived the benefit of his homestead exemption. No decision construing the statute (section 3647, Code Va. 1887), allowing a debtor to waive the benefit of his homestead exemption, holds that such waiver creates a lien on the property a debtor may claim for his homestead. The creditor having a waiver note has no hold or claim upon the property of the debtor as a security for the debt. 13 Enc. Pl. & Prac. 123. When a debtor gives a waiver note to his creditor as between himself and such creditor, he incumbers his right to claim the benefit of a homestead exemption. In re Solomon, 2 Hughes, 164, Fed. Cas. No. 13,166. This is as far as the effect of a waiver note on the right of a debtor to claim a homestead exemption has ever been carried by any court in Virginia, state or federal.

It is not, as contended by counsel for the bankrupt, such a lien as that preserved under section 67, cl. "d," Bankr. Act 1898. Likewise erroneous is the contention that the title to the property claimed as a homestead did not vest in the trustee on the adjudication of bankruptcy. This assumption is based on section 6a and on section 70a of the bankrupt act of 1898:

"Sec. 6. Exemptions of Bankrupts. (a) This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they

have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

"Sec. 70. Title to Property. (a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt."

This court in Re Sisler, 2 Am. Bankr. R. 760, 96 Fed. 402, construed sections 6a and 70a in their application to property claimed by a bankrupt in Virginia as a homestead, and it cannot more clearly state its views in this case than by repeating what it said in that:

"It is insisted that by these provisions of the bankrupt act no title to the property claimed by the bankrupt to be exempt under the Virginia homestead law passes to the trustee. That the title to property exempt by state laws does not pass to the trustee in bankruptcy cannot be questioned. Similar provisions to those just quoted from the bankrupt act of 1898 are found in the bankrupt law of 1867. Yet it was held in Re Solomon, supra, that, where there was a waiver of the homestead exemption, the property claimed to be exempt as a homestead did pass to the assignee. The error in the argument which insists that the title to the property claimed by the bankrupt as a homestead does not pass to the trustee lies in the fact that such property is not, by the constitution and laws of Virginia, absolutely exempt from the payment of debts. The argument of counsel for the bankrupt applies to such specific property as is exempt under section 3650, Code Va., on which any deed of trust, mortgage, or other writing or pledge made by a householder to give a lien on such property is void as to such property. Section 3655, Id. The distinction between the character of exemption of property given by section 3650 and that of the homestead exemption allowed by the constitution is very clearly stated by the court of appeals of Virginia in Reed v. Bank, 29 Grat. 719. Christian, J., delivering the opinion of the court, says: 'The privilege given by the constitution is a personal privilege, to be exercised by him or not, as he may choose. The constitution does not declare, as does the poor debtors' law, that certain property "shall be exempt" from levy, etc., but that the householder or head of a family shall be entitled to hold property, to be selected by him, to the value of $2,000. In the former case the law executes itself. It is a part of the public policy of the government to exempt that particular property absolutely from forced sale, and its provisions cannot be waived. But there is no such constitutional declaration that property to the amount of $2,000 "shall be exempt." On the contrary, the very language used plainly shows that it may be exempt only when the privilege given to the householder or head of a family has been exercised, and the property selected and set apart by him.'"

In Linkenhoker's Heirs v. Detrick, 81 Va. 44, the court followed the decision in Reed v. Bank; and in Re Solomon, supra, Waite, C. J., drew the same distinction.

The position taken by counsel for the bankrupt, that in claiming a homestead exemption, where no benefit can result to him or his family, he is simply trying to uphold a contract, and if he did otherwise he would be depriving some creditors of vested rights, and placing others where they ought not to stand, is without merit. It is no part of the bankrupt's duty to aid some of his creditors in securing the payment of their debts, to the exclusion of others equally meritorious. The duty of the bankrupt, if he is entitled to a homestead exemption, is to claim it for the benefit of himself or of his family. The policy of the law in making provision for a homestead exemption is to provide shelter, food, and raiment for the family

when it is overtaken by the calamity of an indebtedness that cannot be liquidated without depriving the family of its home and the necessaries of life. The doctrine is thus stated in Wap. Homest. 4:

"The conservation of family homes is the purpose of homestead legislation. The policy of the state is to foster family homes as the factors of society, and thus promote the general good. To save them from disintegration, and secure their permanency, the legislator seeks to protect their homes from forced sales, so far as it can be done without injustice to others."

In Shipe v. Repass, 28 Grat. 716, Judge Staples says:

"But no one can look into the provision of our constitution and the adjudicated cases of other states and fail to see that the primary object is to provide for the family. As was said by the supreme court of Ohio in Sears v. Hanks, 14 Ohio St. 298: 'The humane policy of the homestead act seeks not the protection of the debtor, but its object is to protect his family from the inhumanity which would deprive its dependent members of a home; and, in aid of this wise and humane policy, the whole act should receive as liberal a construction as can be fairly given to it. We think its provisions protect the debtor's family as against his creditor in the actual enjoyment of a homestead, irrespective of the title or tenure by which it is held.' See Smyth, Homest. § 532. In the constitution and laws of all the states, and in the decisions of all the courts, the idea is kept prominently in view that the great purpose of the homestead exemption is not merely the benefit of the husband or parent, but the maintenance and security of the family against the imprudence, mismanagement, and neglect of the former."

It being the purpose of the homestead law to provide an exemption for the benefit of the insolvent debtor and his family, the bankrupt will not be permitted, under the guise of claiming a homestead exemption, to so pervert the law as to secure a preference to one or any number of his creditors. A court of bankruptcy will not lend its sanction to a scheme so palpably unjust, and that so flagrantly violates the primary object of the bankrupt act, which is that equality shall obtain in the administration of a bankrupt's estate, and that his creditors shall share pro rata in its distribution. To permit the bankrupt, under the color of claiming a homestead, to enable one class of his creditors—those holding homestead waiver notes—to collect their debts, to the exclusion of creditors holding nonwaiver claims, would practically annul the order adjudicating him an involuntary bankrupt. It would enable him, in great part, to carry into effect the preferences he aimed to give some of his creditors when he executed the deeds of trust of November 24, 1899, and of February 3, 1900. The creditors of this estate, unless they are lienholders, will share ratably in its distribution.

For the reasons stated, the holding of the referee is sustained.

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## In re WILLIAMS.

(District Court, W. D. Tennessee. January 14, 1901.)

BANKRUPTCY—PETITION FOR REVISION—PROCEDURE.

In a case for revision by original petition under Bankr. Act, § 24b, the petition must be filed in the court of appeals, and not in the district court, and cannot be "allowed" by the district court or judge by analogy to the process of taking appeals.[1]

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[1] Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

Application for an appeal to the circuit court of appeals, and also to be allowed to file a petition for revision, and to have the court fix the necessary bonds, issue the necessary citations, direct the necessary notice to be given to defendants, and to otherwise perfect the appeal and revision.

Hugh Edgington, for the motion.
Chas. R. White, opposed.

HAMMOND, J. This is a case for revision by original petition, under section 24b, Bankr. Act, and not for appeal, under section 25a, Id. The petition for revision must be filed in the court of appeals, and not here. Job-Printing Co. v. Schaefer, 41 C. C. A. 614, 101 Fed. 699. Neither the supreme court nor the court of appeals has seen fit to regulate the practice by rules prescribed for the purpose, and it seems plain to me that it would be an impertinent usurpation for the district court or judge to assume any function or authority in that behalf; and this notwithstanding the analogy suggested in Re Abraham, 35 C. C. A. 592, 93 Fed. 767–783. The court of appeals may, if it choose, treat an unauthorized appeal as an original petition for review, but non constat that the judge of the court of bankruptcy may "allow" the petition for revision, or resort to an unauthorized proceeding, as if upon appeal, to suit the convenience of parties. The proceedings for taking an appeal and for a review in bankruptcy are entirely distinct. Under the general law as contained in the Revised Statutes regulating the process of appeal, and section 25a of the bankruptcy statute, any judge of the court of original cognizance may "allow" the appeal, perhaps; certainly so under general order in bankruptcy No. 36 (32 C. C. A. xxxvi., 89 Fed. xiv.); but, in the absence of such statutory authority, I cannot agree that a review may be so had by "analogy" merely because neither the supreme court, under its special powers conferred by the bankruptcy statute, nor the court of appeals, under its general power to regulate its practice, original or appellate, has chosen to prescribe the mode of practice. Whatever inconvenience results must be endured until the actual practice by precedent has become established. The application of counsel that I shall fix a bond, approve the sureties, and direct the time and character of the "due notice" to be given under section 24b, is obviously beyond the power of the district court of bankruptcy.

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## In re MARCUS et al.

(Circuit Court of Appeals, First Circuit. January 17, 1901.)

No. 361.

BANKRUPTCY—ARREST—WRIT OF PROTECTION—JUDGMENT FOR COSTS.

A writ of protection against arrest of a bankrupt in civil actions save in those which are exempted by Bankr. Act 1898, § 9, does not protect him from arrest on execution on judgment for costs rendered against him after the adjudication; such costs not being provable, within section 63a. Wagner v. U. S. (C. C. A.) 104 Fed. 133, distinguished, and In re Marcus (D. C.) 104 Fed. 331, approved.

Petition for Revision of Proceedings in the District Court for the District of Massachusetts.

See 104 Fed. 331.

James D. Thomson, pro se.
Hiram P. Harriman, for defendants.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. The bankrupt against whom this petition was brought was arrested on an execution which issued from the superior court for and within the county of Suffolk, in the state of Massachusetts, on a judgment rendered after the adjudication in bankruptcy. The judgment was for costs in a suit brought by the bankrupt against the petitioner before the petition in bankruptcy was filed, which suit was disposed of in favor of the petitioner, and judgment thereon entered as already said. At the time of his arrest the bankrupt held a writ of protection, as follows:

"Commonwealth of Massachusetts. In the District Court of the United States for the District of Massachusetts. In the Matter of Alfred A. Marcus and Simeon Marcus, Bankrupts, in Bankruptcy.

"To all Persons Interested in Said Estate: Whereas, said bankrupts, on the twentieth day of March, A. D. 1900, did apply to me, James M. Olmstead, a referee in bankruptcy for and as said district court, for a writ of protection, it is hereby ordered and decreed that said bankrupts be, and are hereby, protected and exempt from arrest in all civil actions brought against them, save in those which are exempted by section 9 of the bankruptcy act. This order to continue until the final adjudication on their application for their discharge, unless suspended or vacated by order of this court; and it is further ordered or decreed that all persons are prohibited from arresting the said Alfred A. Marcus and Simeon Marcus, save as aforesaid, until adjudication on their application for a discharge.

"Witness my hand at Boston, in said district, this seventeenth day of May, A. D. 1900. James M. Olmstead."

The bankrupt applied to the district court, sitting in bankruptcy, to be discharged from the arrest, and a discharge was ordered, and this petition was brought to revise that adjudication. The record shows that, in ordering the discharge, the court relied on the writ of protection, though apparently its specific terms were not brought to its attention, and that it did not rely on the provision in the bankrupt act of July 1, 1898 (section 9a), which exempts a bankrupt from arrest when in attendance upon a court of bankruptcy, or when engaged in the performance of a duty imposed by the act, nor on the broad powers asserted for courts of bankruptcy by the circuit court of appeals for the Sixth circuit in Wagner v. U. S. (C. C. A.) 104 Fed. 133.

The bankrupt was adjudicated such on his own petition, filed before the judgment for costs was rendered, as already said. Therefore the costs were not provable against his estate, and consequently they were within the letter of the express exceptions in section 9a, so far as they relate to arrests on civil process when issued upon a debt or claim from which a discharge in bankruptcy is not a release. Section 63a directs specifically what taxable costs are prov-

able, and its provisions with reference thereto must be held to cover that entire subject-matter, and to exclude such costs from being considered in connection with those parts of the act which relate to provable "unliquidated claims." In this particular we agree with the conclusions of Judge Lowell, sitting in the district court for the district of Massachusetts, reported in Re Marcus (D. C.) 104 Fed. 331. We also agree with the conclusions there expressed, that, ordinarily, a bankrupt is not entitled to be protected from arrest on an execution of the character of that now before us. We also concur in the construction and effect there given to the writ of protection in that case, which we are advised was the same in form as the writ of protection in the case at bar, in that it relates only to actions on claims or debts which are provable.

We are not called upon to determine what should be our action if the court below had undertaken to proceed on the broad principles asserted in Wagner v. U. S., or had held that the bankrupt should be discharged from arrest because he was in attendance on the court, or engaged in the performance of some duty imposed on him. Under the circumstances, the arrest cannot be regarded as illegal, the bankrupt should not have been discharged therefrom, and this petition is well grounded.

Let there be a decree for the petitioner, with costs against the respondents.

In re HEMBY-HUTCHINSON PUB. CO.

(District Court, N. D. Illinois, N. D. October 29, 1900.)

No. 1,471.

BANKRUPTCY—SUITS BY TRUSTEE—JURISDICTION.

A general appearance by a defendant to a petition by a trustee in bankruptcy does not constitute a consent to be sued in the court of bankruptcy, which will prevent him from objecting to its jurisdiction on the filing of an amended petition, where such amended petition for the first time states a case authorizing relief against him.

In Bankruptcy. On exceptions to report of referee.

Stern & Lauer, for trustee.
Respondents, pro se.

KOHLSAAT, District Judge. In this case I am of the opinion that the general appearance of defendants to the rule to show cause, and their failure to set up their right to be sued in the state court until after the filing of the second amended petition herein, when for the first time a case was made upon which relief could be obtained against them, did not constitute the consent contemplated in the opinions of the supreme court covering the question of the jurisdiction in which trustees in bankruptcy may bring suit. The exceptions to the referee's finding are therefore sustained, and the petition dismissed for want of jurisdiction. The trustee is granted leave to bring suit in the proper state court.

## In re SEEBOLD.

## WILCOX v. CIVIL SHERIFF OF PARISH OF ORLEANS et al.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1901.)

No. 987.

1. BANKRUPT ACT—APPEAL—REVIEW—JURISDICTION.

Where the United States circuit court, acting as a court of bankruptcy, denied a rule by the trustee on the civil sheriff of a parish to turn over to the trustee certain funds received as the proceeds of a sale of the bankrupt's property under proceedings instituted in the state court prior to the proceedings in bankruptcy, and the trustee appealed, and also presented his petition to the circuit court, praying that the cause and judgment be sent to the circuit court of appeals, and a return day fixed, and formal notice was served on the attorneys of record, the action taken was sufficient to bring the cause before the circuit court of appeals for review, under section 24b, providing that on due notice and petition such court shall have jurisdiction to revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction, though the order of the bankrupt court was not appealable.[1]

2. SAME.

Under Bankr. Act, § 24b, providing that the circuit court of appeals has jurisdiction in equity to revise, in matter of law, proceedings of the inferior courts of bankruptcy "within their jurisdiction," the jurisdiction referred to is territorial, and such court has jurisdiction of an appeal from a court of bankruptcy within its circuit where, though objection to the jurisdiction of the court below was presented there by the appellee, other grounds of defense were also presented by him, and the court did not ground its decision in his favor on the question of jurisdiction.

3. SAME—EXECUTION FROM STATE COURT.

Where an action was begun in a state court and prosecuted to judgment, execution issued, and the property subjected to pledge by the judgment seized and advertised for sale before the institution of voluntary proceedings in bankruptcy, the state court having possession of the property and jurisdiction of the parties, the court of bankruptcy had no authority to stop the proceedings.

Petition for Revision of Proceedings in the Circuit Court of the United States for the Eastern District of Louisiana.

On March 8, 1900, suit was instituted by the landlords of Mrs. Lisette Seebold (now the bankrupt) for rent for certain premises in the city of New Orleans claimed to be due the landlords on that day by the terms of the lease under which the premises were held and occupied. On the 13th day of the same month, on the answer and confession of Mrs. Seebold, the landlords obtained judgment against her for the sum of $2,974.99, with interest thereon at the rate of 8 per cent. per annum from March 9, 1900, until final payment, together with 10 per cent. upon principal and interest, as attorney's fees, and all costs. It was therein also adjudged and decreed that the lessors have the privilege and right of pledge granted and fixed by law in favor of lessors upon the property and movable effects in the premises described and rented by them to the said Mrs. Seebold, and decreed that the privilege and right of pledge be enforced and the property and effects be sold according to law; that out of the proceeds of sale the lessors be paid the amount, with interest and attorney's fees and costs, by priority and preference over all parties whatsoever. And on the same day last named a writ of execution issued out of the state court, commanding the sheriff to seize and sell the property of Mrs. Seebold, to cause to be made for the lessors the sum, with interest, at-

[1] Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

torney's fees, and costs, with the privilege and right of pledge granted and fixed by law in favor of lessors upon the property and movable effects in the premises rented by the lessors to Mrs. Seebold. Under this writ the sheriff seized (1) all the movable property and effects that were in the premises; (2) the contract of lease made by the lessors with Mrs. Seebold; and in case the lease should not be sold (3) all the right of occupancy of the premises described vested in Mrs. Seebold under the lease. Having made the seizure, the sheriff advertised the property to be sold on Monday, April 2, 1900. On March 31, 1900, Mrs. Seebold presented her petition to be adjudged a bankrupt, and was on the same day so adjudged by the court of bankruptcy for the Eastern district of Louisiana, after which, but on the same day, she presented her petition to the judge of the court of bankruptcy, reciting the fact of the seizure that had been made of her goods and property under the judgment and execution mentioned, and the advertisement for the sale to be made on April 2d, stating that she was not advised that the sale, as advertised to take place, would be ruinous to the creditors or injurious to their interests, and unless the court sees fit to intervene and restrain the said sale she does not feel authorized to do so; but she prays for an order enjoining and restraining the sheriff from paying over to the plaintiffs, the lessors, in the proceedings mentioned, the proceeds of the sale of the stock of merchandise seized and advertised for sale under the proceedings, and directing the sheriff to hold the proceeds until the further order of the court of bankruptcy, and to pay the proceeds to the trustee, or other officer to be elected or appointed in the bankrupt proceedings, to distribute the same to the creditors of Mrs. Lisette Seebold. On the same day, March 31, 1900, the judge of the court of bankruptcy made an order substantially in conformity to the prayer of this petition of the bankrupt. The sale as advertised by the sheriff duly proceeded on April 2, 1900, and was completed on the 16th of the same month. The gross proceeds of the sale were $2,584.48. On June 7, 1900, the sheriff took a rule in the state court for the distribution of these proceeds, naming as defendants in the rule all the parties in interest, including C. O. Wilcox, the trustee, the city of New Orleans, and the state tax collector, which rule was fixed for trial in the state court, to be had on June 8, 1900, on which day the trial of the rule and matter was continued to June 15th. On April 3, 1900, the judge of the court of bankruptcy entered an order to the effect that "the judge of this court, pursuant to * * * section 601, Rev. St. U. S., does hereby recuse himself in said bankruptcy proceedings of said Mrs. Lisette Seebold, and hereby orders that this order shall be entered on the minutes of this court, and that an authenticated copy of this order, with all the proceedings in this cause, shall be forthwith certified to the circuit court for the Eastern district of Louisiana, New Orleans division." On April 27th the order just recited was so amended as to show that the same was made on motion and request of the bankrupt, through her counsel. Wilcox was duly elected and qualified as trustee in the proceedings in bankruptcy in this estate; and on June 8, 1900, he presented to the circuit court, into which the proceedings had been certified, his petition reciting substantially the facts as to what had occurred, and the present status, and praying that the sheriff and the lessors be required to answer, and that each of them be ordered to turn over and deliver to the honorable court and to the trustee the proceeds of the sale of the property located in the rented premises, and praying in the meanwhile for a restraining order, on which petition the Honorable Charles Swayne, United States district judge for the Northern district of Florida (then, by designation, holding the circuit court for the Eastern district of Louisiana), ordered that the defendants named in the petition should show cause on June 12, 1900, at 11 a. m., why they, and each of them, should not turn over to the trustee the proceeds of the property sold by the sheriff, referred to in the petition, and why an injunction should not issue as prayed for, and that a restraining order should issue, forbidding the defendants from disposing of the funds in the possession of the sheriff until the disposition of the same by the United States circuit court. In answer to this rule the sheriff appeared and peremptorily excepted to the petition of the trustee on the ground (1) "that the court is without jurisdiction of the matters and things inquired about; that this respondent is the executive

officer of the civil district court for the parish of Orleans, and only to that court is he responsible, and only that court can direct the distribution of the funds in his hands resulting from the execution of the writ emanating from that court"; (2) that the question of distribution of the funds is now pending before the civil district court in proceedings instituted prior to this proceeding, and to which the trustee was made a party; (3) that, the bankruptcy in this case being voluntary, the proceedings in the civil district court referred to in the petition were not affected thereby; (4) that under the laws of the state it is incumbent, before letting property seized, or the proceeds thereof, go out of his possession, that the taxes on the same be first paid, and that the city of New Orleans has served notice upon him that upon that property there are taxes due amounting to $143, and that the state of Louisiana has served a similar notice that there are taxes due to it amounting to $151.06. It is unnecessary to recite the answer of the other respondents. The matter came on to be heard in the circuit court on June 14th, and on the next day that court entered an order in part as follows: "In re Bankruptcy of Mrs. Lisette Seebold. (No. 12,878.) The rule taken herein by C. O. Wilcox, trustee, on June 8, 1900, on the civil sheriff of the parish of Orleans, and on Mrs. De Guilbeau et al., to turn over certain funds to the trustee, and to have an injunction issued, having been argued by counsel for the respective parties and submitted, and having been duly considered by the court, it is ordered that said rule and application of the trustee be denied, and that the restraining order issued herein be dissolved." From this order the trustee took an appeal to this court. He also presented his petition to the circuit court, which, after making the suitable recitations, prays that this cause and the judgment herein rendered as aforesaid be sent to the honorable United States circuit court of appeals for the Fifth circuit for revision and review, and that a return day be fixed by this honorable court, and, if any bond be required of petitioner, that the amount of said bond be fixed by this honorable court; that the said civil sheriff and Mrs. Alice Grailhe de Montaima, widow of Albin de Grilleau, and J. A. Robert Grailhe de Montaima, both residing at Loan, in the republic of France, and J. C. Thomas Grailhe de Montaima, residing at Paris, in said republic of France, be duly notified of this petition, and for all such orders as equity or the nature of the case may require." This petition was presented to one of the judges of the circuit court of appeals, who thereon ordered, June 17, 1900, that the same be filed and notified to the defendants therein "by service of a copy thereof upon the parties through their attorneys of record herein, and let the petitioner, the trustee, be allowed to petition the United States circuit court of appeals for the Fifth circuit for a revision and review of the judgment rendered in the cause on June 15, 1900, returnable according to law; petitioner to furnish bond in the sum of $100." The trustee assigns as error that the circuit court erred in holding that he, as trustee, was not entitled to have ordered to be delivered to him for administration and distribution in bankruptcy, under the orders of the United States circuit court as a court of bankruptcy, the property belonging to said bankrupt in the possession of the civil sheriff of the parish of Orleans, state of Louisiana, upon the facts shown by the record in this cause, and appearing in the transcript herein, and that the court erred in entering judgment in favor of the defendants and against the plaintiff.

E. T. Florance, for petitioner.

Carroll & Carroll and Dinkelspiel & Hart, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, having stated the facts as above, delivered the opinion of the court.

We do not understand that either of the parties to this proceeding have excepted, either in the circuit court or in this court, to the action of the judge of the court of bankruptcy in transferring the administration of the estate of this bankrupt into the circuit court

under section 601 of the Revised Statutes of the United States, or to have objected, either in that court or in this court, that the circuit court did not have jurisdiction to proceed therein as provided by section 637 in reference to "any cause, civil or criminal, of whatever nature." We refer to the matter only to announce that our action in this case may not be taken as indicating any view we may have as to the application of those sections of the Revised Statutes to this subject. We, however, invite the attention of the courts of bankruptcy and the bar to the consideration of clause 8 in section 1, and to the definition of "courts of bankruptcy" repeated in section 2, and to clauses 3, 4, and 5 of section 38, of the bankrupt act of 1898, and to general order No. 12 (32 C. C. A. xvi., 89 Fed. vii.). The exception taken by the civil sheriff to the jurisdiction of the court below was taken to it as a court of bankruptcy, and not on the ground that it was the circuit court, and not embraced within the definition of "courts of bankruptcy."

In this court it is urged orally by counsel on behalf of the civil sheriff that this court is without jurisdiction, because the order of the court below is not such a judgment as may be reviewed on appeal or writ of error under section 25, and that the action taken is not sufficient to bring the subject to the attention of this court under clause "b" of section 24. Counsel for the trustee does not contend that the case is here by appeal, but he does insist that it is properly presented on his petition for review. In the preparation and presentation of this petition counsel was guided by the suggestions of this court in a case heretofore decided, in which we said:

"In analogy to the rule prescribed for allowing appeals, and to the practice in allowing writs of error in cases at law, the petition for revision may be presented to and allowed by a judge of the court of bankruptcy, or any one of the judges of this court." In re Abraham, 35 C. C. A. 592, 93 Fed. 783.

In the case now before us the bankruptcy proceedings were being conducted, as already mentioned, in the circuit court, which explains, if it needed explanation, the address of the petition to the circuit court. Section 24b provides that the power of review conferred upon this court shall be exercised on due notice and petition by any party aggrieved. It does not limit the time within which the petition shall be presented, allowed, and perfected. In this case the petition was presented to a judge of this court five days after the judgment was rendered which it seeks to have reviewed. It is not plain that immediate notice was not given to the parties, and the record shows that formal notice was served on the attorneys of record on the 1st day of August, 1900. The petition brings up the whole record of the action taken by the court conducting the bankrupt proceedings bearing upon the judgment sought to be reviewed, and we are clear, for the reasons stated in our opinion in Re Abraham, supra, that the petition for review and the action thereon, and the compliance with the order of the judge, properly bring before us the proceedings sought to be reviewed, and that the objection urged thereto is not well taken.

Counsel for the respondent sheriff further urge that the court of bankruptcy having been without jurisdiction to grant the orders

prayed for in the rule taken by the trustee, and the court having denied the rule, that action can be reviewed only, if at all, by an appeal to the supreme court. These questions are of perennial recurrence. It is to be observed that the question of jurisdiction is not the only one presented by the answer which the respondent sheriff made in the circuit court to the rule taken by the trustee; that in that court he submitted three other grounds on which he relied as defenses against the relief sought by the trustee. And it is to be observed further that the judge does not, on the face of the order made by him, ground his action on the want of jurisdiction in the court. We think the question of jurisdiction of this court is not well taken in this case. The language of the section cited seems clear to us:

"The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law proceedings of the several inferior courts of bankruptcy within their jurisdiction."

The words "within their jurisdiction" manifestly relate to territorial limits, confining this court to the exercise of the jurisdiction conferred to superintend and revise in matter of law the proceedings of the several courts of bankruptcy in this circuit. As we have already noticed, the action we are asked to review was taken as in a court of bankruptcy. And, assuming (which is not contested by the parties to this proceeding) that the action was the action of a court of bankruptcy, we refrain from the citation of further authority to show our jurisdiction. The subject of the controversy was money in the hands of an officer of the state court, the proceeds of the sale of property made under a judgment and decree of the state court fixing the amount due by the defendant in the suit in that court, and decreeing the statutory privilege and right of pledge granted and fixed by the state law in favor of the plaintiffs in that suit. The suit was begun and proceeded to judgment, and there was a seizure thereunder of the property subject to the privilege and right of pledge, and the same was advertised for sale, all before the beginning of the bankruptcy proceedings in this case. The bankruptcy proceedings were not involuntary. The state court had the amplest possession of the subject of the controversy and full jurisdiction of the parties at the date of the institution of the bankruptcy proceedings. There is no provision in the present bankrupt law which authorizes or permits the courts of bankruptcy, by the use of either summary or plenary process, to stop the proceedings of the state court in a suit in which it had already, before the institution of the proceedings in bankruptcy, obtained possession of the subject-matter and jurisdiction of the parties. What effect the provisions of the bankrupt act may have to stay proceedings in a state court is a question of which that court has full jurisdiction to decide, subject to prescribed methods of review, and which the courts of bankruptcy may not attempt to limit or control without a manifest disregard of that comity which is an essential element of our public law, and under which our state and national systems of judiciary work in admirable harmony. Certainly with, and probably without, an order of the court of bankruptcy, the trustee in this case could have made his application to the state court

in the suit therein pending, setting up his claim, or the claim of the estate he represents, to the proceeds in question. Or, in answer to the rule taken in that court by the sheriff, the trustee could have fully presented the claims and had the rights of the bankrupt estate in the proceeds adjudged in that suit. If the personal property seized and held by H. B. McMurray, civil sheriff for the parish of Orleans, had been held by him in his individual capacity, and, upon demand made on him by the trustee for the delivery up of the property, that demand had been refused on the ground that he had a right to hold it for the satisfaction of other claims upon it, the case would then be brought within the provision of section 23b, as construed by the supreme court of the United States (Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Mitchell v. McClure, 178 U. S. 539, 20 Sup. Ct. 1000, 44 L. Ed. 1182; Hicks v. Knost, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183); and as construed by this court in Re Abraham, supra; and the trustee could not proceed in the court of bankruptcy against McMurray to enforce the recovery thereof, except by his consent. And it seems to us that, for a stronger reason, the court of bankruptcy cannot entertain a suit or rule against him when he holds the personal property and effects, or the proceeds, not as an individual adverse claimant, but as the executive officer of a state court of competent original jurisdiction.

It is unnecessary to notice the other matters set up in the sheriff's answer. The judgment of the court of bankruptcy is affirmed.

## ROSS v. SAUNDERS.

**(Circuit Court of Appeals, First Circuit. January 10, 1901.)**

No. 345.

BANKRUPTCY—COMPOSITION—CONFIRMATION—APPEAL—PARTIES.

A bankrupt whose application to have a composition confirmed was not formally opposed by creditors cannot appeal from a decree of refusal; there being a want of parties, as the question is merely between the court and the bankrupt.

Appeal from the District Court of the United States for the District of Massachusetts.

Wm. Henri Irish, for appellant.

Calvin P. Sampson (Charles W. Bartlett and Eldridge R. Anderson, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. The appellant in this case was duly adjudicated a bankrupt in accordance with the act approved on July 1, 1898. After adjudication, and after a discharge had been granted him pursuant to section 14, pars. "a," "b," he offered a composition, having in all respects complied with the terms of the act. Thereupon the bankrupt applied to the court to confirm the composition.

We do not in this case consider the effect of the fact that a discharge had been granted before the proceedings in composition were commenced. The court refused to confirm the composition. There is enough in the record from which we may infer that it was not satisfied that the composition was for the best interests of the creditors. No creditor appeared formally in opposition. The trustee, as trustee, appeared and opposed the confirmation, and was permitted to do so, although he was not made a party to the record. He offered in evidence an informal paper, signed by certain creditors who had assented to the composition, withdrawing their assent; and this paper was taken under consideration by the court. The court refused to confirm the composition, notwithstanding no creditor appeared in opposition thereto. All these matters are laid by the appellant as irregularities; and he also asks us to consider the case on its merits, although it is evident that we have before us only a very small portion of the facts which were within the control of the district court.

We are met at the threshold, however, with a difficulty arising in respect to the parties to this appeal. The appeal was taken against the trustee, and the citation issued to him, and to no other person. There is no law authorizing any person to become a party to this proceeding, except the bankrupt and his creditors. The statute directs notice to the latter, and to no other person; and general order 32 (32 C. C. A. xxxi., 89 Fed. xiii.) provides for their appearance, and for no other. There is nothing in the statute or in the general orders which authorized the trustee, as trustee, to interfere in this proceeding, beyond furnishing such information concerning the estate under his charge, and the administration thereof, as might be requested, which duty is expressly imposed on him by law. Neither is there anything which justifies the trustee in defending this appeal at the expense of the estate, or in his capacity as trustee. The English statutes in bankruptcy provide expressly that a trustee may appeal from an order of confirmation. Under those statutes the official receiver becomes the ad interim trustee, and stands quasi trustee until the trustee proper is appointed. Therefore he has the same relation to a question of composition which the trustee has, but he is not expressly authorized by the statutes to appeal. Consequently, in Ex parte Reed, 17 Q. B. Div. 244, 258, an official receiver was somewhat sharply told that he ought not to appear on the hearing of an appeal of this character unless the court required him to do so. In that particular case it was held that he ought not to have appeared, and his costs were refused, although the composition was set aside. This is in accordance with the ordinary rule that a stakeholder stands equal between the parties concerned, and should not interfere in litigation unless required to do so by the court which has jurisdiction over him.

These matters, of course, ought not, of themselves, to bar the appellant if the trustee had been, in substance, made a party to the record; but they lead up to the proposition that in a matter of an application for a composition the bankrupt has no right of appeal. Whether or not the composition shall be confirmed depends not

merely on the question whether the bankrupt has conformed to the statute in all respects, or on whether creditors have appeared in opposition, but also on whether the judge in bankruptcy, acting in his capacity as general administrator or general trustee, is satisfied that it is for the best interests of the creditors that it should be. On this particular matter there may be no opportunity for an issue, or for parties to an issue, because the judge in bankruptcy may be required, as general administrator or general trustee, to protect the interests of all concerned, including not only those creditors who may not be represented, but even those who are.

Although the English statutes confer broader powers on the court with reference to confirming compositions than our statute, and authorize it to look further than to the mere questions whether the bankrupt has complied with the terms of the statute, and whether the composition is for the best interests of the creditors, yet the expressions of the judges administering those statutes throw light on the nature of this system, which was adopted by the United States from England, and therefore presumably adopted with the same spirit as it possessed in its place of origin, except so far as our statute has otherwise expressly provided. In Re Burr [1892] 2 Q. B. Div. 467, 472, Lord Esher remarked with reference to a proceeding in composition, "I have said before that in bankruptcy cases the court has very often to protect creditors against themselves." In Ex parte Reed, already referred to, in commenting on the restrictions which parliament had placed around compositions, he observed at page 250 that creditors are generally utterly careless, and write off their debts as bad, and agree to terms which give some possibility, an evanescent chance, of their getting something out of the wreck. He also observed at page 251 that, because of this known behavior of creditors, parliament had enacted restrictions with reference to compositions, "taking away from the majority of creditors that power which they had so recklessly and carelessly used, and putting a controlling power into the hands of the court for the purpose of protecting the creditors against their own recklessness." If it is desired to follow this topic further, Williams, Bankr. (7th Ed.) 65–67, and the notes there found, show how broad is the discretion which the English courts have exercised in matters of this nature. All this illustrates the substance of what we have said,— that on a refusal to confirm a composition the issue may be between the bankrupt and the court, as often happens in administering estates in bankruptcy, so that it is in no form to make proper parties to an appeal, as understood in the practice of the federal courts.

With reference to the ordinary application for a discharge, there are proper parties to the controversy if it be refused, because the court is required to grant it unless creditors appear in opposition, and an issue is made by them and is sustained against the bankrupt. It has no discretion in the matter. It is true that, although the question whether the judge in bankruptcy is satisfied that the composition is for the best interests of the creditors involves discretion, it is always to be exercised judicially. In re Farmers' Loan & Trust Co., 129 U. S. 206, 215, 9 Sup. Ct. 265, 32 L. Ed. 656. This, however,

does not necessarily imply that, for the proper exercise of this discretion, there must be a formal issue and parties thereto. The fact, therefore, that it may properly happen that, when an application to confirm a composition is refused, there may be no issue duly framed, with parties thereto, leads to the conclusion that the statute does not intend to grant a bankrupt a consequent right of appeal. It is true that under the present act the action on the composition, if confirmed, operates to discharge the bankrupt from all his debts except those otherwise specified; and in this particular the statute is unlike the earlier ones. Therefore it may well be said that now the confirming or the refusing to confirm a composition constitutes a "judgment granting or denying a discharge," as the case may be, and that either comes within the general letter of the provision for appeals. Nevertheless, in this, as in all other cases where the general language of an instrument or statute applies to two or more subject-matters, it must always be construed distributively if the elements of the various subject-matters so require.

The fundamental right of the bankrupt under the statute is to surrender all his assets and obtain his discharge. The fundamental right of the creditor is to have all the assets of the bankrupt applied to his debt, subject to his obligation to submit to a discharge when they have been thus applied. Either party seeking more than this appeals to the equitable discretion of the court; so that, when the bankrupt asks a surrender of his assets on any terms whatever, he is not within such legal right as affords him legal grounds of complaint, even if he be refused under circumstances where his application might well have been granted. The considerations to which we have called attention—especially the views of the English courts as found in Re Burr, ubi supra, and Ex parte Reed, ubi supra, and in Williams, Bankr. (7th Ed.) 65–67, and notes—show how completely the confirming of a composition is, so far as the bankrupt is concerned, a mere matter of grace, so that its refusal in no way prejudices his condition, or deprives him of any substantial right with reference to which the law should be eager to seek out a remedy by appeal. Of course, as we have already said, the discretion to be exercised by the district court in matters of composition is judicial; and, if any irregularities occur in reference thereto which raise a question of law, it is not improbable that the bankrupt is entitled to apply in that behalf to the revisory powers of the circuit court of appeals, on a summary petition.

On the other hand, the creditor, who is fundamentally entitled to the application of all the assets to his debt, may well claim just ground for further relief by appeal if the bankrupt is allowed to withdraw his assets by virtue of a composition, except under such facts and in accordance with such sound judicial discretion as accord with the best interests of the creditors. When a creditor comes into the district court to maintain that proposition, he becomes a party to the record in the manner directed by general order 32 (32 C. C. A. xxxi., 89 Fed. xiii.), and an issue is framed; and, if his objections are overruled, it is not an unreasonable construction to hold that a just right is involved, which comes within both the letter and

the spirit of the provision giving an appeal when a discharge is granted. However this may be, and without undertaking to pass on the right of appeal against an order confirming a composition, we are clear that the bankrupt has no corresponding right. If there have been any irregularities in the proceedings in the court below of a serious character, he must look for his remedy in some other direction.

The circuit court of appeals for the Sixth circuit, in an opinion in U. S. v. Hammond, 104 Fed. 862, held that an appeal lies in favor of a bankrupt from an order refusing the confirmation of a composition. In that case, however, there were objecting creditors, and an issue made, and so proper parties to an appeal. Therefore, notwithstanding the disposition which we have to follow decisions of circuit courts of appeals in other circuits, it is apparent that U. S. v. Hammond is not practically applicable to the facts of this appeal. It is possible that, if the court in the Sixth circuit had had before it the precise record which we have, it would have stopped before reaching its conclusions. However, as it is apparent that we have no proper parties before us, it would be impracticable for us to follow the decision in the Sixth circuit.

The appeal is dismissed, without costs to either party.

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## In re MAPLES.

(District Court, D. Montana. January 8, 1901.)

1. Bankruptcy—Debts Released by Discharge—Judgment for Seduction.
A judgment recovered by an unmarried woman for her own seduction, under the statutes of Montana, which permit the bringing of such an action in her own name, and the recovery of damages, to be assessed in the sound discretion of the jury, and which also make seduction a criminal offense, is one for a "willful and malicious injury to the person," within the meaning of Bankr. Act 1898, § 17a, subd. 2, from which the defendant cannot be released by a discharge in bankruptcy.

2. Same—Voluntary Proceedings—Grounds of Jurisdiction.
A petition in voluntary bankruptcy which schedules no property except such as is exempt under the laws of the state, and but a single debt, which is a judgment from which the petitioner would not be released by a discharge, fails to disclose any subject-matter upon which the court can act, and an adjudication of bankruptcy made thereon will be set aside on motion, and the proceedings dismissed for want of jurisdiction.

In Bankruptcy.

Geo. W. Farr, for petitioner.
Strevell & Porter, for bankrupt.

KNOWLES, District Judge. Edward R. Maples, on the 12th day of November, 1900, filed his petition in this court praying to be adjudged a bankrupt. On the 13th day of said month the prayer of said petitioner was granted, and the said petitioner was adjudged a bankrupt, and the matter referred to Henry A. Frith, referee in bankruptcy, residing at Billings, Mont. On the 27th of November of said year, Annie Olson filed her petition in this court asking that said adjudication of bankruptcy be set aside, and that said Maples'

petition in bankruptcy be dismissed. The grounds upon which this petition is based are that the only debt set forth in the petition from which the said Maples asks to be discharged is a judgment in favor of the said Annie Olson for the sum of $3,131.80, recovered in the district court of the Seventh judicial district of the state of Montana in and for the county of Custer; that said judgment was obtained in an action for a willful and malicious injury to the person of said Annie Olson; and, this being a debt from which he, the said Maples, could not be discharged, the court had no jurisdiction of the matter. The facts set forth in the petition are as follows: The only debt scheduled by the said Edward R. Maples in the schedule annexed to his said petition is that of this petitioner, Annie Olson, which is a judgment against him, the said Edward R. Maples, for $3,131.80, damages and costs, recovered in the district court of the Seventh judicial district of the state of Montana in and for the county of Custer in an action for damages for seduction. The said Maples files an answer to this petition, but fails to deny that the said judgment was obtained in an action for seduction. He denies, however, that said judgment of Annie Olson set up in her petition and scheduled by Edward R. Maples, bankrupt, was obtained in an action for a willful and malicious injury to the person of the said Annie Olson, within the meaning of section 17a of the United States bankrupt law of 1898. In this answer it is not denied that the judgment was obtained in an action for damages for seduction. This is, in legal effect, admitted. In the schedule of indebtedness this debt is described as follows:

"This claim is a judgment against petitioner in favor of Annie Alson, rendered in the district court of the Seventh judicial district of the state of Montana in and for the county of Custer for the sum of $3,131.80, with interest thereon at the rate of eight per cent. per annum, obtained October 12, 1899, in the suit of Annie Olson against this petitioner for seduction under a promise of marriage."

The question is thus presented to the court as to whether this judgment was obtained in an action for a willful and malicious injury to the person of the said Annie Olson. The statute of Montana (section 576, Code Civ. Proc.) provides:

"An unmarried female may prosecute, as plaintiff, in an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor."

In the statutes of Montana (section 4336, Civ. Code) it is provided:

"The damages for seduction rest in the sound discretion of the jury."

At common law a woman could not maintain an action for seduction in her own name. The action had to be maintained by her parents, or some one standing in their place, or by some one entitled to her services. When a woman brings an action in her own name for seduction, is the foundation of the same a personal injury? There can be no doubt but it is, under the statute law of Montana, under which the judgment was obtained. Section 3476 of the Code of Civil Procedure of Montana, provides:

"An injury is of two kinds: (1) To the person, and (2) to property."

Sections 3477 and 3478 of said Code provide:

"The injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating or destroying it."

"Every other injury is an injury to the person."

A woman suing for her own seduction should be entitled to the same rule in assessing her damages as is awarded to her parents under the law that permitted them to recover in such cases. It has been frequently held that the parent's right to damages extends not only to the loss of the services of his child, but also to the disgrace brought upon his family by the seduction of his daughter. Bigelow, Cas. Torts, p. 294. In the case of Barbour v. Stephenson (C. C.) 32 Fed. 73, Judge Jackson, in charging a jury, said:

"The plaintiff is entitled to recover as damages all that you choose to give him for his wounded feelings up to the sum claimed in his declaration, which is $20,000. A father, of course, feels a consolation in the virtue of his daughter. * * * You may give the plaintiff damages in your discretion up to the limit claimed in his declaration for the loss of that comfort and consolation which he had a right to feel in the purity and virtue of his child. You may take into consideration his loss of hope in the future of his daughter, and compensate him for the same. You may award him damages not only for his mental anguish in the disgrace of his daughter, but for his anxiety as to what is to become of her in the future. You may look to the loss to him and his family of social standing and position by reason of the daughter's disgrace; you may consider his mortification, humiliation, and sense of dishonor."

The injuries for which damages were awarded in the above cause, when applied to the person seduced, are certainly personal injuries. Wounded feelings, loss of hope in the future, mental anguish in the disgrace, loss of social standing and position, mortification, humiliation, and sense of dishonor are to be considered in weighing the damage to the father. Much more should they be weighed in considering the damage to the injured woman. These are all injuries that pertain to the person.

The next point to be considered is, did the bankrupt willfully and maliciously perpetrate the same? "Willful" means "intentional" or "deliberate." It may mean, when used in a statute, an intentional and deliberate doing of a wrongful act. How seduction can be other than a willful act it is difficult to comprehend. Certainly it is done intentionally. A malicious injury may not always include personal ill will or hostility to the person injured. The definition of the term "malice" given in Rap. & L. Law Dict. is as follows:

"Malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another."

In the note to Terwilliger v. Wands, 72 Am. Dec. 429, it is said of this term:

"Malice means a want of legal excuse. This is the sense in which the term is most frequently employed, and it is probably the only sense in which it is properly employed. Substitute 'absence of legal excuse' for 'malice' in many opinions in the reports which are difficult to be understood, and they will become easily intelligible. * * * Malice, in law, does not mean malice or ill will towards the individual affected by libel or slander. In the ordinary sense of the term, 'malice' in law, or absence of legal excuse, is an implication of law from the false and injurious nature of the charge, and differs from

actual malice and ill will towards the individual, frequently given in evidence to enhance the damages."

King v. Root, 4 Wend. 113; Pennington v. Meeks, 46 Mo. 217; Jellison v. Goodwin, 43 Me. 287; Com. v. Goodwin, 122 Mass. 19-35; Bigelow, Cas. Torts, pp. 116, 202, 203.

Seduction is a criminal offense under the statute law of Montana. See section 458, Pen. Code. It therefore cannot be said that there can be any legal excuse for such an injury. When a man with blandishments and promises that are never fulfilled seduces an unmarried woman, knowing well the consequences to her of his acts,—that she will lose her standing in society, that her future will be blighted, that she will be shunned by her own sex, and lose the respect of the opposite sex,—it ought to be held in law that his injury to her is malicious.

The counsel for the bankrupt have cited quite a number of opinions to the effect that it is no ground for an objection to the final discharge of a bankrupt that he has scheduled as his liability a judgment against him from which the decree of this court would not discharge him. That is not the issue presented to the court in this case. There are no objections to any application the bankrupt has made for a discharge; hence all the cases cited by the counsel for the bankrupt are not in point. The grounds upon which a discharge may be opposed are specially named in the statute. There is one case that might be considered as to whether the injury received by plaintiff was a willful and malicious one,—In re Sullivan, 2 Am. Bankr. R. 30. In that case it was held that, as the action was maintained by the father for the seduction of his daughter, it could not be said that as to him the injury was willful and malicious; that the action was founded upon the loss to the father of the services of his child. In that case, however, it is said:

"If the action and recovery had been by the daughter, instead of the father, malice might be inferred from his [the bankrupt's] act."

I reach the conclusion, then, that the judgment in this case is for a willful and malicious personal injury, and that it cannot be discharged under the bankruptcy act. The bankrupt, in his petition, therefore, has not presented any debt or claim from which this court can discharge him.

In some of the cases cited by the bankrupt's counsel it was claimed that the discharge might operate on claims that were not scheduled. This may be true. And yet, upon a mere supposition that possibly there might be such claims, should a court be called upon to act and render its judgment? In regard to the federal courts it is generally said that their jurisdiction is not general, but special, and the grounds for exercising such jurisdiction must appear in the record. There should always be a subject-matter upon which any court can act. It ought not to be called upon to act upon a mere supposition that there might be somebody or something affected by its judgment. It also appears from the schedules of the bankrupt that he has but $75 worth of wearing apparel. This is all his assets, and he claims this wearing apparel as exempt under the laws of Montana, and this un-

doubtedly is the case. The bankrupt has no property, then, that the court can take charge of. In section 4 of the bankruptcy act of 1898 it is provided:

"Any person who owes debts except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."

In Loveland, Bankr., it is stated:

"The power conferred extends only to persons, corporations, partnerships, etc., who are subject to be adjudged bankrupts. These courts have no authority over persons other than those specified in the act to be subject to its provisions."

Certainly a debt which the action of the court could not affect ought not to give jurisdiction.

In Brown, Jur. § 10, p. 23, it is said:

"Whenever the court lacks jurisdiction of the subject-matter, it may, on its own motion, or when its attention is called to the fact, refuse to proceed further, and dismiss the action."

It is therefore adjudged that the adjudication of Edward R. Maples as a bankrupt be, and the same is, vacated and annulled, and his petition to be adjudged a voluntary bankrupt is dismissed, and the reference canceled.

## McKEY v. LEE et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 720.

BANKRUPTCY—PREFERENCES—DEDUCTION OF NEW CREDITS.

Bankr. Act 1898, § 60c, providing that "if a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him," entitles such a creditor to a deduction of the amount of the new credits from the preferences which he is required to surrender before proving his claim, and is not limited in its application to cases where the trustee sues to recover the preferences.

Appeal from the District Court of the United States for the Northern Division of the Northern District of Illinois.

The facts are not disputed, having been agreed upon before the referee, and in the District Court, as follows:

1. "That on the 17th day of January, A. D. 1900, said Patrick F. Ryan duly filed his voluntary petition in bankruptcy herein, and was on the same day duly adjudicated a bankrupt. That the first meeting of creditors was duly held, and said Edward B. McKey at said meeting of creditors was duly elected trustee for said bankrupt, and at once qualified, and has been acting as such trustee since the time of his election.

2. "That said Patrick F. Ryan was on said 17th day of January, A. D. 1900, and for four months next prior thereto had been insolvent, and that the fair cash value of his assets was and had been during the whole of said four months less than the amount of his liabilities by at least the sum of twenty thousand dollars, but that the said Lee, Tweedy & Co., claimants, were not aware of such insolvency, and had no reasonable cause to believe, up to the time of the filing of said petition in bankruptcy herein, that said Patrick F. Ryan was insolvent.

3. "That on the 17th day of September, A. D. 1899, said bankrupt was indebted to said Lee, Tweedy & Co. in the sum of $874.52.

4. "That said Lee, Tweedy & Co. received from said bankrupt, in the regular course of business, without knowledge of the insolvency of said Patrick F. Ryan, the following sums of money:

"On the 3d day of October, A. D. 1899, the sum of $500; on the 18th day of October, A. D. 1899, the sum of $334.56, and on the 22nd day of December, A. D. 1899, the sum of $500, making a total of $1,334.56 so received; that said several sums were received by said Lee, Tweedy & Co. in part payment of and duly credited upon the account and claim of said Lee, Tweedy & Co. against said bankrupt.

5. "That said Lee, Tweedy & Co. sold and delivered merchandise to said bankrupt within the four months next preceding the time of the filing of said petition in bankruptcy herein, as follows:

| | |
|---|---|
| On September 23, 1899 | $ 93.84 |
| On September 23, 1899 | 1,050.10 |
| On September 23, 1899 | 112.50 |
| On September 25, 1899 | 184.00 |
| On September 28, 1899 | 196.68 |
| On September 28, 1899 | 35.61 |
| On September 28, 1899 | 23.05 |
| On October 3, 1899 | 63.82 |
| On October 3, 1899 | 359.43 |
| On October 21, 1899 | 231.25 |
| On December 1, 1899 | 54.00 |
| On December 2, 1899 | 175.75 |
| On December 2, 1899 | 34.50 |
| Total amount of merchandise sold and delivered by said claimants within said period of four months | $2,614.53 |

6. "That on the 6th day of February, A. D. 1900, said Lee, Tweedy & Co. duly filed their claim against said estate for the sum of twenty-one hundred and eight dollars ($2,108).

7. "That on the 13th day of April, A. D. 1900, said trustee duly filed the following objections to said claim of Lee, Tweedy & Co.

"'Now comes Edward B. McKey, trustee of said estate, and objects and excepts to the claim of Lee, Tweedy & Co., which claim was proved and filed herein on the 6th day of February, A. D. 1900, and was allowed on the 6th day of February, A. D. 1900, for the sum of $2,108, and for cause of said objection and exception shows that said Lee, Tweedy & Co. have received a preference, that is to say, the said Patrick F. Ryan, while insolvent, paid to said Lee, Tweedy & Co. the amount of $1,334.56, within the four months next preceding the time of the filing of the petition in bankruptcy herein.

"'Wherefore the said Edward B. McKey, trustee, prays that the said claim be reconsidered, and that an order be entered herein disallowing the said claim, unless said claimant shall surrender said preference.'"

Upon this statement of facts the referee ordered that the objections of the trustee be overruled, and allowed the claim of Lee, Tweedy & Co. for the sum of two thousand one hundred and eight dollars.

Upon the hearing in the District Court this order was reversed, and in its stead it was ordered that the said claim of Lee, Tweedy & Co. for the sum of two thousand, one hundred and eight dollars be disallowed, unless said Lee, Tweedy & Co. should, within ninety days, surrender to the trustee the sum of five hundred dollars; and that upon such surrender the claim of Lee, Tweedy & Co. should be allowed for the sum of two thousand, six hundred and eight dollars. It was further ordered that the objections of the trustee to the allowance of said claim, unless and until the said Lee, Tweedy & Co. surrender the sum of one thousand, three hundred and thirty-four dollars and fifty-six cents, be overruled.

From this ruling of the District Court the appeal was prosecuted.

S. A. Levinson, for appellant.

Charles F. Harding and T. O. Bunch, for appellees.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

Paragraph (g), section 57, of the Bankruptcy Act, provides:

"The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Paragraph (a), section 60, provides:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Paragraph (b), section 60, provides:

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Paragraph (c), section 60, provides:

"If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

Appellant insists that the payments made to Lee, Tweedy & Co.—one thousand, three hundred and thirty-four dollars and fifty-six cents—the 17th of September, 1899, (that being the beginning of the four months' period previous to the bankruptcy) were a preference, within the meaning of section 60, and that under paragraph (g), section 57, there must be a return of these payments, before the claim can be allowed.

The District Court held that the sale of goods to the bankrupt, after the payments, amounted, within the meaning of paragraph (c), section 60, to a further credit, in good faith, without security, of property going into the bankrupt's estate; and set off the value of such property against the payments, requiring, as a condition to the allowance of the claim, a return only of the surplus payment.

Counsel for appellant contend that paragraph (c), section 60, is not applicable to the facts stated; that it is intended to affect cases only where the trustee seeks to recover, by suit, preferential payments made to a person having had reasonable cause to believe that a preference was intended as provided for in paragraph (b), section 60; that the employment of the word "recoverable" shows that such a limitation of the right of set off was intended.

We cannot concur in this interpretation. Confessedly, it would limit the right of set off to those only, who, having received the preference knowingly, chose to stand out against its return to the trustee. The creditor willing to make return, without the delay and expense of

a suit by the trustee, even though the preferential payments had been innocently received, could exercise this impulse toward obedience with the law, only under penalty of losing what otherwise his recalcitrancy would have secured him. We ought not to lean toward an interpretation that would thus put the consenting creditor at a disadvantage, and afford a premium to the designing creditor.

There is nothing in the employment of the word "recoverable" that forces such an interpretation. The primary definition of the word is to "regain," to "get back again." Cent. Dict. A thing is "recoverable" when it is susceptible of being "regained," "gotten back." The law provides, alternatively, for the regaining of the preferential payments by the trustee, first by visiting the creditor with the danger of a penalty—the disallowance of any portion of his claim; and, secondly, in case of the knowing creditor, the right upon the part of the trustee to bring a suit. In either case the payments are gotten back,—there is a recovery,—and in both,—whether under stress of the penalty or by virtue of a suit,—it is the law that makes them recoverable.

Such interpretation compasses the reasonable purpose of the provision. It leaves the estate unimpaired; for the property of the creditor coming into the debtor's estate is presumably the equivalent of the money value at which it was purchased. It, in substance, simply cancels the effect of the preference, to the extent, only, that such preference no longer harms the interests of the other creditors.

The order will be affirmed.

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## CITIZENS' BANK OF SALEM v. W. C. DE PAUW CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1901.)

No. 707.

BANKRUPTCY—ACTS OF BANKRUPTCY—CONCEALMENT OF ASSETS BY CORPORATION.

A petition in bankruptcy was filed against a corporation by a creditor alleging that the president of the corporation had secretly purchased, through a third party, judgments against it aggregating $250,000 for the sum of $80,000, and had caused the property of the corporation, worth $200,000, to be sold thereunder, and bid in by the holder, and that the property was resold at a profit of $100,000; all of which facts were known to the corporation, but were not known by its creditors until shortly before the filing of the petition. The position of the petitioner was that, owing to the fiduciary relations between the president and the corporation, the profit realized on the resale of the property in equity belonged to the corporation, and was assets for the payment of its debts, which it had continuously concealed, constituting an act of bankruptcy under Bankr. Act 1898, § 3a, subd. 1. *Held* that, conceding the transaction to have been fraudulent, and an act of bankruptcy on the part of the corporation, it was not on the ground of "concealment" of assets, but the fraud consisted in the "transfer" of its tangible property for an inadequate consideration, with intent to defraud its creditors, within the meaning of the same provision; and that, such transfer having been made more than four months before the filing of the petition, a demurrer thereto was properly sustained.

Appeal from the District Court of the United States for the District of Indiana.

In Bankruptcy. In the matter of the petition of the Citizens' Bank of Salem for an adjudication in bankruptcy against the W. C. De Pauw Company. On appeal from an order sustaining a demurrer to the petition.

The action below was in bankruptcy, and was upon the petition of the Citizens' bank of Salem, a corporation organized under the laws of the State of Indiana, to declare the W. C. DePauw Company, also a corporation under the laws of Indiana, an involuntary bankrupt.

The petition, with its amendments, sets forth substantially the following facts: That the De Pauw corporation became insolvent at the beginning of the year 1895, and has so continued ever since; that, on the 17th of January, 1895, at the suit of Newland T. DePauw, a member of the board of directors, and president of the corporation, a receiver was appointed, who took charge of, and operated the plant, until May 16th, 1898; that the receiver employed Newland T. DePauw as general manager for the receivership, and that, by virtue of this relationship, DePauw obtained full information respecting the assets and liabilities of the corporation.

It is further averred that, November 27th, 1897, DePauw entered into a secret contract with the Union Trust Company of Indianapolis reciting that judgments aggregating one hundred and seventy-one thousand dollars had been obtained against the corporation as principal and DePauw as surety, and other judgments aggregating one hundred thousand dollars had been obtained against the DePauw corporation alone. The agreement assigns to the said Trust Company a large amount of the individual property of DePauw. and provides that in consideration of the property thus transferred the Union Trust Company should purchase the aforesaid judgments at about one third of their face value; that upon such purchase the Union Trust Company should acquire through such judgments the assets of the corporation to be held in trust for DePauw and his sister; that the title thereto should be taken in the name of the Union Trust Company; and that when the Trust Company had been reimbursed for all the sums advanced, with interest, such property and assets should be transferred to said DePauw and his said sister.

It is further averred that this agreement was in substance carried out; that two hundred and fifty thousand dollars of the outstanding judgments were purchased for about eighty thousand dollars; that the transaction was kept a secret, it being given out that such judgments had been purchased by the Union Trust Company in its own right, and were enforceable at their full face value; that a sale of the assets of the corporation under these judgments, and the mortgage securing them, was brought about by the receiver, at which sale the property was bought in by the Trust Company in its own name; that thereafter the plant was operated in the name of the Trust Company until 1899, when it was sold at the request of DePauw to the American Window Glass Company; that over one hundred thousand dollars profit was realized upon this transaction; but that the transactions, except the judicial sale, and the sale to the Window Glass Company, were kept a secret from the creditors of the corporation until March 1st, 1900. The petition alleges that the actual valuation of the property of the corporation was two hundred thousand dollars and that the corporation is indebted to the petitioner in sums aggregating something over twelve thousand dollars.

The petition concludes as follows: "Your petitioner further says that said W. C. DePauw Company well knew all the matters and things hereinbefore set forth whilst the same were occurring, and has known and now well knows that the money and property aforesaid of the estimated value aforesaid of $100,000 are assets belonging to it which should be applied to the satisfaction of your petitioner's said claim, but said W. C. DePauw Company, notwithstanding the premises, and with intent to hinder, delay and defraud your petitioner, has continuously permitted and suffered said assets to be concealed, and has wholly failed to assert any claim thereto, or to take any steps whatever looking to the application of said assets to the satisfaction of your petitioner's said claims, and still permits and suffers such assets to be so concealed."

To this petition a demurrer was filed, and by the court below sustained; and from the order sustaining the demurrer the appeal is taken.

The petitioner's contentions are set forth in the brief of its counsel as follows: "1. By virtue of the fiduciary relationship existing between Newland T. DePauw and his Company, the W. C. DePauw Company, the former was disqualified from entering into a contract of the character of that of November 27, 1897.

"2. All profits (over $100,000.00) realized by Newland T. DePauw by virtue of the contract of November 27, 1897, belong in equity to the W. C. De Pauw Company, and, as such, constitute assets of the W. C. DePauw Company, which should be applied to the payment of its debts, including those of the petitioner.

"3. The W. C. DePauw Company had knowledge of the contract of November 27, 1897, and of the profits which had been realized under such contract, and all its rights by virtue of such contract; having knowledge of the existence of the available assets of the value of $100,000.00, which assets were unknown to its creditors, the W. C. DePauw Company failed to disclose the existence of such assets or take any steps to apply such assets to the payment of its debts.

"4. By so acting and refusing to act, when under the circumstances it could have acted, the W. C. DePauw Company permitted its property and assets to be concealed within the meaning of Section 3 of the Bankrupt Act.

"5. Such concealment is a continuous act, and permitting such concealment is, therefore, a continuous act of bankruptcy, so long as the property continues to be concealed and permission continues to be given to conceal the same."

Morris M. Townley, for appellant.

Ferdinand Winter, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

The provisions of the bankrupt act governing this case are as follows:

Section 3, (a), "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them," and (b) "A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment," and (c) "It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt," and Section 1, (15) "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed,

with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

The case presented upon the petition, at most, is that of an officer of a corporation buying up at a discount, under the guise of another person, outstanding judgments against the corporation, under which its property, under the same guise, is subsequently purchased at judicial sale. The insistence is that the property thus transferred from the corporation to the offending officer remains, in equity, the property of the corporation, subject only to a lien in favor of the purchaser (to be asserted, of course, in apt time,) for the actual amount paid out by him; and that the failure of the corporation to assert its right, or make known to the creditors the nature of the transaction under which the transfer was made, constituted in law a concealment of its property with intent to hinder and defraud creditors.

It is clear that if the property transferred under the judicial sale is to be excluded from consideration in balancing the assets and liabilities incident to the question of solvency, the corporation was, after such transfer, insolvent; for after the judicial sale nothing was left to balance against the petitioner's claim. The position of the appellant is that this property, as an available asset, was, in effect, concealed; that the concealment was the debtor's act, intended to diminish, by so much, the property open to seizure by creditors; and that, having thus hindered, delayed, and attempted to defraud his creditors, he can not, when the fraud is disclosed, plead that a restoration of the property to the estate would make it solvent, and thus preclude an application of the bankruptcy law at all. The contention, in short, is that the bankrupt, having committed a fraud that makes him amenable to the law, can not ward off the hand of the law by showing that the extent of the fraud was such that, but for it, the estate would be solvent. The bankrupt law is, in this, as in its other provisions, intended to protect creditors; and was perhaps intended to lend a hand to those who, by its enforcement, will receive one hundred cents, as well as those who will receive but ninety-five, in cases where, but for the enforcement of the law, there would be received less than full payment. This brings us, then, to the real question in this case: If the corporation is guilty of any act of bankruptcy, within what definition does the transaction fall.

It is insisted by counsel for appellant that the transaction constitutes, within the meaning of the bankruptcy law, a concealment of the corporation's property with intent to hinder, etc. Counsel for appellee, on the contrary, contends that the transaction, if an act of bankruptcy at all, falls within the words, "convey," or "transfer," as used in Section 3. The significance of the difference is that, if the latter construction prevails the petition was demurrable, for it shows that more than four months had elapsed after the conveyance or transfer, and before the filing of the petition; while, if the former is maintained, and the concealment is deemed continuous until discovered March 1st, 1900, there remains no question, based upon the four months intervening.

It may, perhaps, with correctness, be said that the separation of some tangible thing, money, or chose in action, from the body of an insolvent debtor's estate, and its secretion from those who have a right to seize upon it for the payment of their debts, is, within the law, a concealment, and continues such as long as the secretion remains. In such a case, the property open to creditors is decreased by just the amount thus secreted. It is, to all intents and purposes, so far as the creditors are concerned, as if the property thus secreted had not been in existence. There is nothing to put the creditors upon notice; nothing that they may keep within their vision—a tangible subject of inquiry, either as to its value or its ownership. It is, in effect, a concealed withdrawal from possibility of seizure of just so much of the debtor's estate.

But such is not the case under review. This case is as if the corporation had transferred to the Trust Company property worth two hundred thousand dollars, at a nominal consideration of two hundred and fifty thousand dollars, but upon the real consideration of eighty thousand dollars. The quantum of property is not kept under cover. There has been no withdrawal. The res is not concealed. It remains open and visible. The creditor may keep it in sight, and may take any available means of seizing it. It is only the actual consideration paid that is concealed. Fraudulent "transfers" are always accompanied by a concealment of some such character. It is what, in most cases, makes the "transfer" fraudulent. But it does not transpose the transaction from its proper place as a fraudulent "transfer" or "conveyance," to some other place in the classification of the law.

We regard the transaction as more nearly falling within the definition of "transfer" than that of "concealment," as these terms are used in the Bankrupt Act. The judicial sale was open; was known to the petitioner; and the thing transferred was clearly defined. The petitioner had the same opportunity of inquiry that other creditors have in cases where debtors attempt to fraudulently convey and transfer their property. To the extent that the Bankrupt Act covers such an offence, we are willing to go, but we have no warrant, we think, to stretch its provisions, in order to meet what may seem like a hard case.

There is no error in the order of the court below.

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## UNITED STATES v. LEGG.

(Circuit Court of Appeals, Second Circuit. January 8, 1901.)

No. 55.

1. CUSTOMS DUTIES—ENTRY OF GOODS—TIME.

   Rev. St. § 2785, providing that the owner of merchandise on board a vessel shall, within 15 days after report of the master to the collector of the district, make entry thereof in writing to the collector, does not prevent entry of the goods before entry of the vessel.

2. SAME—EFFECT OF OFFER TO ENTER.

   An importer being entitled to make the entry of the merchandise required of him by Rev. St. § 2785, when he presented himself to the col-

lector, with his papers and moneys for duties, and offered to make entry and pay the duties, entry will be considered to have been at that time, though the collector refused to receive or file the papers for the purpose of determining whether they are goods "previously imported" and "for which entry has been made" at the time Tariff Act 1897 went into effect, so as to be subject to the duties imposed, not by it, but by Tariff Act 1894.

3. SAME—NATURE OF ENTRY.

The written entry required of an importer by Rev. St. § 2785, and not the series of acts necessary to the entering of the goods, is the "entry" referred to in Tariff Act 1897, § 33, providing that, after the act goes into effect, goods previously imported, for which no entry has been made, shall be subject to the duties imposed by it.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York, reversing a decision of the board of general appraisers which affirmed a decision of the collector of the port of New York touching the rate of duty to be paid by certain imported merchandise.

Henry C. Platt, for the United States.

Everit Brown, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The only question presented is whether the importation is subject to the duty imposed by the tariff act of 1894, or to that imposed by the tariff act of 1897. The latter act provided that (except where otherwise specified) the new rates of duty should be levied, collected, and paid "on and after the passage of this act." Its final section (34), providing for the repeal of inconsistent legislation, contained the usual provision that the same shall not affect any act done or any right accruing or accrued. The thirty-third section reads as follows, being in the form usual in such acts:

"Sec. 33. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof," etc.

Manifestly that part of the section beginning, "and all goods," etc., "previously entered," deals only with goods entered for warehouse, and need not further be considered, since the importation at bar was entered for consumption. The facts, about which there is no dispute, are as follows: It is conceded that by the president's signature the new tariff act did not take effect until 4:06 p. m. on Saturday, July 24, 1897. The official and actual business hours of the custom house ended at 4 p. m. of that day. The goods in question were on the steamship La Touraine. She arrived in the port of New York prior to 11:50 a. m. July 24th, and, in accordance with the usual practice, her arrival was at that hour posted in the custom house. Thus advised of the arrival of his goods, the importer, before

4 p. m. on that day, presented himself at the proper place, with all the necessary papers, and with the money to pay the duties, and offered to make a consumption entry for the merchandise and pay duties. The entry was refused by the collector on the ground that the vessel had not made entry in accordance with the law and regulations. On the following Monday the merchandise was entered for consumption, and duties were assessed thereon under the new act.

Section 2774, Rev. St. U. S., provides that within 24 hours after the arrival of any vessel from a foreign port the master shall repair to the office of the chief officer of customs and make report of the arrival, and shall thereupon or thereafter file a manifest, etc. This court has held that section 33, above quoted, does not, by the use of the word "entry," refer to this "entry of the vessel." In re Gardiner, 4 C. C. A. 155, 53 Fed. 1013. Section 2785, Rev. St. U. S., reads as follows:

"The owner or consignee of any merchandise on board of any vessel, or, in case of his absence or sickness, his known agent or factor in his name, shall, within fifteen days after the report of the master to the collector of the district for which such merchandise shall be destined, make entry thereof in writing with the collector, and shall in such entry specify the name of the vessel and of her master, in which, and the port or place from which such merchandise was imported; the particular marks, numbers, denominations, and prime cost, including charges of each particular package or parcel whereof the entry shall consist, or, if in bulk, the quantity, quality and prime cost; including charges thereof, particularly specifying the species of money in which the invoices thereof are made out. Such entry shall be subscribed by the person making it, if the owner or consignee, in his own name, or, if another person, in his name as agent or factor, for the owner or consignee. The person making such entry shall also produce to the collector and naval officer, if any, the original invoices of the merchandise, or other documents received in lieu thereof, or concerning the same, in the same state in which they were received, with the bills of lading for the same; which invoices shall be signed by the persons in the offices of the collector and naval officer who have compared and examined them."

The goods were imported and became subject to duty when La Touraine arrived within the limits of the port. Arnold v. U. S., 9 Cranch, 119, 3 L. Ed. 671. From that time the importer was debtor to the United States for the duties upon them. What, then, was the result of his effort to have them entered and to pay his debt? The board of general appraisers reached the conclusion that in view of the provision of section 2785 that the owner or consignee shall, within 15 days after the report of the master, make entry, etc., the vessel must first be entered according to law; and, secondly, after such entry of the vessel according to law, then, and then only, can the importer make entry of his merchandise. Or, in other words, "entry of the vessel at the custom house is a condition precedent to all customs proceedings by consignees of her cargo." The treasury department seems to have construed this clause of section 2785 sometimes in one way, sometimes in another. Synopsis 12,089, Nov. 28, 1891; Synopsis 12,419, Feb. 29, 1892. But in view of the decision of the supreme court in Davies v. Miller, 130 U. S. 284, 9 Sup. Ct. 560, 32 L. Ed. 932, there seems to be no doubt that the true construction imports the fixation of a date after which the importer may not make his entry, but not the fixation of the date before which he may not do

so. In that case the statute provided that the importer should give notice of dissatisfaction "within ten days after the ascertainment and liquidation of the duties." The court held that this must be construed "to fix only the terminus ad quem, the limit beyond which the notice shall not be given, and not to fix the final ascertainment and liquidation of the duties as the terminus a quo, or the first point of time at which the notice may be given." The only point in the case is whether the act of the importer in presenting himself with his papers and money for duties, and offering to make his entry and to pay his debt to the government, which arose by the mere fact of importation, put his goods in the category of those "previously imported" "for which entry has been made." If the importer was, under the statutes, entitled to make the entry required from him by section 2785 when he so presented himself, and to pay his debt for duties,—and the opinion last cited seems clearly to indicate that he was,—the collector could not deprive him of his right to do all section 2785 required of him by any arbitrary refusal to receive or file his papers. Campbell v. U. S., 107 U. S. 407, 2 Sup. Ct. 759, 27 L. Ed. 592. Having himself done all that the law required of him, all rights secured by such compliance with statutory requirements are saved by the clause of section 34 referred to at the outset of this opinion. The case may be treated, then, as if the collector had received the documents presented by the importer prior to 4 p. m. on July 24th.

The only remaining question is whether this written entry by the importer under section 2785 is the "entry" referred to in section 33 of the act of 1897. "The term 'entry,' in the acts of congress, is used in two senses. In many of the acts it refers to the bill of entry,—the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used to denote, not a document, but a transaction,—a series of acts which are necessary to the end to be accomplished, viz. the entering of the goods." Hoffman, J., in U. S. v. Cargo of Sugar, 3 Sawy. 46, Fed. Cas. No. 14,722. That case was a prosecution under a statute providing a penalty "if any owner or consignee of goods shall knowingly make or attempt to make an entry thereof by means of any false invoice or false certificate * * * or of any other false or fraudulent practice or appliance whatsoever." Manifestly, the word "entry," in such statute, referred to the entire transaction of passing the goods through the custom house. To the same effect is U. S. v. Baker, 5 Ben. 251, Fed. Cas. No. 14,500. But the word is most frequently used in the statutes (e. g. Rev. St. U. S. §§ 2786–2788, 2790, 2794, 2799, 2800, 2802, 2869, 2900), as it is in the practice of the custom house and in common speech, as referring to the particular documents which the statutes in pari materia require, and which they designate as "entries." We see no reason, and are referred to no authority, for holding that the word is used in this section (33) with any other meaning than its usual one. Indeed, the form of phrase used, "goods * * * for which no entry has been made," seems to import a reference to the entry which the importer is required to make. Similar phraseology, using the prep-

osition "for," will be found in section 2802, manifestly referring to the importer's written entry. The decision of the circuit court is affirmed

UNITED STATES v. PINNEY, CASSE & LACKEY CO.

(Circuit Court of Appeals, Second Circuit. December 6, 1900.)

No. 22.

CUSTOMS DUTIES—CLASSIFICATION—COTTON CLOTH, FILLED.

The term "filled," as used in paragraph 311 of the tariff act of 1897, fixing the duty on "cotton cloth, filled or coated," which is a manufacturing, rather than a commercial, term, is not confined in its meaning to such goods as have been weighted with a foreign substance—usually an inorganic material—to give them a factitious solidity, in which sense it was formerly used in England, but the filling may be starch alone. But, whatever substance is used, to constitute "cotton cloth, filled," within the meaning of that section, such quantity must be used as to substantially close the interstices in the cloth, and make a plain surface, and the samples of imported "Scotch Hollands," or "King's Hollands," used for window shades, stiffened with 20 per cent. in weight of starch, but which does not substantially close the interstices, are not dutiable under such paragraph, but under paragraphs 304–309, being the countable cotton clauses.

Appeal from the Circuit Court of the United States for the Southern District of New York.

D. Frank Lloyd, Asst. U. S. Dist. Atty.

W. Wickham Smith, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from the decision of the circuit court of the United States for the Southern district of New York, which reversed the decision of the board of United States general appraisers, which had sustained the action of the collector. 99 Fed. 720. The goods in controversy are known as "Scotch Hollands," or "John King & Son's Hollands," which are made and used for window shades in houses, and are manufactured or prepared from cotton cloth which had been woven in the ordinary way. Prior to the tariff act of 1897, this class of goods had been classified for tariff purposes as cotton cloth, bleached or colored, under the clauses of the tariff acts known as "countable clauses," and which, in the act of 1897, are contained in paragraphs 304 to 309, and which provide a rate of duty according to the number of threads to the square inch and the weight and value per square yard. Paragraph 311 of the act of 1897 contained a new provision, which was "cotton cloth, filled or coated, three cents per square yard and twenty per centum ad valorem." Against the protest of the importers, the collector classified the goods in question under this paragraph as filled cotton cloth, and his decision was sustained by the majority of the board of general appraisers. The point in controversy is whether the importations in question, which are the product of John King & Son's well-known factory in Scotland, seven-eighths of their goods coming to the United States, are filled cotton or merely starched cotton. It is

to be premised that the term "filled" is not, strictly speaking, a commercial term; that is to say, no goods are ever bought or sold or inquired about as filled goods. The term is a technical one, used by the manufacturers, and relates to the process of manufacture, and therefore is also employed, to a certain extent, by the commission merchant, or by the importer, who is naturally familiar with the method of manufacture by which the goods which he sells are presented to the public. To a limited extent it is a term used in commerce, but its meaning depends upon its signification among the manufacturers to whose business it relates. Formerly, in England, the term "filled cotton goods" was synonymous with "weighted goods," and meant that the interstices of the fabric were loaded or weighted with foreign substances, among which inorganic substances, like china clay, chalk, or Glauber's salts were used; and that, although starch was used, some other material, like clay, or perhaps glue or glucose, must be used also. This weighting was for the purpose of giving to the goods "a factitious solidity," and thus of deceiving the inconsiderate purchaser. The following extracts from Depierre on "The Finishing of Cotton Goods" illustrate the method and the substances which were used in this class of filling:

"Afterwards come the filled or weighted finishings, where considerable quantities of earthy matters are incorporated, either on one side or both sides of the fabric, by means of the back-starching machine, or the ordinary and friction starch mangles."

"The principal qualities that a body destined to give weight in finishing must possess are a fine white colour, in a tenuous powder, of a moderate price, insoluble in water, and in the ordinary agents used in finishing it must not be influenced by the emanations generally found in air, nor must it be poisonous. The bodies possessing these qualities are china clay, whiting, or chalk, gypsum, talc, steatite, and kaolin. These substances are those most generally employed."

The interstices of cotton cloth are also necessarily filled in order to finish or prepare the goods for the purposes for which they are designed, and, when thus filled, the completed goods contain no element of deception.

The protesting importer insists that filling cotton goods, whatever may be the object of the process, necessarily consists in the use, with or without starch, of some one of the inorganic materials which have been or can be named, or of glue; that filling, in the proper sense of the term, by the use of starch alone, is either impracticable, or is not within the meaning of the term; and that the use of starch alone is simply for the purpose of starching or stiffening the fiber of the goods. The importer's definition of filling is satisfied if the goods contain in addition to starch an appreciable quantity of inorganic material. It is a conceded fact in this case that, so far as an introduction of foreign substances, other than coloring matter, into the interstices of the cloth is concerned, starch only was used, which constituted about 20 per cent. of the weight of the completed fabric. The ordinary process used in the manufacture of window shades, called "beetling," was also used, which consists "in pounding the cloth in order to give a moire or polished finish thereto, and the effect of which is to flatten the threads, or to bring them closer to-

gether." The theory of the government is that at the date of the act of 1897, and for many years prior thereto, in this country, the interstices of cotton goods which were finished for a great variety of purposes, of which window shades, vellums, book cloths, trunk linings, shoe linings, and cheap shirtings are examples, were filled with starch only, and that filling the interstices by starch alone for many of the various purposes for which cotton goods are manufactured was and had been a well-understood process of manufacture, and that the interstices of the goods in question were filled. The testimony upon the questions of fact between the parties comes from an exceptionally intelligent and experienced class of witnesses, who are about equally divided numerically. Upon the point maintained by the protesting importers,—that filling the interstices of cotton cloth with starch alone cannot be done, and was not commonly practiced in this country in and before 1897, the importers must fail, because it is a fact that in this country cotton goods in the process of manufacture into window shades have been for many years, by well-known and extensive manufacturers, filled with starch alone. The process was for the purpose of making a plain surface, and thereby an acceptable window shade. In like manner the interstices of cotton cloth for bookbinders' purposes and for tracing cloths are closed with starch alone, so as to put the cloth into proper condition. An alleged difficulty with the case of the government consists in the fact that the boundary line between starching and filling cannot be clearly defined. Starching consists in the use of a solution, and in many cases a weak solution, of starch, which is incorporated into the fiber of the threads to give stiffness or body to the cloth; while filling is the substantial closing of the interstices, and thus the creation of a permanent plain surface. This is done by running the cloth, which has been placed in a shallow box filled with the proper solution of starch, through a series of rolls, whereby the starch or filling matter is squeezed into the mesh or pores of the cloth. The practical difficulty in defining the line of demarkation between the two processes arises from the business system of finishing cotton goods. The manufacturer of the cotton cloth sends his brown cloth to a bleaching, dyeing, and finishing company with directions to finish in a certain way,—perhaps in accordance with a sample,—or to fill and finish for a certain purpose. The term "filling" has thus come to be an elastic term, and in business directions is often used loosely, and instructs the finisher to fill the particular goods so far as needful for the particular purpose for which they are to be used, or to fill in accordance with the style of cloth which is to be filled. Thus, a window shade demands a more complete and uniform plain surface, with pin holes substantially closed, than do linings for trunks or satchels. Nevertheless, the term means, when used with precision, the substantial closing of the interstices of cloth, which is the intended result; and this meaning of the term and intent of the process is recognized by some of the manufacturers of large experience who are witnesses for the United States. As thus defined, there is no real difficulty in ascertaining, either for purposes of the tariff or for any other purpose, when a window shade is filled. That

inspection or examination by unaided eyesight, to which persons of ordinary powers of observation are accustomed, will enable either the purchaser or the appraiser to know whether or not the interstices of a piece of cotton cloth have been substantially closed; and, so far as window shades are concerned, the opportunities for the comparison of a piece of imported goods with samples in which the apertures have been actually closed are very abundant. An inspection of the samples of the imported goods which are in evidence plainly shows that they have not been filled. Filling has been partially effected, but they have not been filled in any proper meaning of the word, and this conclusion is confirmed by the opinion of at least two of the manufacturers who were called by the government, one of whom says, "The interstices are not filled up entirely." Another says that the interstices have been closed "in a measure," and that these goods were not properly finished. Another says that the samples are the least filled, and are two of the poorest pieces of King's Hollands which he ever saw. A manufacturer and commission merchant of experience, who was called by the importers, truly says in regard to the goods in question, "The pin holes or interstices are somewhat closed." The witnesses for the government who speak of these goods as "filled" use the word in the elastic sense of which we have spoken, and do not mean either that they are absolutely or substantially closed. As a matter of course, the result which we have reached does not imply that none of the Scotch Hollands of John King & Son are filled goods. The question whether the particular importations were a fair sample of the manufacturers' uniform product was not in issue. We concur with the circuit court in the opinion that the importations in question were not filled in fact, and are also of opinion that they were not filled in accordance with any definition of the term which is not admittedly inexact. The decision of the circuit court is affirmed.

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## STERN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 8, 1901.)

No. 44.

CUSTOMS DUTIES—DECORATED GLASS ARTICLES.

Tariff Act 1897, par. 100, imposing a 60% ad valorem duty on "vessels of glass, * * * decorated, * * * and any articles of which such glass is the component material of chief value, and porcelain, opal and other blown glassware, all of the foregoing filled or unfilled," covers decorated articles of glass not susceptible of being filled, as is apparent from inspection of Tariff Act 1890, pars. 106, 110, 111, and Tariff Act 1894, pars. 89, 90, of which said paragraph 100 is a consolidation.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York, affirming a decision of the board of general appraisers, which sustained the action of the collector of the port of New York in assessing duty on certain imported goods, consisting of lamps, globes, lamp shades, chimneys, and candelabra, all of which were made of glass, and decorated in some way.

W. Wickham Smith, for appellants.
D. Frank Lloyd, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The importation was under the tariff act of July 24, 1897. The relevant paragraphs are:

"Paragraph 100. Glass bottles, decanters, or other vessels of glass, cut, engraved, painted, colored, stained, silvered, gilded, etched, frosted, printed in any manner or otherwise ornamented, decorated, or ground (except such grinding as is necessary for fitting stoppers) and any articles of which such glass is the component material of chief value, and porcelain, opal and other blown glassware; all of the foregoing, filled or unfilled and whether their contents be dutiable or free, sixty per centum ad valorem."

"Par. 112. Stained or painted glass windows, or parts thereof, and all mirrors, not exceeding in size one hundred and forty-four square inches, with or without frames or cases, and all glass or manufactures of glass or paste or of which glass or paste is the component material of chief value, not especially provided for in this act, forty-five per centum ad valorem."

The articles in question are manufactures of glass, and it is conceded that they are dutiable under paragraph 112, unless they are within the enumeration of paragraph 100, for no other paragraph covers them. Moreover, it is manifest that, being articles of glass decorated, they are covered by the words, "vessels of glass, * * * decorated," in paragraph 100, unless the rules of statutory construction require us to give to those words a more restricted meaning. It is contended by the appellant that they should be thus restricted because of the last clause of the paragraph: "All the foregoing, filled or unfilled, and whether their contents be dutiable or free." In the ordinary use of language, the employment of such a phrase would seem to import the idea that "the foregoing" were articles which were susceptible of being filled, just as in Dinglested v. U. S., 33 C. C. A. 395, 91 Fed. 112, 62 U. S. App. 306, this court held that the phrase, "if decorated 40%, if not decorated 30%," apparently indicated that congress had in mind "articles susceptible of decoration." But, while such an argument may lend support to some particular theory of construction, it is not, of course, controlling. Words are not always used in tariff acts with grammatical or scientific accuracy, and the most persuasive argument as to the intent of congress, when such intent is not entirely clear upon a mere reading of the statute, will be found in an examination of the history of the words employed, and a comparison with earlier acts in pari materia.

In the tariff act of 1890 will be found these paragraphs:

"Par. 106. All articles of glass, cut, engraved, painted, colored, printed, stained, decorated, silvered, or gilded, not including plate glass silvered, or looking-glass plates, sixty per centum ad valorem."

"Par. 110. Porcelain or opal glassware, sixty per centum ad valorem.

"Par. 111. All cut, engraved, painted or otherwise decorated glass bottles, decanters, or other vessels of glass shall, if filled, pay duty in addition to any duty chargeable on the contents, as if not filled, unless otherwise specially provided for in this act."

Under this act it is apparent that articles of glass, whether susceptible of being filled or not, are provided for in paragraph 106, the provision that the fact of being filled shall be immaterial on the

question of payment of duty being found in another paragraph (paragraph 111).

The draftsman of the next tariff act (1894) undertook to consolidate provisions of the three sections of the earlier act into two, with this result:

"Par. 89. All articles of glass cut, engraved, painted, colored, printed, stained, decorated, silvered or gilded not including plate glass silvered, or looking-glass plates, forty per centum ad valorem.

"Par. 90. All glass bottles, decanters, or other vessels or articles of glass, when cut, engraved, painted, colored, printed, stained, etched or otherwise ornamented or decorated, except such as have ground necks and stoppers only, not specially provided for in this act, including porcelain or opal glassware, forty per centum ad valorem: provided, that if such articles shall be imported filled, the same shall pay duty, in addition to any duty chargeable upon the contents as if not filled, unless otherwise specially provided for in this act."

It will be perceived that while the general paragraph covering "all articles of glass cut, engraved," etc., remains the same, except for reduction of duty, those articles which are bottles, decanters, or other vessels, cut, engraved, etc., are provided for in a paragraph by themselves at a like rate of duty, in which paragraph is included the provision for payment of duty when filled. Moreover, "porcelain or opal glassware," which in the former act had a paragraph for itself, is included in the one providing for the bottles, decanters, etc. There seems to be no sound reason for holding that the words, "porcelain or opal glassware," have any narrower meaning in their new position. They cover such glassware, whether it be in shapes susceptible of being filled or not. We therefore in this tariff act of 1894 have the provision as to payment of duty, if the articles be imported filled, included in a paragraph which lays duty upon articles which may be susceptible of being filled, and also upon articles (the porcelain or opal glassware) which may not be susceptible of being put into such condition.

The draftsman of the act of 1897 undertook still further to consolidate the paragraphs. In the place of paragraphs 89 and 90 of the act of 1894, he substituted paragraph 100 of the act of 1897. It enumerates additional forms of ornamentation (frosting and grinding), provides for articles of which glass is component of chief value, and adds "other blown glassware" to the porcelain and opal. Except for these changes, it is an amalgamation of the two separate paragraphs of the act of 1894,—a reverter to the arrangement of the act of 1890, wherein "articles of glass" generally, and "glass bottles, decanters," etc., had the rate of duty they should pay prescribed in a single paragraph. No trace of the general paragraph, "all articles of glass, cut, engraved," etc., which is found in paragraph 89 of 1894, in paragraph 106 of 1890, in paragraph 135 of 1883, and in schedule "b," § 2504, Rev. St. U. S. (to go no further back), will be found elsewhere in the act of 1897 than in paragraph 100, and in paragraph 100 will be found all its provisions. That the old paragraphs 89 and 90 have been condensed into the new paragraph 100 is a self-evident proposition upon inspection of the text. Under these circumstances, to hold that the result of the condensation has been to cast away all provisions as to "articles of glass, cut, en-

graved," etc., which are not containers, because the new paragraph includes a provision that duty shall be paid "filled or unfilled," would be a strained construction. And we are referred to no authority persuasive to any such conclusion. The decision of the circuit court is affirmed.

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## WOLFE v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 8, 1901.)

No. 40.

CUSTOMS DUTIES—SCHIEDAM SCHNAPPS.

Wolfe's Aromatic Schiedam Schnapps is dutiable under the tariff act of March 3, 1883, par. 99, as a proprietary preparation.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Edward Hartley, for appellant.

Chas. D. Baker, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In 1890 the appellant, under the name of Udolpho Wolfe's Sons & Co., imported into the port of New York certain "Wolfe's Aromatic Schiedam Schnapps." The collector assessed the duty upon the merchandise under paragraph 311 of the act of March 3, 1883, which reads as follows:

"Brandy and other spirits manufactured or distilled from grain or other materials and not specially enumerated or provided for in this act, two dollars per proof gallon."

The appellant protested against this classification upon the ground that the goods were dutiable as a proprietary preparation under paragraph 99 of the same act, which is as follows:

"Proprietary preparations, to wit: all cosmetics, pills, powders, trochees, or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils or preparations or compositions recommended to the public as proprietary articles, or prepared according to some private formula as remedies or specifics for any diseases or affections whatever, affecting the human or animal body."

The board of general appraisers held the goods dutiable under paragraph 313 of the same act, which was as follows:

"Cordials, liquors (liqueurs), arrack, absinthe, kirchwasser, ratafia and other similar spirituous beverages or bitters, containing spirits, etc., and not specially enumerated or provided for in this act, two dollars per proof gallon."

The circuit court, upon review of the decision of the board of general appraisers, held the article dutiable under paragraph 312 of the same act, which reads as follows:

"On all compounds, or preparations of which distilled spirits are a component part of chief value, not specially enumerated or provided for in this act, two dollars per proof gallon."

The article has long been imported into this country under the same name, in the same form of bottle, surrounded by labels and

recommendations, wrapped in pasteboard boxes, and styled, "Wolfe's Aromatic Schiedam Schnapps, a superlative tonic, diuretic, anti-dyspeptic, and invigorating cordial." The record does not disclose how long it has been imported under this name, but under the internal revenue act of July 1, 1862, the bottles were uniformly stamped as proprietary articles, as they also have been under the existing war revenue act of 1898. The article is sold in this country by the firm of Udolpho Wolfe's Sons & Co., mainly to wholesale druggists and dealers in patent medicines, is also sold to wholesale grocers, and has a distinctive reputation as a diuretic and tonic, as well as for purity of preparation. It is composed of gin, reduced in proof, sweetened and flavored. The act of 1883 omitted the words "medicines" and "medicinal" where they occurred in the corresponding section 2504 of the Revised Statutes and substituted for "medicines" the word "preparations" in one place, and "articles" in another. The supreme court, in Ferguson v. Arthur, 117 U. S. 482, 6 Sup. Ct. 861, 29 L. Ed. 979, examined the question of proprietary medicines, with reference to the proper classification of "Henry's Calcined Magnesia," a superior article of calcined magnesia, long known and long subjected to internal revenue stamps in England and in this country as a proprietary article. Many of the suggestions which led the court, speaking by Justice Blatchford, to regard it as a proprietary medicine, are applicable to the proprietary article now under consideration. The length of time during which Wolfe's Schnapps has had a peculiar reputation and distinctive character in this country, and during which it has been presented by the manufacturer as an article in which he had a proprietary right, is of importance in the decision of the case.

The decision of the circuit court is reversed.

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## BRYANT v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1901.)

No. 947.

PUBLIC LANDS—CUTTING TREES.

Rev. St. § 2461, prohibiting the cutting or removing of oak trees or other timber from the public lands of the United States, with intent to export, dispose of, use, or employ the trees or timber for any purpose except for the use of the navy, is not violated by boxing pine trees on the public lands for the purpose of the manufacture of turpentine, since it is not a cutting of the trees, within the meaning of the statute.

In Error to the Circuit Court of the United States for the Northern District of Florida.

Blount & Blount and C. H. Laney, for plaintiff in error.

W. W. Howe and John Eagan, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The distinguished counsel who appeared for the defendant in error in the opening paragraphs of his brief concisely and correctly states this case, as follows:

"Under assignments of errors in record, and set out and discussed in brief for plaintiff in error in this case, the question is squarely presented to the court as to whether cutting and boxing pine trees on public lands of the United States for turpentine purposes is a criminal offense, within the meaning of section 2461 of the Revised Statutes of the United States. The information filed in this case, and upon which the defendant was convicted, is based on the last clause of this said section 2461, which is as follows, to wit: 'Or if any person shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting any live oak or red cedar trees, or other timber on, or shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing any live oak or red cedar trees or other timber, from any other lands of the United States, acquired, or hereafter to be acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the navy of the United States; every such person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months.'"

This question has not been passed upon by the supreme court, or by any of the circuit courts of appeals, so far as we know. The only case reported to which we have been referred, or with which we are acquainted, in which the question here presented arose, is the case of U. S. v. Leatherberry (D. C.) 27 Fed. 606, in which the learned judge of the district court used the following language:

"The object and purpose of the statute [section 2461] is to protect the public timber. This purpose would, in a great measure, be defeated, should the view of defendant's counsel prevail. The language of the statute is, 'cut, or procure to be cut, or aid or assist or be employed in cutting,' etc., 'with intent to export, dispose of, use, or employ the same in any manner whatsoever other than for the use of the navy of the United States.' Certainly cutting the timber in order to extract its gum and sap for one's private use is cutting it with intent to use and employ it in a manner other than for the navy of the United States."

Under our judiciary system as it was then constituted, this case was taken to the circuit court by a writ of error, and the judgment of the district court was reversed. Leatherbury v. U. S., 32 Fed. 780. The circuit court which pronounced this judgment of reversal was held by the circuit judge (now senior circuit judge of this circuit) sitting alone. In the opinion which he delivered he used the following language:

"It is very difficult to make out that the boxing of a pine tree for turpentine, which is well understood in turpentine districts to mean cutting into a tree, more or less deep, in such a way as to cause the resin or gum of the tree to run and gather in the basin formed at the bottom of the cut, is a cutting of the tree in the sense in which the word 'cut' is used in the statute, where it evidently means to sever or fell. And if this should be satisfactorily answered, and it be shown that the cutting of the statute includes any cutting, however slight, then it seems that the requisite intent, to constitute an offense, is wholly lacking. It is not even plausible to argue that an intent to procure turpentine from a tree is an intent to dispose of the timber. It is not necessary to consider whether, under the statute referred to, the value of the resin obtained from a pine tree, delivered at a distillery, is a proper circumstance to be considered in determining the value of the tree."

It will be conceded that, as a precedent, the decision of the appellate court, though that court consisted, at the time the decision was rendered, of a single judge, is entitled to the greater weight. A care-

ful examination of the whole of each of the opinions—the one by the district judge sitting in the district court, and the other by the circuit judge sitting in the circuit court—satisfies us that the weight of the reasoning, also, is with the opinion of the circuit court.

The provision of the section immediately preceding section 2461, the last clause of which this case requires us to construe, authorizes the president of the United States to "employ so much of the land and naval forces of the United States as may be necessary effectually to prevent the felling, cutting down, or other destruction of the timber of the United States in Florida, and to prevent the transportation or the carrying away any such timber as may be already felled or cut down." The act of March 2, 1831, contains the provisions which appear in section 2461, in which the words "cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting," etc., are used. In the next following section this language appears: "If the master, owner or consignee of any vessel shall knowingly take on board any timber cut on lands," etc. A part of the penalty denounced for violating the provisions of section 2461 is a fine not less than triple the value of the trees or timber so cut, destroyed, or removed. In the opinion in Leatherbury v. U. S., supra, Judge Pardee called attention to the fact that section 2461, Rev. St., was originally the first section of an act approved March 2, 1831, entitled "An act to provide for the punishment of offenses committed in cutting, destroying, or removing live-oak and other timber or trees reserved for naval purposes." Some of the approved definitions of the word "timber" are "the body, stem, or trunk of a tree"; and others, much used in the western part of the United States, "woods or forest; wooded land." As used in botany, the word "tree" means any perennial woody plant of considerable size, usually over 20 feet high, and growing with a single trunk. When used with reference to the appropriating of the plant products of land, the word "cut" is defined to mean to sever and cause to fall for the purpose of gathering; to hew; to mow or reap. "Send me also cedar trees, fir trees, and algum trees, out of Lebanon; for I know that thy servants can skill to cut timber in Lebanon." 2 Chron. ii. 8. We note that in the affidavit which supports the information in this case the acting special agent of the general land office, in preferring his seven several charges against the defendant, shows that the defendant did "unlawfully cut, and cause and procure to be cut, from the following described public lands of the United States"; and the language of each of the seven several counts in the information likewise charges that the defendant did "unlawfully cut, and cause and procure to be cut, from the following described public lands of the United States." While it is true that penal statutes should be strictly construed, it is undoubtedly the duty of the courts to look to the mischief intended to be prevented, and to take into consideration the character of the remedy proposed to be applied, in doing which the mere letter must yield to the manifest spirit, and give to the provisions that measure of restriction or expansion which a sound, reasonable reading of the whole requires of each particular. It is conceded that the purpose of the act in question is to protect

the public lands. Taking a comprehensive view of the various provisions to which we have alluded, and bearing in mind the definitions we have suggested as applicable to the terms used in the statute, the legislative intent seems to have been to secure that protection by preventing the unauthorized cutting down, removal, or destroying of the timber trees growing thereon, and the unauthorized removing and destroying of such timber trees as had been already felled or cut down, or as might be felled or cut down from time to time; and it is not at all apparent to us that it was the intent of the legislature to make the "cutting and boxing of pine trees on public lands of the United States for turpentine purposes" a criminal offense. We think it is not a matter of common knowledge that such cutting and boxing of pine trees destroy the value of the trees as timber, or that it has a tendency even to retard the growth of the trees. It is, however, we think a matter of common knowledge, of which we may take notice, that on March 2, 1831, and long before that date, the "turpentine business" was an industry most prevalent in all the parts of the country where there were pine-growing public lands; and, if it had been the intention to protect these public lands from the ravages of that business, it would have been easy to make that intention clear by the use of appropriate words. We are therefore constrained to hold that the cutting and boxing of pine trees on public lands of the United States for turpentine purposes is not a criminal offense, within the meaning of section 2461 of the Revised Statutes of the United States. As the record shows that on the trial in the court below the court, of its own motion, gave the following instruction to the jury, to wit: "If you find that the defendants, within three years before the filing of the information, boxed, or procured to be boxed, trees on the land mentioned in the indictment, for the purpose of using or disposing of the turpentine taken therefrom, you will find them guilty,"—which instruction was duly excepted to, and is here assigned as error, it follows that the judgment of the circuit court is reversed, and the case is remanded, with the direction to award the defendant a new trial.

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## UNITED STATES v. MILLER.

(District Court, D. Nevada. January 11, 1901.)

Nos. 952, 953.

1. INDIANS—INTOXICATING LIQUORS.

Indians who, living in their tribal relations, are, under the laws and treaties, wards of the government, are necessarily under the charge of "an Indian superintendent or agent," though off the reservation at the time liquor is given them, within Rev. St. § 2139, as amended July 23, 1892 (27 Stat. 260), and January 30, 1897 (29 Stat. 506), inhibiting the giving of intoxicating liquors "to any Indian, a ward of the government under charge of any Indian superintendent or agent."

2. SAME—INTENT.

The question of wrongful intent in furnishing intoxicating liquors to Indians is immaterial under the statute declaring that any person who shall furnish it to them shall be punished.

8. SAME—LIABILITY OF INDIAN.

**An Indian is within the statute decreeing that any person who shall furnish intoxicating liquors to Indians shall be punished.**

Sardis Summerfield, U. S. Atty.
J. Poujade, for defendant.

HAWLEY, District Judge (orally). The defendant is a Modoc Indian. He was indicted by the grand jury of the district of Nevada for the crime of disposing of intoxicating liquor to a Piute Indian contrary to the provisions of the statute in such case made and provided. Rev. St. § 2139, as amended July 23, 1892 (27 Stat. 260), amended January 30, 1897 (29 Stat. 506). The defendant was placed on trial before a jury. The bottom facts of this case established by the evidence are that, in the evening of the day named in the indictment, some Piute Indians assembled at the cabin where the defendant resided, and, while engaged in a game of cards, asked the defendant if he could get them some whisky. He replied that he thought he could; that he knew a party from whom he could get liquor, and thought he could find him. That four Piute Indians then put up 25 cents each, and gave the money to the defendant to enable him to buy the whisky. That defendant then left the cabin, and was gone about one hour, and returned with a bottle of whisky. That he procured a small glass, filled it with the contents of the bottle, and himself gave to each of the four Piute Indians who gave him the money the glass thus filled with whisky. That each of these Indians drank the contents thereof and became intoxicated. The defendant, in his testimony, stated that he took the money and went around town, trying to find the person who he thought would procure the liquor for him; that he could not find him; that he then went to the railroad depot, and walked along the railroad track and met a "hobo"; that, after some talk appropriate to the occasion, he prevailed upon the stranger to procure a bottle of whisky for him; that he gave him $1, and promised to reward him with the sum of 25 cents for his services; that after he got the bottle of whisky he paid, of his own money, 25 cents, as promised; that he then returned to the cabin, and, hearing a number of voices therein, he secreted the whisky outside of the cabin and went in to ascertain who were there, and, finding none but Indians present, he went outside, got the whisky, brought it in, and disposed of it as above stated; that the other Indians who had come in also helped to deplete the bottle. It further appeared that on the night in question James Shaw, a reliable and intelligent Indian of the Piute tribe, a member of the Indian police of the Pyramid reservation, intrusted and charged with the duty of quelling all disturbances among the tribe, and specially instructed by the officers of the reservation to ascertain and cause the arrest of every person who disposes of liquor to Indians, on his return from a public entertainment given to the school children, to which he had been invited, was attracted by loud and boisterous noises which he heard in the cabin of the defendant; that in the performance of his duties, he went into the cabin, and at once ascertained that the Indians were all drunk. Thereafter the witness

Shaw, upon inquiry, ascertained all the facts, which, at his instigation, led to the arrest of the defendant.

At the close of the evidence the defendant moved the court to be discharged upon the following grounds: That he was under a disability, and did not have the capacity to commit the crime charged in the indictment; that he is an Indian, and if the offense charged was committed by him, and none but Indians were affected by it, this court has no jurisdiction to punish him; that the policy of the laws of the United States relating to Indians has ever been, and is, to confine the jurisdiction of all crimes committed by an Indian upon Indians to the Indian authorities; and that this jurisdiction is extended not only to cases in which Indians have provided for the punishment of crimes and offenses among themselves, but to cases in which no punishment has been provided for by them. The following authorities are cited in support of his motion: U. S. v. Barnaby (C. C.) 51 Fed. 20; Ex parte Mayfield, 141 U. S. 107, 115, 11 Sup. Ct. 939, 35 L. Ed. 635; Ex parte Crow Dog, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030; Alberty v. U. S., 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051. These authorities, and others of like character, in my opinion, have no application to this case, and need not be reviewed. They refer to an entirely different class of cases from the one in hand.

The statute under which the defendant was indicted reads as follows:

"Any person who shall sell, give away, dispose of * * * any malt, spirituous or vinous liquor * * * which produces intoxication * * * to any Indian, a ward of the government under charge of any Indian superintendent or agent, * * * shall be punished by imprisonment. * * *"

Under the treaties and laws of the United States the Piute and Shoshone Indians living in their tribal relations are the wards of the government of the United States, and as such are necessarily under the charge of "an Indian superintendent or agent," within the meaning of these words as used in the statute. The fact that the Indian to whom the liquor was given was off the Indian reservation at the time he received the liquor constitutes no defense or excuse whatever. U. S. v. Earl (C. C.) 17 Fed. 75, 77; U. S. v. Hurshman (D. C.) 53 Fed. 543, 544; U. S. v. Holliday, 3 Wall. 407, 415, 18 L. Ed. 182. In the case last cited the court said:

"The policy of the act is the protection of those Indians who are, by treaty or otherwise, under the pupilage of the government, from the debasing influence of the use of spirits; and it is not easy to perceive why that policy should not require their preservation from this, to them, destructive poison, when they are outside of a reservation as well as within it. The evil effects are the same in both cases."

The strict enforcement of this law is essential not only for the protection of the Indians who are the wards of the government, but also as a means of safety and security to the citizens of this state who are placed in fear when the Indians become intoxicated. It is a matter of common knowledge that the Indians living in their tribal relations in this state are, as a general rule, a harmless and inoffensive people, friendly disposed towards the government, and peaceable in their relations with the citizens of the state. But when they pro-

cure intoxicating liquors of any kind they drink to excess, their ordinary nature and disposition is at once perverted, and their inclination is to assault and injure every one, without regard to race or color, who comes within their path. They become dangerous not only to themselves, but to society at large, and are the special terror of the women and children living in the community where the crime mentioned in the act is committed. There is absolutely nothing in the policy of the act which supports in any manner the view contended for by counsel, that the defendant is under any disability to commit the crime because he is an Indian. On the other hand, the entire policy of the act is in favor of holding the defendant amenable to the law, the same as any other person. It will be observed that, under the particular subdivision of the act here involved, it is not made an offense for any person to sell liquor to an Indian who is not a ward of the government under the charge of an Indian superintendent or agent. (There are other subdivisions of the statute which make it a crime to dispose of liquor to any Indian to whom allotment of land has been made by the government, but that subdivision has nothing to do with the present case.) If, therefore, any person could sell or dispose of liquor to such an Indian because he is not a ward of the government, and if such Indian, because he is an Indian, could sell and dispose of the liquor to the Indians who are the wards of the government, it would result in creating and encouraging all the evils that are intended to be prevented by the policy of the act. No construction is admissible which would sanction an evasion of the act. The citizens of this state are constantly complaining to the officers, national and state, to be more vigilant in finding out and arresting the offenders against this law, and, as a general rule, it is only upon complaints of this character that steps are taken which result in their arrest and conviction. The chiefs and other officers of the respective tribes who are living in their tribal relations, and are wards of the government, as well as the superintendents and agents of the Indian reservations, are earnest and active in aiding the citizens of this state in their efforts to get rid of all persons who are engaged in disposing of liquor to Indians, and this aid will not be withheld because the guilty party is an Indian.

It was suggested by counsel that the obtaining of the whisky and disposing of it to the Piutes by the defendant was simply a friendly act on his part, performed solely for the purpose of having a good time on Christmas eve, and that he had no intention to violate the law. These suggestions furnish no excuse whatever for the commission of the offense, and can only be considered, if at all, in mitigation of his sentence. The intent of the defendant in giving the liquor to the Piute Indians is wholly immaterial. It is the act itself, the doing of which constitutes the crime. Where a statute forbids the doing of a certain thing, and is silent concerning the intention with which it is done, a person who does the forbidden act is guilty, although he had no wrongful intent beyond that which is involved in the doing of the prohibited act. The defendant, if he voluntarily did the prohibited act, cannot excuse himself on the ground that he did not intend to violate the law.

The motion must be decided upon the meaning and interpretation of the statute. The real question is whether an "Indian" is included in the word "person," as specified in the statute. This question has never before been raised in this court, and hence I have deemed it necessary to put on record my individual views in regard thereto. There is apparently a dearth of authorities upon this direct question. But the absence of authorities, to my mind, can be readily accounted for upon the ground that cases arising under this statute have seldom, of late years, at least, been deemed of sufficient importance to require an opinion; and it is evident that the question herein presented has seldom been raised. This court has dealt with many cases under the statute within the past 10 years, and no Indian has ever before been accused of the commission of this offense. To my mind, the question is absolutely clear and easy of solution. The word "person" is broad and general, and includes all persons, of whatever denomination, sex, race, or color. No exception is made in the statute, and, in the absence of any exception, it necessarily applies to every person. An Indian is a person, within the meaning of the statute, the same as any other human being.

The defendant cites the language used by Black on Intoxicating Liquors (section 427), where, in speaking of the sale of liquor to Indians under the provisions of section 2139, Rev. St. U. S., the author says:

"By the laws of the United States it is provided that every person, except an Indian in the Indian country, who shall sell spirituous liquor to any Indian under the charge of any Indian superintendent or agent, shall be punishable by imprisonment. * * *"

Without attempting to trace the history of congressional legislation with regard to the crime of disposing of liquor to Indians, it is enough to say that many statutes have been passed in regard thereto. In the earlier statutes the words "except an Indian in the Indian country" were found therein. But long before the Revised Statutes were enacted these words were excluded therefrom. In the preface to the Revised Statutes the commissioner, among other things, said:

"The portions of the statutes repealed are printed in italics and included in brackets."

Section 2139 reads:

"No ardent spirits shall be introduced, under any pretense, into the Indian country. Every person [*except an Indian, in the Indian country*] who * * * disposes of any spirituous liquors * * * to any Indian under the charge of any Indian superintendent or agent * * * shall be punished by imprisonment," etc.

It will therefore readily be seen that the learned author, whose general statements upon different subjects are usually very accurate and correct, inadvertently made a mistake in regard to the law in question. The same mistake was made by Judge Deady in U. S. v. Windslow, 3 Sawy. 337, 28 Fed. Cas. 739 (No. 16,742). But the question is settled by the fact that since the publication of the Revised Statutes this act has been twice amended,—one amendment fixing the maximum of the sentence to be imposed (27 Stat. 260), and the other including a more definite statement of the offense, and

declaring the minimum of the sentence to be imposed (29 Stat. 506, c. 109). There are no exceptions mentioned in either of these amendments, and they are the only laws now in force upon the subject. It is evident that congress purposely left out the words "except an Indian in the Indian country," so as to reach "any person" and "every person" who commits the offense specified in the statute. In the face of this express legislation upon the subject, it cannot be said that the law does not apply to an Indian as well as to any other person. It is, however, proper to add that in support of the views herein expressed, and of the conclusions herein reached, there is an opinion directly in point, which was rendered prior to the enactment of the Revised Statutes, upon statutes which did not contain the words "except an Indian in the Indian country." In U. S. v. Shaw-mux, 2 Sawy. 364, 366, Fed. Cas. No. 16,268, Judge Deady said:

"The word 'person,' in its ordinary sense, includes an Indian, whether he be uncivilized, under the charge of an Indian agent, in the Indian country, or otherwise. The burden, then, is upon the defendant to show that, although he is plainly within the letter of the statute, he is not within the true intent and meaning thereof. The argument in his behalf is that the principal power of congress in the premises does not extend to the regulation or control of conduct or intercourse between Indians within the limits of a state, and therefore the statute should be construed so as to exclude this case, which is one of intercourse between Indians only. * * * But, in the revision and re-enactment of the section in 1862 (12 Stat. 339) and 1864 [13 Stat. 29], its operation, so far as the disposition of liquor to Indians is concerned, was limited to Indians under charge of a superintendent or agent, whether within or without the Indian country, and the provision of the act of 1854 [10 Stat. 270], restraining the natural signification of the word 'person' was not inserted, so that the section stands in this respect as it did prior to the passage of said act. It being premised that congress has the power to regulate the disposition of spirituous liquors to an Indian, by whomsoever such disposition is made, in considering the question of whether congress intended to include Indians in the word 'person,' as used in this section, weight ought to be given to the argument of convenience. Upon all the Indian reservations in the country Indians will be found, if permitted to do so with impunity, through whom white men will be able to introduce spirituous liquor among the Indians with comparative security to themselves. The traffic can scarcely be prevented unless the Indians who are employed as go-betweens are held to be within the purview of the law prohibiting it."

Motion denied.

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CURTIS DAVIS & CO. et al. v. SMITH.

(Circuit Court, D. Connecticut. January 14, 1901.)

No. 992.

EQUITY PLEADING—SUPPLEMENTAL BILL—WHEN PROPER.

Where, pending a suit in equity for infringement of a trade-mark, complainant sold its business, good will, and trade-marks to another, but did not convey its right to recover for past infringement, it parted with only a part of its interest in the suit, and the court, having acquired jurisdiction, will retain it to dispose of all the questions involved, and will permit the filing of a supplemental bill to bring the grantee before it as a party complainant.

In Equity.

Archibald Cox, for complainants.
Donald G. Perkins, for defendant.

TOWNSEND, District Judge. The complainant corporation, Curtis Davis & Co., having brought a bill for infringement of its trademark "Welcome," in connection with the sale of soap, and during the pendency of said suit having sold its business, good will, trademarks, and plant to the corporation of Lever Bros., Limited, the two corporations have joined in a petition for leave to file a supplemental bill bringing Lever Bros. before the court as a party complainant.

The demurrer, inter alia, alleges as follows:

"(1) It is alleged and appears in said supplemental bill that Curtis Davis & Co., the original complainant, pending the original bill, have parted with all the business, property, trade-marks, and trade-names described in said original bill, and to protect which relief in equity by injunction was sought in this court by said original bill, and upon the facts set forth in said supplemental bill neither said Curtis Davis & Co., nor said Lever Bros., Limited, Boston Works, is entitled, nor are they jointly entitled, to the relief sought, or to maintain said supplemental bill, and said Curtis Davis & Co. are not entitled, upon the facts therein stated, to the equitable relief therein sought, and have adequate remedy at law; and all the facts constituting, and necessary to constitute, the cause for which said Lever Bros., Limited, Boston Works, seek to maintain said supplemental bill against this defendant, are not stated and set forth in the same as the same should be stated and set forth in an original bill, or an original bill in the nature of a supplemental bill."

Defendant contends that the vendee, Lever Bros., may file an original bill in the nature of a supplemental bill, but that the original complainant, having parted with its whole interest in the trade-mark and trade-name, cannot maintain such a bill, or be a party to it, and that it has an adequate remedy at law in an action for damages for infringement, but cannot ask in equity for an accounting.

This bill is filed in accordance with the following provisions of equity rule 57:

"Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day upon proper cause shown and due notice to the other party."

It appears from the allegations of the petition and proposed supplemental bill that Curtis Davis & Co. have not transferred all their interest in the subject-matter of the suit, and that they are still entitled to recover profits prior to the assignment. In these circumstances, a court of equity, having once acquired jurisdiction, will retain it until the questions involved in the suit have been determined. The assignee of an interest in such a suit is entitled to the benefit of the prior proceedings therein.

The distinction between a supplemental bill and an original bill in the nature of a supplemental bill is stated by Judge Wallace in Campbell v. City of New York (C. C.) 35 Fed. 14, as follows:

"Although the distinction between supplemental bills and original bills seems to rest upon purely artificial reasons, it is well recognized, and is attended in practice with consequences which affect the substantial rights of parties. If the cestuis que trustent had not transferred all their interest in the subject-matter, and there had been simply a change of trustees by

operation of law, or if there had been only a partial alienation of the title of Campbell, a supplemental bill might lie. As it is, the demurrer must be sustained."

In Daniell's Chancery Practice it is said:

"If, after a suit was instituted, any circumstance occurred which, without abating the suit, occasioned an alteration in the interest of any of the parties, or rendered it necessary that new parties should be brought before the court, the proper method of doing it was by supplemental bill. * * * If a plaintiff, suing in his own right, made such an alienation of his property as to render the alienee a necessary party to the suit, but not at the same time to deprive himself of all right in the question, he brought the alienee before the court by supplemental bill." Daniell, Ch. Prac. (5th Am. Ed.) 1515, 1516.

See, also, Walter Baker & Co. v. Baker (C. C.) 89 Fed. 673, and cases cited. The demurrer is overruled.

## CODDINGTON v. PROPFE.

(Circuit Court, E. D. Pennsylvania. February 6, 1901.)

1. PATENTS—INFRINGEMENT.
   Patent No. 307,746, claim 1, as to sealing wax composed of certain designated substances and finely-ground fibrous material, *held* infringed by the Propfe patent, No. 636,922, claiming a sealing wax composed of certain named substances and "fibers of asbestos wool."

2. SAME—CLAIMS FOR FUNCTIONS.
   In patent No. 303,984, for improvements in machinery for manufacturing wax tapers and coated strings, the first class of claims are claims for functions, and void.

3. SAME—ANTICIPATION.
   Patent No. 303,984, for improvements in machinery for manufacturing wax tapers, as to the first class of claims *held* anticipated in view of McPhetridge patent, No. 16,211.

4. SAME—RESTRICTION.
   Patent No. 303,984, for improvements in machinery for manufacturing wax tapers, is, as to the second class of claims, unless they are restricted to the precise combination, anticipated by prior patents.

5. SAME.
   Patent No. 303,984, for improvements in machinery for manufacturing wax tapers, *held* not infringed.

E. Hayward Fairbanks, for complainant.
Hector T. Fenton, for respondent.

J. B. McPHERSON, District Judge. The defendant is charged with infringing two letters patent,—one being No. 307,746, issued November 11, 1884, for improvements in composition for sealing wax; and the other being No. 303,984, issued August 26, 1884, for improvements in machinery for manufacturing wax tapers and coated strings. The defenses are want of novelty and noninfringement.

Patent No. 307,746 has two claims, but only the first is involved in this suit. The claim is as follows:

"A sealing wax consisting of resin, oil, or oily substance or substances, and finely-ground fibrous material, substantially as and for the purposes specified."

The specification describes the composition fully, and explains the purposes for which it is to be used.

"The object of my invention is to produce a sealing wax which shall possess to a large extent the qualities of wax composed largely of beeswax, but which shall be more tenacious, and much cheaper. This wax is especially applicable to sealing cans containing fruit, vegetables, meat, and the like; and in this connection I prefer to employ it in the form of waxed strings, prepared by a machine, which is also my invention, and which forms the subject for separate letters patent. This wax may, however, if desired, be employed in the usual manner for sealing cans. The wax consists of a composition of resin, oil, or tallow, or other oily substance or substances, and a fibrous material,—such as cotton or hemp fiber, asbestus, or agatite finely ground,—and mixed for ordinary purposes in the proportion of sixteen parts resin, one to two parts tallow or oil, and two parts of the fibrous material. The resin and tallow are first well mixed, after which the fibrous material is added, and the whole thoroughly mixed, and the mixture is then poured out into molds of any desired size and shape, and allowed to cool, when it is ready for use.

"If the wax is to be used in the manner most common for sealing cans, it is molded into sticks, in which shape it is placed in the market; but if it is to be used in the form of waxed strings, as above mentioned, the strings are properly coated with the wax while it is in a molten or liquid state, and allowed to harden on the strings.

"The resin which I preferably employ is that known as 'pine-tree resin,' and the preferred grades are E and F. For the lower grades a greater amount of oil or tallow or other oily substance will be required. The objection to the lower grades of resin is that they make a dark-colored wax, which is not so handsome or salable as the lighter-colored wax made from the higher grades of resin.

"The preferred description of oil or oily substance or substances which enter as an ingredient or ingredients into the above-described composition are what are known as 'nondriers,' and of these nondriers the preferred are such as tallow, lard, paraffin oil, and cotton-seed oil.

"The precise portion of resin or oil may be somewhat varied in case it is desired to make the wax harder or softer. By increasing the proportion of resin, the wax is made harder, and by increasing the proportion of oil it is made softer, and it may thus be made of any desired degree of hardness. The fibrous material employed imparts to the wax a very tough and tenacious property, which causes it to adhere very firmly to the can, and prevents it from being drawn in by the cooling of the contents of the can."

The defendant's composition, for which he has also obtained a patent,—No. 636,922, applied for since this suit was brought, and issued November 14, 1899,—is composed of "resin, an oily substance, fibers of asbestus wool, and stearic acid." Some effort was made to sustain the defense of noninfringement by asserting, in the language of the defendant's specification, that the stearic acid has "a chemical effect apparently upon the resin, tallow, and asbestus fiber, particularly the former, which gives a resultant composition having properties peculiarly its own, and which is well adapted to the coating of strings for the purpose hereinbefore stated"; but the effort did not pass beyond the stage of mere assertion. It is true that the defendant repeated in his testimony the words just quoted, but obviously this repetition added nothing of value. So far as appears, no chemist has examined or analyzed the composition, and the defendant is not qualified to give expert testimony upon the subject. Stearic acid is a fatty or oily substance, and there is no evidence that would justify me in finding that it behaves otherwise

in his composition than tallow or lard would behave. There is a clear infringement, therefore, of complainant's first claim, unless "fibers of asbestus wool" differ materially from "finely-ground fibrous material." As it seems to me, after an inspection of the two substances, there is no such difference in fact, whatever may be the apparent difference in the language used to describe them. Nothing more is needed to show their practical identity than to compare specimens of the two materials. Both are finely divided powders, scarcely differing in any respect save in color, and certainly not in the size of their respective particles. It conveys a wrong impression to speak of "fibers of asbestus wool," as if the minute particles of this substance resembled the fibers or strands of animal hair or wool. It is a powder merely, and, as the defendant uses it, is already as fine as if it had been finely ground. The purpose of such material is to act as a binder to make the wax tough and tenacious, and not to act chemically upon the resin and the tallow, or other oily substance. I am, therefore, of the opinion that the defendant's composition infringes the first claim of the complainant's patent No. 307,746. And, without discussing the two patents set up as anticipations, I am also of opinion that neither is effective for this purpose,—the Burbridge patent, because its fibrous material is not to be finely ground; and the Waterous patent, because steatite does not appear to be a fibrous material.

To the patent for the machine, however, I think the defense of noninfringement is good. The complainant's machine belongs to the class described in McCormick v. Talcott, 20 How. 405, 15 L. Ed. 931, in the following passage:

"If he be the original inventor of the device or machine called the 'divider,' he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But, if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

The machine is designed "rapidly and cheaply [to] produce waxed strings or tapers for sealing fruit jars, or for lighting purposes. It has special reference, however, in the present instance, to the manufacture of waxed strings for sealing fruit jars." The claims said to be infringed are seven in number and fall into three classes; the first class being:

"(1) A machine for manufacturing waxed strings or tapers, by the aid of which machine said strings are waxed and automatically cut to the required length, substantially as and for the purposes specified."

"(22) The combination of mechanism, substantially as described, for coating strings with wax, and mechanism for automatically cutting the strings into the desired lengths after being coated, substantially as and for the purposes specified."

The second class being:

"(2) A machine for coating strings with wax, consisting of a pan, B, in which to melt the wax, and mechanism, substantially as described, for re-

taining the strings in said pan, and drawing them horizontally through the same, substantially as and for the purposes specified."

"(4) The combination of a vessel for holding the melted cord-coating material, staples or guiding devices having openings, $b^1$ and $b^2$, and means for drawing the strings through the staples or guides, $b^1$, $b^2$, substantially as and for the purposes specified."

"(6) In a device for coating the cord or strings, the combination of the extended shallow pan for holding the liquid cord-coating material and devices for keeping the cord near or at the bottom of said pan while being drawn through said pan, substantially as and for the purposes specified."

And the third class being:

"(14) In a machine for coating strings, the roller, C, provided with a porous exterior, substantially as and for the purposes specified."

"(8) The combination of the vessel for holding the cord-coating material, devices for immersing the cord therein, drum or roller, C, and feed rollers, d and $d^1$, all supported in an appropriate frame, and mechanism, substantially as described, for causing said rollers to revolve, substantially as and for the purposes specified."

Concerning the first class, it is enough to say that these are either claims for functions, and therefore void, or else they are claims for the particular device described in the specification, and need not be separately considered. As broad claims for the device, I think they cannot be sustained, in view of the patent to McPhetridge, No. 16,211, dated December 9, 1856, and perhaps also in view of other prior patents cited by the defendant.

The second class are claims for a combination consisting of a waxing pan, the staples or guiding devices therein for keeping the strings submerged in the wax, a revolving and grooved roller or drum covered with cloth or other soft porous material, a pair of geared feed rollers, and mechanism for causing the rotation of the drum and the feed rollers. Unless these claims be restricted to the precise combination claimed, they cannot be sustained, for prior patents show a waxing pan, guiding devices therein, and a pair of geared feed rollers to draw the material from and through the waxing pan. The thirteenth, fourteenth, fifteenth, and sixteenth paragraphs in defendant's statement of facts (with a slight change) are, I think, undoubtedly true:

"(13) It was not new with Coddington to provide machinery or mechanical apparatus to cover wick or strings with a waxing or coating composition, and to cut off the same in definite lengths; the ancient wax tapers and wax matches having been so made.

"(14) It was not new with Coddington to provide a mechanical structure to deliver sheets of paper or a series of cords or wicks to a waxing or coating pan, means to keep the cords submerged therein, means to strip off the surplus coating, driven rollers to draw the paper or cords from the waxing pan, and means to wind up the waxed paper or cord, or to deliver it to other devices for further treatment.

"(15) The prior patents to Bancroft of 1882, Page of 1881, Montgomery of 1849, and McPhetridge of 1856, each show and describe some or all of this mechanism, substantially as stated in the preceding paragraph.

"(16) It was not new with Coddington to provide, in a single apparatus or machine, mechanisms operating automatically and in unison, whereby a string was fed forward, coated with wax or like composition, cooled, drawn forward by driven rollers, delivered to cutting devices, and cut off in definite lengths, in one continuous operation; such a machine or apparatus being described in prior McPhetridge United States patent of 1856."

A prominent feature of the third class of claims is the roller provided with a porous exterior. The specification further describes the drum or roller as follows:

"This drum is covered with cloth, which is kept constantly moistened by water from the trough, the preferred means of conveying water from the trough to the drum being a strip of cloth, one edge of which is in the trough and the other edge resting on the drum. This strip acts on the principle of a syphon, and keeps the cloth on the drum moist, and the strings are thus drawn between two moistened surfaces, and are thus cooled and moistened."

In claim 15 the same language is used as in claim 14, except that the word "soft" is inserted before the word "porous." I agree with the defendant's expert in believing that the difference between these two claims is immaterial. To use his language:

"While the specification describes cloth as the 'porous' covering of the drum, the absence of the word 'soft' of claim 15 from the otherwise identical claim 14 in question would indicate that some other covering than cloth could be substituted; but, as both the claims use the word 'porous,' and as the specification describes that the function of the covering is primarily to absorb water from the superposed trough, and give it up to the coated string passing over the drum, it is obvious that no covering which will not perform these functions is the 'porous' or 'soft porous' material of the patent. * * * I do not think, therefore, that the thing referred to in the claim 14 in question is merely a drum per se covered with soft material, nor a drum covered with a porous, water-absorbing material, but is a drum capable of absorbing and giving off water when arranged in proper combination with, or rather in relation to, a water trough delivering water thereto, and also when arranged to operate as a guiding device, and hence grooved, and with means to revolve said drum."

It is sufficient to add that there is no such drum in the defendant's machine. The device that is supposed to correspond is thus correctly described in the brief of defendant's counsel:

"These rollers are merely guide rollers. They are free to revolve, but are not driven. They are nothing but plain, wooden, uncovered rollers. Their obvious function is to guide the string to and through the water in the cooling pan marked 'D.' They are in no sense drawing rollers. They are not cooling rollers in the sense of the claim of the patent, and certainly are not rollers 'covered with a porous material.'"

The bill must be dismissed as to the patent for the machine, but sustained as to the patent for the wax. The costs will be equally divided.

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## GAISMAN et al. v. GALLERT.

(Circuit Court, S. D. New York. January 12, 1901.)

1. PATENTS—CONSTRUCTION OF CLAIMS.
   When the claims of a patent are open to two constructions, one of which destroys, while the other saves, the patent, the court will not hesitate to adopt the latter, especially as against one who has certainly copied and is using the invention.

2. SAME—INFRINGEMENT—WAIST BELTS.
   The Gaisman patent, No. 542,306, for an improvement in waist belts (claims 1 to 5), construed, and *held* valid, and to include as a part of the fastener or holding device claimed the button holders shown in the preferred method of construction, and also *held* infringed.

In Equity. Suit for infringement of patent. On final hearing.

The patent in suit is No. 542,306, granted to Henry J. Gaisman, assignor of one-half to Ferdinand S. M. Blun, for an improvement in waist belts for men and women. The specification says: "My invention provides convenient means for firmly holding the belt and trousers in the desired position relatively to each other, so that the belt or garment cannot fall below or work up above the fixed proper position; also, when desired, can afford such connecting means as to conceal from the outer view of the belt the existence of such means and leave the outer facing of the belt undisturbed with the appearance of an ordinary belt. With my invention suspenders may be worn or omitted. The belt may be worn without making use of the invention. Trousers are generally supplied with suspender buttons. It is common to provide each side of the front with two buttons and two buttons in the back; but they are liable to vary in their distance apart and in their positions forward and backward. My invention provides means for allowing each button or its connecting means to adjust itself laterally to requirements. It also allows a belt of a given size to adjust itself to a wide range of sizes of waist. My belt holds itself in such a position as to cover and conceal the joining line of the upper and lower garments. * * * The engagement of the buttons with the button holder is reliable and can be effected rapidly. It insures the required position of the belt and upper edge of the trousers, so that the upper edge of the trousers is concealed under the belt. While the details of construction shown in the drawings are the ones I prefer, they are subject to modifications which would not depart from the spirit of the invention and are intended to be included by the claims. The form of holder and its means of engaging and disengaging with the button may be varied within wide limits. The stay and metal facings may be varied in form, proportions, and material. The slot or guideway need not be straight. It may obviously be curved, waved, or variously formed. Instead of the outer portion of the belt being thicker than the inner portion or lining the conditions may be reversed. I can dispense with the lining and attach to the main or outer body of the belt a horizontally-formed guide or slotted piece of metal or suitable material, which shall carry the button or button holder." The first five claims of the patent are involved. The claim chiefly relied on is the third, which is as follows: "(3) As a new article of manufacture, a flexible belt having secured thereto a series of fasteners each provided with a horizontal slot open at one end, said fastener being located on the inner face of the belt, and being spaced apart, and means located at the open end of said slot to prevent the spontaneous removal of the button through the open end of the slot under ordinary conditions of use, but arranged to allow the button to be removed by a direct pull when required, all substantially as herein specified." The answer alleges the usual defenses of lack of novelty and invention. The defense principally relied upon at the argument and in the brief is that if the claims are given the limited construction required by the prior art the defendant does not infringe.

T. F. Bourne, for complainants.

E. M. Marble, for defendant.

COXE, District Judge (after stating the facts). What Gaisman invented and secured by the claims in issue was a flexible belt capable of easy adjustment and so constructed as to cover and conceal the joining line of the shirt and trousers of a man and the waist and skirt of a woman. The third claim may be considered as fairly representing the others. It is intended to secure as a new article of manufacture a flexible belt having secured thereto (1) a series of fasteners spaced apart and located on the inner face of the belt, (2) each fastener being provided with a horizontal slot open at one end, (3) means located at the open end of said slot to prevent the spon-

taneous removal of the button, but to permit its removal by a direct pull. Many prior inventors had the same object in view as Gaisman and it is not surprising that in stating the purpose of their inventions they have used language similar to his. There is, however, nothing in the prior art which shows his method of solving the problem. The prior structures appear to have had a transient and partial success, whereas Gaisman's has been very generally adopted. It is not necessary to examine the prior art in detail for the reason that it is not pretended that the patent is anticipated by any of the references. In the opinion of the court the defendant's best reference is the patent of Van Duzer. The horizontal slot of this patent is shown on the outside of the belt, but this difference is immaterial as one has but to turn the belt over in order to have a slot on the inside. The device, however, operates in an entirely different manner from the complainants' fastener. It is clumsy and one that can never become popular. It lacks simplicity and ease of operation. It requires time and care to locate the button in the slot and the disengagement is equally difficult. In the Sanders belt the metallic loops are seen on the outside of the belt. The loops are detachably fastened to the trousers buttons by means of a jaw or clamp. The device has none of the distinctively novel features of the Gaisman invention. The serious inquiry seems to be not whether the claims have been limited by the prior art but whether Gaisman has himself so limited them that they include neither his own nor the defendant's device. The specifications and drawings show two ways in which the invention may be practiced. First, with a button holder sliding in a horizontal channel, and, second, with the holder omitted and the button engaging directly with the channel. Precedence is clearly given to the first of these mechanisms. The second is mentioned in a single paragraph of the description as an alternative construction and is shown in only one figure of the drawings—the eighth and last. And yet it is asserted that none of the claims covers what the patentee evidently considered the principal feature of his invention.

The court is unable to perceive how the proceedings before the patent office materially affect the present controversy. The effort there was to avoid the Van Duzer reference, it being thought for a time that the longitudinal slot in the plate there shown met Gaisman's open slot and method of applying it as shown in Fig. 8. On March 25, 1895, amended claims to obviate the objections of the examiner were submitted with a memorandum which states as follows:

"The claims as now presented seem to us to clearly avoid the references, for the reason that in Van Duzer a direct pull on the button will not carry it through the slot in the fastening as said fastening has no open ended slot."

Five days afterwards the patent was allowed. It was not necessary to omit the button holder in order to avoid Van Duzer. Van Duzer does not show a button holder or anything approximating one; he shows nothing but a closed longitudinal slot in which the suspender button can slide after being locked in. This slot either an-

ticipated Fig. 8 or it anticipated nothing. There was nothing in the patent office proceedings which required the omission of the button holder as a condition precedent to obtaining a patent. It is inconceivable that the patent-office officials could have believed the patent valid for the open slot of Fig. 8 and void for the features shown in the other figures. In Fig. 8 the engagement with the button is made directly, in the other figures it is made through the medium of an ingenious holder adapted to fit buttons of all sizes and slide easily in the guideway. The specification says:

"When the button is connected directly, it occupies a position similar to the plate H [bottom plate] of the button holder."

Two propositions are advanced in support of the contention that the claims are not infringed. First: The claims must be construed so narrowly that no structure will infringe in which the patented device is not "copied and reproduced in its minutest details." Second: The defendant's structure does not infringe unless a button holder is "read into" the claims, which, upon the facts in proof, the law will not permit. If the first of these propositions be accepted nothing but a Chinese copy will infringe, and if the second be accepted it is doubtful if even a Chinese copy will infringe. If the contention be correct that the claims do not cover the device when a button holder is employed it follows that any one can with impunity appropriate the exact device shown in Figs. 2, 3, 4 and 5 of the drawings. The proposition is somewhat startling on its face and should be supported by exceedingly cogent reasoning. If there be a way compatible with reason and common sense to avoid a construction which declares that a patent granted by the government has no claim which protects the invention, that way should be found and followed. It is thought that neither of the defendant's propositions can be maintained. Although the complainants are not entitled to a broad construction they are entitled to a construction which covers plain and palpable imitations of their improvement, and they are also entitled to a liberal reading of the claims when they are attacked by one who is most certainly using the invention. That the claims are capable of the construction asserted by the defendant may well be conceded, but it is thought that they are also capable of the construction urged by the complainants. When forced to choose between a construction which destroys and one that saves the patent the court should not hesitate to adopt the latter. Winans v. Denmead, 15 How. 330, 341, 14 L. Ed. 717; Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715; Hoyt v. Horne, 145 U. S. 302, 309, 12 Sup. Ct. 922, 36 L. Ed. 713. If the claims relate solely to the structure shown in Fig. 8 there is no infringement; if, on the contrary, the words "fasteners" and "holding device" of the claims be held to refer to "the button holders J" there is no difficulty in finding infringement, for the defendant's button holders contain every feature of this holder.

The defendant operates under a patent to Schwarz which was rejected upon reference to the patent in suit. In reply to the examiner's criticisms the solicitors wrote:

"Applicant gets all the functions of Gaisman's preferred construction and more, with the exception that the applicant's plate is permanently attached, whereas Gaisman's is removable."

In other words, the defendant's device was claimed as an improvement on Gaisman's device, showing the latter and some additional features. The use of the improvement, if it be one, is immaterial so long as defendant uses the patented mechanism. It follows that the complainant is entitled to the usual decree.

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## SPRAGUE ELECTRIC RY. & MOTOR CO. v. STEEL MOTOR CO.

(Circuit Court, W. D. Pennsylvania. July 12, 1898.)

No. 11.

PATENT—SUIT FOR INFRINGEMENT—INJUNCTION.

Where complainant in an action for a preliminary injunction asks leave to withdraw so much of its motion as seeks an injunction based on infringement of a certain claim of a patent, and it does not appear from complainant's moving papers that he charges respondent with infringing in the manufacture and sale of the articles referred to in such claim, the question of such infringement will not be passed upon solely at respondent's instance.

Sur Motion for Preliminary Injunction.

Betts, Betts, Sheffield & Betts and Christy & Christy, for complainant.

Harding & Harding, for respondent.

BUFFINGTON, District Judge. The complainant, the Sprague Electric Railway & Motor Company, moves for a preliminary injunction against the Steel Motor Company to enjoin infringement of claims 2 and 6 of letters patent No. 324,892, issued August 25, 1885, to Frank J. Sprague for an electric railway motor. These claims were adjudged valid by the circuit court of the Second circuit, and its decree affirmed on appeal. The validity of the patent having been sustained, an injunction must issue, as the respondent company concedes that Exhibits Nos. 1, 2, 3, 5, 6, and 7 infringe the second claim. As to the sixth claim, respondent alleges that the present proofs fail to show in said exhibits the use of all the elements of said claim. We will not pass on that question, as the complainant asks leave to withdraw so much of its motion as seeks for an injunction based on infringement of said claim. Such leave will be given, without prejudice to complainant's right to aver and maintain such charge of infringement hereafter.

The foregoing enjoined types are what are known as "nose-suspended motors." The respondent manufactures motors with sidebar suspensions, and has produced plans and models of two such, known as Nos. 4 and 8, respectively, has submitted them to the inspection of the court and parties, and has urged the court on this present motion to pass on the question whether they infringe. Counsel for respondent allege that complainant's moving papers charge that respondent infringes in the manufacture and sale of said side-suspended

motors. A careful consideration of the record satisfies us that such charge has not been made on the motion before us by complainant, and that the respondent, not the complainant, has sought to raise that issue. Against action thereon by the court the complainant protests, alleging that, while it regards said types as infringing the patent in suit, it is not willing to have that question passed on in the present motion or presentation by the respondent, and on its models and drawings. We must therefore regard the question as before us wholly and solely at the respondent's instance. Such being the case, we must decline to pass upon it. The practice to the contrary is settled in this circuit. Edison Electric Light Co. v. Westinghouse Electric & Mfg. Co. (C. C.) 54 Fed. 504. Let an injunction as indicated above be drawn and submitted.

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EDISON PHONOGRAPH CO. et al. v. KAUFMANN et al.

(Circuit Court, W. D. Pennsylvania. January 3, 1901.)

No. 8.

1. PATENTS—INFRINGEMENT—RIGHT TO IMPOSE CONDITIONS ON PURCHASERS.
The manufacturer of a patented article has the right in selling the same to jobbers for the trade to prescribe conditions and restrictions to govern its subsequent sale, and one who buys from a jobber with notice of such conditions and restrictions is bound thereby, and for their violation may be treated as an infringer.

2. SAME—SALE IN VIOLATION OF KNOWN RESTRICTIONS.
Complainants manufactured a patented phonograph, which they sold only under what was called a "jobber's agreement," which contained certain conditions and restrictions as to the prices at which the instruments were to be sold. Defendants applied to purchase, and were sent a copy of such agreement to sign, and informed that no sales were made except thereunder. They refused to sign such agreement, and subsequently procured a third person to purchase and ship them the instruments, which he did by signing the agreement. Defendants proceeded to sell the instruments so bought in violation of the conditions of the agreement. *Held*, that they were not bona fide purchasers without notice of such conditions, notwithstanding they took the instruments from the first purchaser unconditionally, and without knowledge that he signed the agreement, but, under the circumstances, were put upon inquiry, and were, moreover, bound by the knowledge of the first purchaser, as their representative, and in selling in violation of the known rules of complainants rendered themselves liable as infringers.

In Equity. On motion for preliminary injunction.

Howard W. Hayes, for complainants.
W. B. Rodgers, for respondents.

ACHESON, Circuit Judge. I cannot doubt that the complainants have the right to sell their patented phonographs with the restrictions and upon the conditions contained in their "jobber's agreement," and that dealers buying the patented instruments from the jobbers with notice of those restrictions and conditions are bound thereby. Dickerson v. Matheson, 6 C. C. A. 466, 57 Fed. 524; Same v. Tinling, 28 C. C. A. 139, 84 Fed. 192, 195. The material facts here appearing are these: Upon application for a supply of the

patented phonographs by the defendants to the complainants, the defendants were informed of the plan the complainants had devised for the protection of themselves and their customers as embodied in their "jobber's agreement," and a copy of that agreement was furnished to the defendants to be signed by them. A correspondence by letters between the parties then ensued. The defendants asked to have the agreement modified by striking out the eleventh clause, but this was positively refused by the complainants. The defendants were advised fully of the reasons which had led to the adoption of the plan for doing business as contained in the "jobber's agreement," and the defendants were distinctly informed that the complainants would not deviate therefrom in any instance. Shortly thereafter (within two months) the defendants took steps to get a supply of the patented phonographs manufactured by the complainants through one Wood, a merchant of the city of New York, from whom the defendants were accustomed to purchase other goods. Wood was not then a dealer in phonographs, and the defendants did not send him an order for the instruments. The defendants' manager, Mr. Baer, saw Wood personally, and procured his services in the matter of obtaining the phonographs from the complainants. The following extract from Mr. Baer's affidavit in behalf of the defendants, made and filed herein, states the transaction thus:

"Affiant inquired of said Wood as to whether the purchase of the phonographs could be made from him, to which inquiry said Wood replied that he did not then know, but felt sure that he could get them, and sell them to defendants. It was distinctly understood between affiant and said Wood that defendants, in case they received the phonographs, would not be bound by any trade restrictions. Shortly thereafter affiant saw said Wood, and made inquiry as to what, if anything, had been done in relation to the matter. Wood replied that one Gilmore, the president or manager of the complainant companies, had been in Europe for some time, and was expected home in a few days, or had been home a few days; that said president or manager was a friend of his, and that there was no use for him to talk to anybody else; that when one wants on the inside one must go to the head man; and that he would go to Orange in a few days, and see said Gilmore about the matter. Shortly thereafter affiant saw Wood, who informed him that the goods desired would be shipped in a few days. Affiant then told him that defendants might cut the list prices, and Wood replied: 'I don't care what you do with them. You may give them away if you want to.' Affiant said, 'I fear you cannot get further orders if we break the price.' Wood replied that he would not have any trouble getting more goods because of his relation with the said president or manager. The purchase made from Wood was unconditional, and there was no agreement or understanding, expressed or implied, that the defendants were to be in any way restricted as regards price or otherwise."

In fact, Wood procured the phonographs from the complainants by first signing the said "jobber's agreement," thereby becoming subject to all its restrictions and conditions. Having thus acquired from the complainants these phonographs, Wood immediately shipped them to the defendants, who have been selling them at their store in Pittsburg in violation of said restrictions and conditions. Can the defendants be esteemed bona fide purchasers without notice? I think not. It is hard to believe that they placed any reliance whatever in the representations of Wood. They had just

been in direct communication with the complainants, and had learned what their invariable course of business was. The defendants certainly knew enough to distrust the ability of Wood to procure by legitimate means the phonographs freed from restrictions and conditions. Indeed, Wood's suggestion involved secret and underhand dealing with an official of the complainant companies. Under all the circumstances, inquiry by the defendants of the complainants was a plain duty, and such inquiry would have revealed the truth instantly. Moreover, the defendants did not buy in the open market. They purchased through Wood. He represented them in the transaction, and his knowledge is to be imputed to the defendants. The defendants, I think, must be treated as infringers. Let a decree for a preliminary injunction be drawn.

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## LEIN v. MYERS et al.

(Circuit Court of Appeals, Second Circuit. December 6, 1900.)

No. 7.

PATENTS—ANTICIPATION—EVIDENCE OF PRIOR INVENTION.

The Lein patent, No. 615,073, for a mattress frame, claim 1, *held* anticipated by the Taber design patent No. 26,245, issued prior to Lein's application, and concededly disclosing the same device, on the ground that the evidence was insufficient to sustain the burden resting on complainant to prove the priority of Lein's invention.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon an appeal from a decree of the circuit court, Southern district of New York, sustaining the first claim of United States patent 615,073, and finding infringement in defendants' structure. 97 Fed. 607.

M. E. Robinson, for appellants.

Clifton V. Edwards, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The patent is for a mattress frame, and was issued to complainant November 29, 1898, upon an application filed August 7, 1897. The specification states that the object of the improvement is to construct a simple and inexpensive frame, in which the smallest possible surface will be exposed to the accumulation of dust, dirt, or vermin, and in which the weight put upon the mattress will be so distributed as to be directed against all parts, and in which the greater the weight the more firmly will the frame be held together. The device comprises a corner bracket in which the side rails and end bars are inserted. Of this bracket the specification states:

"The bracket, C, comprises a socket, e, into which the end of the side rail is adapted to snugly fit, while the upper surface of this socket extends backwardly a suitable distance, forming an extension, d, which, when the woven-wire fabric is attached to the end bars, bears firmly down upon the side rails, as hereinbefore mentioned."

The first claim is as follows:

"(1) A socket for a mattress frame comprising a part adapted to engage the upper surface of the side rails of the mattress frame, a horizontally extending shoulder formed on one side thereof, a vertically extending bracket at the outer end of said shoulder, a similar bracket at the point where said socket engages the side rail, and means for screwing the end bar of the mattress to the upper ends of said brackets, substantially as described."

On November 3, 1896 (upon application filed August 10, 1896), a patent for a design for a corner block for mattress frames was issued to one Taber (design No. 26,245). It is conceded by complainant that the subject-matter of the first claim of the patent in suit is disclosed in this design patent. To avoid the defense which this design patent establishes, it is necessary for complainant to show that his invention antedates the date of his application by several months. The burden of proving this is upon complainant, and we are unable to concur with the judge who heard the cause at circuit that he has borne such burden. Such evidence, especially when it deals with experiments which resulted only in some two or three specimens, which never left the shop, and were seen years before by but a few persons, who, in giving their recollections of dates, are unable to fix such dates by reference to some transaction whose date is susceptible of definite proof, is rarely satisfactory. Before discussing this testimony, it may be noted that it deals with two different groups of devices, an "earlier pattern" and "earlier casting," and a "later pattern" and "later casting." The judge at circuit was of the opinion that the earlier device embodied the invention of the first claim. We have reached a different conclusion, not finding in it the "part adapted to engage the upper surface of the side rails," which the specification refers to as an extension backwardly a suitable distance, thus securing a bearing surface adapted to give the strength of structure and distribution of weight, which was the object sought for. The crucial fact, therefore, which complainant must establish by persuasive proof, is a date for the "later" pattern or casting prior to November 3, 1896.

Complainant's application is sworn to July 19, 1897. His concern moved into a new factory on Second avenue in December, 1894. His narrative of what took place between these fixed dates is as follows: Shortly after he got settled in the new quarters (Second avenue), it being a dull season, he made sketches, experimented, and, having finally settled upon a plan, made patterns, which he got completed somewhere about March or April, 1895 (before the busy season, which was usually in April or May). Shortly after the patterns were completed, castings were made of composition. After these were made, he got the tubular side rails ready, and the frame was assembled into a spring (the trade-name for a completed spring mattress), and put together by himself and one of his workmen, Beyers. It then appeared that the tension was not great enough, so the spring was taken apart, and the fabric cut off, in order to put on fabrics with greater tension. By that time they were in the busy season, and the thing was laid aside, so that they might get out orders, and the "invention lay dormant for some little time." At that time his idea, as

he says, was to "make the casting of something stronger than the composition," and he finally got them made of malleable iron. There is no suggestion that the model of the castings was then changed; only the material. This "took some time to get them cast," and it was late in the fall before they were ready to do much more with it. "When we got time," says the witness, "after our busy season was over in the fall, we took the matter up again, made a spring that suited us so far as tension was concerned, but not so attractive as we would like." In this narrative complainant is corroborated by the workman Beyers, who says he believes he saw the pattern in the early part of 1895, and the casting in about May or June; that he very well recollects putting the bed together, which, "to the best of his knowledge, must have been" in the month of June, 1895. He is also corroborated by his son, William J. Lein, who says he saw the pattern before they moved to Second avenue (a fixed date,—December, 1894), and the casting four or five months after moving, when he assisted to construct a metallic bed with the identical casting in it. The evidence abundantly proves the existence of the device embodied in the earlier pattern and casting in the year 1895. As to the device embodied in the later pattern and later casting, however, the evidence is unpersuasive. Complainant's narrative is that after he had made a bed that suited, using the earlier form of casting in malleable iron, which was late in the fall of 1895, he went to work to make another set of patterns. "These patterns," he says, "with the sketches, took some time, and, with the business then increasing, it was some time before we got the castings ready to put together. We were, however, so well satisfied with what we had done that I determined to apply for a patent, and did so in July, 1897, to the best of my recollection. The pattern I produce is one that was made at that time." In this narrative of events it will be observed that the witness gives no date for the production of the later pattern, and his statement seems rather to indicate that such production was nearer in time to the application for the patent than it was to the completion of the earlier model of spring bed. The man who made the castings is named, but neither himself nor his books produced to fix the date. At the close of a long direct and cross examination, complainant was asked on redirect the question, "When did you receive the later castings?" to which he replied, "The latter part of 1895 or in 1896,"—an answer which witness does not accentuate by reference to any transaction of known dates, and which does not entirely harmonize with his narrative of events as given on the direct. Complainant's partner, Irvine, was not called as a witness, but it is stipulated that, if called, he would testify as set forth in a page of the record: "In the latter part of 1895 Mr. Lein showed me the complainant's exhibit later pattern, and in the latter part of 1895 or early in 1896 he showed me complainant's exhibit later casting, and about this time I saw this casting put into a mattress frame which was assembled in the shop by Mr. Lein, and tested by him and some of the workmen." Here again the date is fixed by the unaided memory without reference to any other occurrence which the witness knows the date of. He does, however, fix it as of the time when the mattress frame was as-

sembled in the shop by complainant and some of the workmen. The testimony of these two witnesses is not very strong as to date when these later patterns and castings were produced. It lacks corroboration. Nevertheless, it might be accepted as sufficient to carry the date of invention back prior to November 3, 1896, if it were uncontradicted. Two other witnesses, however, called by the complainant, give testimony which indicates that the date was more recent. Beyers, the workman who has been already quoted as to the assembling of the bed made with the original castings, testified that he put together a mattress with the later castings "right after we moved from Second avenue to Twenty-Third street"; he "thinks it must have been" before they moved; that he first saw the later patterns and castings, but says that it was after removal that they were assembled; "must have been in July, I think, because I know it was our slack season." The removal to Twenty-Third street was in 1897. William J. Lein, the foreman of the shop, testified that he saw the later pattern "first just before we moved to Twenty-Third street, and assisted in constructing one immediately after we moved there." Asked when he first saw the later casting, he replied, "To the best of my belief, it was about two years ago [he testified September 12, 1899], or when we first moved into Twenty-Third street, where I assisted in constructing a spring of these castings," and added that they moved into Twenty-Third street in May, 1897.

Upon this state of the testimony, all produced from complainant's own shop, we are not satisfied that he has shown by a fair preponderance of proof that his invention antedates the issue of the Taber design patent, which concededly discloses the limited improvement sought to be covered by the first claim of the patent in suit. The decree of the circuit court is reversed, with costs.

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PARRAMORE v. TAYLOR.

(Circuit Court, D. Connecticut. January 16, 1901.)

No. 1,014.

PATENT—HOSE SUPPORTER—INFRINGEMENT.

The Parramore patent, No. 629,391, to provide an improved construction designed to enable a skirt to be clasped around the corset by means of hangers without affecting the hose supporter, must be limited to the means illustrated in the specifications, or its equivalent, and thus limited is not infringed.

James A. Hudson, for complainant.
F. W. Smith, Jr., for defendant.

TOWNSEND, District Judge. Final hearing on bill and answer raising questions of validity and infringement of the first and second claims of complainant's patent, No. 629,391, granted July 25, 1899, to Reddin W. Parramore, for a hose supporter. One of the objects of the invention, as stated by the patentee, "is to provide an improved construction especially designed to be connected with a stud or clasp of the corset, thus dispensing with the use of safety pins and other

attaching devices, which have been found injurious to the corset, and enabling a tight-fitting skirt to be clasped around the corset without hindrance from the hose supporter." This object is accomplished by means of a hanger "consisting of a fabric body and a metallic hanger piece," which "is formed with an elongated loop or eye, 8, which extends from the center of the upper convex edge thereof." He adds:

"To use my improved hose supporter, the eye or loop, 8, of the hanger is fitted to the stud, 20, after which the corset clasp is closed over the eye or loop and connected to the stud, thereby attaching the hanger, 5, to the corset in a manner to prevent the hanger from being disengaged accidentally from the corset."

This type of stocking supporter is old, and has been produced in a great variety of forms. Defendant had made such supporters prior to complainant's alleged invention, which only differed therefrom in putting two hooks on the hanger, to be attached to eyes, to be provided near the middle of the corset, just as the eyelets in complainant's hanger, which "enabled the hanger to be connected to studs especially provided on a corset of large size." Defendant had also made such supporters identical with those of complainant, except that they were attached to the corset by a belt instead of a hook. The patentee was the first to design a complete, detachable device which sustained both stockings from a single existing point of support on the corset. Whether it involved invention to thus dispense with corset attachments; to provide a construction which involved the same operation as any one may perform when he loses a button from a garment, namely, to hitch it on to some existing substitute; whether this was anything more than an improvement in degree or finish,—are close and interesting questions, which may perhaps be answered in the affirmative.

The first claim is as follows:

"(1) A stocking supporter consisting of the duplicate suspension tapes or elastics, and a single hanger to which the upper ends of the tapes or elastics are connected, said hanger being provided with an eye or loop adapted to be detachably engaged with the stud of a corset clasp, substantially as described."

Defendant uses a patented "Combined corset steel lock and garment supporting hook," in the shape of an anchor, having no "eye or loop adapted to be detachably engaged with the stud of a corset clasp," and therefore he does not infringe the first claim.

The second claim is as follows:

"(2) A stocking supporter consisting of the duplicate stocking-engaged members, and means for permanently uniting the two members at their upper ends, said means being in the form of a hanger piece which is adapted to be engaged with the corset at the point where the sections of the corset meet, substantially as described."

Does defendant infringe said second claim? Counsel for complainant contends that the patent "should be construed to cover any form of attaching device adapted to engage with any part of the clasping device." But such a broad construction would be manifestly invalid. All complainant can claim is the means illustrated in the drawings and described in the specification, or its equivalent. Defendant's

anchor is not the equivalent of complainant's means substantially as described, because: (1) It is not a "loop or eye." (2) It is not "fitted to the stud, after which the corset clasp is closed over the eye or loop." It is only capable of use on the clasp after its engagement with the stud. (3) It does not "prevent the hanger from being disengaged accidentally from the corset." Its distinct function is to lock stud and clasp together after engagement, but it is not itself locked or held in place save by the strain of the supporter.

These conclusions dispense with the necessity of discussing the other defenses. Let the bill be dismissed.

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## JENNINGS et al. v. ROGERS SILVER-PLATE CO.

(Circuit Court, D. Connecticut. January 11, 1901.)

PATENTS—DAMAGES FOR INFRINGEMENT—LOSS OF PROFITS.

On an accounting in a suit for infringement, where it is shown that defendant placed the infringing article on the market at a much lower price than the patented article was sold by complainants, it cannot be assumed as a basis for computing complainants' loss of profits that they would, but for the infringement, have sold the same number of the articles as were sold by defendant at the higher price.

In Equity. Suit for infringement of patent.

On exceptions to master's report, see 96 Fed. 340.

J. C. Chamberlain, for complainants.

J. G. Calhoun, for defendant.

TOWNSEND, District Judge. Respondent has filed exceptions to master's report on accounting by infringer. The first exception is directed to an apparent mistake in computation on the face of the report, which it is claimed affects the whole report. The second and third exceptions allege a failure to allow the amount actually expended for factory and selling expenses. On this point the master, inter alia, says:

"The defendant's claim of manufacturing expenses in this statement is altogether too extravagant to be believed, being from 25 to 41 per cent., and the complainants' claim of 20 per cent. to be allowed for shop expenses erred in the other way, but not so outrageously. In the very many accountings which I have conducted I have never allowed more than 25 per cent., and it has seldom been claimed."

He allowed the 25 per cent. It is not entirely clear whether the master found that the 25 per cent. covered selling as well as manufacturing expenses. If not, such selling expenses should also be allowed.

As to the fourth and fifth exceptions, the new design is not within the issues referred to the master.

The sixth and seventh exceptions are as follows:

"(6) Because the master errs in finding that the only proper and adequate remuneration to the complainants 'is the profits complainants would have made on the sale of these same mirrors, which they would have made and sold if defendants had not wantonly destroyed the business they had already built up.'

"(7) Because the master errs in finding that the complainants would have made the sum of $1,174.44 profits on the sale of frames but for the infringement of the complainants' patent by the defendant."

The report of the master herein states the various theories on which the evidence was presented, and makes alternative findings thereon. The defendant placed the infringing frames on the market at such a low price as to drive complainants' frame out of the market, and to leave itself a very small margin of profit. In these circumstances it is not clear that the complainants would have sold their higher-priced frames to the persons who bought the cheaper ones from defendant. In fact, one of the complainants stated at the hearing before the master that he did not think they sold to the same customers as those to whom the defendant sold these goods. Therefore the court would not be justified in assuming that the complainants would have sold the same amount of goods to defendant's customers. It does not appear what complainants' sales were prior to the infringement.

The report is referred back to the master to enable him to correct any errors of computation or transcription which he may find therein, and with leave to complainants to introduce further evidence as to damages, if they desire so to do.

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## HENSEL-COLLADAY CO. v. ROSENAU et al.

(Circuit Court, E. D. Pennsylvania. January 29, 1901.)

PATENTS—SKIRT PROTECTORS.

The Poyet patent, No. 621,124, for an improvement in skirt protectors, is not invalid for indefiniteness, in failing to specify how much one of the two heads of the skirt protector should be wider than the other, or how much the number of weft threads in one head should be greater than the number in the other.

Wm. C. Strawbridge, for complainant.
M. A. Kursheedt, for respondents.

J. B. McPHERSON, District Judge. The complainant is the owner of letters patent No. 621,124, issued upon the application of John Baptiste Poyet for an improvement in skirt protectors. The claims of the patent are as follows:

"(1) A skirt protector consisting of a fabric composed of a double head and a brush, one head having a greater number of weft threads than the other, whereby the protector is curved in the direction of its length.

"(2) A skirt protector consisting of a double head, and a brush, one head having a greater number of weft threads than the other, and the two heads being of different widths.

"(3) A fabric for a skirt protector formed of two sets of heads, each set being composed of warp and weft threads, the weft threads being floated from one set of heads to the other, one member of each set of heads having a greater number of weft threads than the other member of said set.

"(4) A fabric for a skirt protector formed of two sets of heads, each set being composed of warp and weft threads, the weft threads being floated from one set of heads to the other, one member of each set of heads having a greater number of weft threads than the other member of said set, and the members of each set of heads being of different widths."

In May, 1898, the complainant began to manufacture and sell skirt protector fabrics embodying Poyet's invention, no curved skirt protector binding having been made or sold before that time. The fabric was put upon the market through Stewart, Howe & May, of New York, and has been largely advertised by a picture of the skirt protector, with the letters "S., H. & M." The invention has been useful and successful, the sales during the first year amounting to $11,000, during the second year to $60,000, and during the third year, up to the month of June, 1900, to $26,000, making a total of $97,000 during this period. The defendants, except Charles and Philip Rosenau, who are not members of the firm of S. Rosenau & Co., and against whom there is no evidence, manufactured and sold a fabric, substantially identical with the complainant's fabric, between the date of the patent and the date of filing the bill. The infringing article embodies the construction specified in each claim of the patent.

No serious effort was made to prove that the patent in suit had been anticipated, and this defense need not be further considered; nor, in reply to the defense of want of invention, is it necessary to say more than to express my disagreement with the defendants upon this point. No doubt the line between invention and the mere application of mechanical skill is sometimes difficult to draw, and there will often be difference of opinion upon the same facts. To my mind, the complainant's patent embodies the result of inventive thought. Another mind may, perhaps, come to a different conclusion.

The principal defense is that the patent is invalid "because it does not state in the specification or either of the claims how much one of the two heads of the skirt protector should be wider than the other, or how much the number of weft threads in one head should be greater than the number in the other." Or, in other words, to quote from Howard v. Stove Works, 150 U. S. 165, 14 Sup. Ct. 68, 37 L. Ed. 1039, because "the description of the invention is vague and indefinite, and is not sufficient to enable those skilled in the art to construct it without experiment so as to attain the desired result." It does not seem to me that this defense calls for much discussion. It is sufficiently answered, I think, by a reference to the specifications and drawings of the patent, and by a statement of the facts that not only is there no testimony to support the charge of insufficient description, but that the defendants did not find the slightest difficulty in making the patented fabric. The patent was granted on March 14, 1899, and almost immediately the defendants began to manufacture; for the bill was filed on May 26th, only two months afterwards, and the defendants' sales were made between these dates.

A decree may be prepared, awarding an injunction, and directing the defendants to account.

## SHERBORNE et al. v. WILCOX & GIBBS SEWING-MACH. CO.

(Circuit Court, E. D. Pennsylvania. January 2, 1901.)

No. 18.

PATENTS—LICENSE AGREEMENT—CONSTRUCTION—ROYALTIES.

A license agreement granting exclusive rights to defendants under two letters patent for the same invention, the younger of which did not expire until May 11, 1903, provided that the rights and obligations of the parties thereunder should continue until August 29, 1899, the date of the expiration of the elder patent, or so long thereafter as the licensee should continue to hold for the joint benefit of the parties any exclusive license rights under a prior license agreement, which contained a clause providing that such agreement should terminate with the life of the elder patent, "or, should any other patent or patents be obtained on pending applications relating to or covering a similar subject-matter as said patent, * * * then with the life of such subsequent patent or patents, having the longer duration, which, when issued, shall be considered to be covered by this agreement." *Held*, that defendants' obligation to pay royalties as required by their license terminated with the life of the younger, and not the elder, patent.

John G. Johnson and Frank P. Prichard, for plaintiffs.

P. K. Erdman, Geo. Tucker Bispham, and Howson & Howson, for defendant.

DALLAS, Circuit Judge. On the trial of this case the court reserved this point: "Whether the rights and obligations of the plaintiffs and defendant, under the agreement between them dated January 8, 1884, continued to the expiration of letters patent of the United States 341,790, or whether the said rights and obligations continued only until August 29, 1899;" and the jury was instructed to find for the plaintiffs, and to assess damages at $15,638.23 upon the hypothesis that those rights and obligations continue to the expiration of patent No. 341,790, and at $1,836.86 upon the hypothesis that they continued only until August 29, 1899. Accordingly, alternative verdicts were rendered, and the plaintiffs now move for judgment for the larger sum, viz. $15,638.23, and the defendant that judgment be entered for the smaller sum only, viz. $1,836.86.

The plaintiffs were the owners of certain patents for "trimmers," used as attachments to sewing machines, and the defendant was their exclusive licensee, under an agreement dated April 11, 1881, which provided, among other things, for the payment of a royalty in fixed sums for each trimming device sold, and 50 per centum of all moneys received as rent upon the leasing of said devices or of sewing machines containing them; "said license and privilege to continue to the full end of the term of letters patent No. 224,219," which, being the youngest of those to which that agreement related, expired on February 3, 1899. The contract of January 8, 1884, recited the agreement of April 11, 1881, as one "whereby the said parties of the first part did grant to the said parties of the second part * * * an exclusive license * * * of making or having made for application to and lease or sale with, and of applying to and of vending or leasing with, any sewing machines, other than those which sew zig-

zag seams, trimming devices having and containing the improvements, or any of them, set forth in certain letters patent of the United States in said agreement cited, or in any other letters patent of the United States which the said parties of the first part might then or thereafter own or control for any improvements upon the said patented inventions, or any of them. * * *" The said contract of January 8, 1884, also contained the following recital and provisions:

"And whereas, for the purpose of extending the business carried on under said license agreement of April 11, 1881, and for the mutual benefit of the parties to said agreement, the said parties of the second part have (by and with the consent of said parties of the first part) acquired by license agreement, dated eighth day of January, 1884, an exclusive license for, to, and within the United States under letters patent number 263,467, dated August 29, 1882, granted to John Bigelow for trimming device for overedge sewing machine, and under any and all other patents owned or which may be granted to or acquired by the said John Bigelow relating to simultaneous trimming and overseaming, and are now engaged in perfecting, and preparing to build, and place upon the market, combined sewing and trimming machines especially adapted for trimming the edges of fabrics, and uniting said trimmed edges by an overedge or overseam stitch (hereinafter referred to as trimming and overseaming machines), and have agreed to pay to the said John Bigelow or his assigns a royalty or license fee equivalent to twenty per cent. of all moneys received by them, the said parties of the second part, as rental or royalty for the use of said machines if leased, or a royalty or license fee of fifteen dollars upon each and every such machine sold: Now, therefore, by and between the parties hereto it is covenanted and agreed as follows: (1) The royalty to be paid by the said parties of the second part to the said parties of the first part upon 'trimming and overseaming machines' made by or for and leased by said parties of the second part shall be an amount equal to thirty per cent. of all moneys received by said parties of the second part as rent for the use of said machines, in lieu of an amount equal to fifty per cent. of such moneys, as provided by clause 5 of said agreement of April 11, 1881. This reduction of royalty is agreed to by said parties of the first part for the purpose of reimbursing to the said parties of the second part the royalties to be paid by them to the said John Bigelow or his assigns, as hereinabove set forth, is to apply to trimming and overseaming machines only, and is to continue so far and so long only as shall be necessary to reimburse to the said parties of the second part royalties actually paid by them to the said John Bigelow or his assigns upon such machines. * * * (4) The terms of said agreement of April 11, 1881, save so far as herein and hereby expressly changed or modified, shall apply to trimming and overseaming machines, and shall ascertain and determine the respective rights and obligations of the parties hereto in regard to the business of making and selling or leasing such machines, save that said business and said rights and obligations shall not expire with letters patent 224,219, nor shall article 14 of said agreement of April 11, 1881, be operative under these presents; but the rights and obligations of the parties thereto under the terms hereof, and of so much of the agreement of April 11, 1881, as is hereby adopted and made part hereof, shall continue until the 29th day of August, 1899, or so long thereafter as the said parties of the second part shall continue to hold (for the joint benefit of the parties hereto) any exclusive license rights under and by virtue of the hereinabove mentioned license agreement with John Bigelow, or any renewal thereof or substitute therefor."

The license agreement between John Bigelow and the defendant which is referred to in the last-mentioned contract also bears date as of January 8, 1884. It includes the following clauses:

"(1) The said licensor grants an exclusive license to the said licensees, and empowers them to sublicense others to make and use the principles shown, embodied, described, or covered in or by said letters patent No. 263,467, dated

August 29, 1882, or any patent or patents which may issue upon the original application, filed June 5, 1879; also a license, not exclusive, under letters patent No. 167,492, dated September 7, 1875. Subject to the conditions hereinafter named, and to the full end of the term for which said letters patent are or may be granted. * * * (9) This agreement, except as hereinbefore provided, shall terminate with the life of the letters patent No. 263,467; or, should any other patent or patents be obtained on a pending application now in the United States patent office, filed June 5, 1879, relating to or covering a similar subject-matter as said patent, viz. trimming in advance of overedge sewing, which application was made by the said licensor, then with the life of such subsequent patent or patents having the longer duration, which, when issued, shall be considered to be covered by this agreement, and a part thereof, the same as if specially mentioned."

When the Bigelow license agreement from which the above clauses have been extracted was made, the application therein referred to in clause 1 as "the original application" and in clause 9 as "a pending application" had been filed, but it had been divided into two divisions, A and B. Upon division A, patent No. 263,467, dated August 29, 1882, had been issued; and nearly four years thereafter a certain other patent, numbered 341,790, dated May 11, 1886, was issued upon division B. Consequently the elder of the two patents expired on August 29, 1899, but the younger will not expire until May 11, 1903; and the controversy is as to whether the contract between these parties of January 8, 1884, terminated with the life of patent No. 263,467, or continues to be operative because patent No. 341,790 is still a living one. The provision of that contract, respecting its continuance, is:

"The rights and obligations of the parties thereto under the terms hereof * * * shall continue until the 29th day of August, 1899, or so long thereafter as the said parties of the second part shall continue to hold (for the joint benefit of the parties hereto) any exclusive license rights under and by virtue of the hereinabove mentioned license agreement with John Bigelow, or any renewal thereof or substitute therefor."

There is here no patent ambiguity. The meaning of this language is plain, and nothing is requisite but to rightly apply it to the Bigelow agreement. That agreement did unquestionably grant an exclusive license under any patent which might issue upon the application of June 5, 1879, and therefore was inclusive of patent No. 341,790; but it is contended that, although the license extended to both patents, its duration was, by reason of the subject-matter of the later one, limited to the life of the earlier one. This contention is not accordant with what would naturally be supposed to have been intended if nothing had been said in the agreement respecting the period of its continuance; and it seems to me that the parties to it must have meant, when providing for its termination "with the life of such subsequent patent or patents," to refer to any and all subsequent patents covered by its granting clause. But, even when separately considered, clause 9 cannot be given the construction which the defendant seeks to put upon it. If it had stated merely that the agreement was to terminate with the life of any patent that might be obtained on the pending application, the defendant's position would manifestly be baseless, and its only possible support, therefore, must be found in this language: "Relating to or covering a similar subject-matter

as said patent, viz. trimming in advance of overedge sewing." On behalf of the plaintiffs it has been argued that these words naturally and grammatically apply not to the words "any other patents," but to the nearer words "pending application"; and a grammarian would, no doubt, affirm this point. But courts, in endeavoring to ascertain the true meaning of the parties to a contract, are not often aided by rules of grammar, and I do not attach importance to any mere nicety of literary composition in this instance. But, on more substantial grounds, I think that the "pending application," not the patent which had already been issued upon it, was the document prominently in mind when provision was made for the termination of the agreement with the life of any other patent to be obtained on that application. I believe that what the parties actually purposed was that the agreement should be operative so long as any other patent or patents which might be obtained upon that application should live, and that the added words, "relating to or covering a similar subject-matter," were not intended to qualify those which immediately preceded them, but were used simply to express the understanding of the parties that the subject-matter of any other patent which could be issued upon the application upon which patent No. 263,467 had been obtained would necessarily be "similar" to that of that patent. But, be this as it may, it seems to me to be clear that patent No. 341,790 does "relate to a similar [it could not "cover" the same] subject-matter as said patent" No. 263,467. The parties to this license agreement knew, when they made it, that the last-mentioned patent had been issued upon division A; that it showed the trimming device, and did not include it because it had been made the subject of division B; and that this device, though capable of being used with straight-ahead machines, was especially valuable for use in connection with overseaming; and I cannot believe that, knowing all this, they still did not regard that specific trimming device—the subject-matter of the second patent—as being related and similar to the subject-matter of the first, which was for a combination, of which, in every claim, a "trimmer" is stated to be an essential element.

I do not deem it necessary to comment upon the agreement of September 1, 1889, between John Bigelow and others of the first part and the defendant of the second part. It is enough to say of it that the only inference which, in my opinion, can be drawn from it, is not favorable to the defendant; and, without it, the plaintiffs' case is fully made out. The defendant's motion that judgment be entered on the verdict for $1,836.86 only is denied The plaintiffs' motion for judgment on the verdict for $15,638.23 is granted.

## BRANSON et al. v. KUTZ et al.

(Circuit Court, E. D. Pennsylvania. January 15, 1901.)

No. 47.

PATENT KNITTING MACHINES—INFRINGEMENT.

The Branson patent, No. 333,102, relating to improvement in knitting machines, in view of the prior state of the art, and of the fact that the patented contrivance was of doubtful utility, and never went into practical use, *held* not infringed.

Joshua Pusey and George J. Harding, for complainants.
Fraley & Paul and F. P. Fish, for respondents.

DALLAS, Circuit Judge. This is a suit in equity upon Patent No. 333,102, dated December 29, 1885, to Edwin R. Branson, for improvements in knitting machines. The claims involved are:

"(1) The combination, with the needle cylinder, needles, cam cylinder, and needle operating cams of levers or lifters located below said cams, and levers or droppers located above said cams, said levers or lifters, and levers or droppers, being constructed to raise and lower the needles successively to render them acting and nonacting, substantially as described."

"(4) The combination, with the needle cylinder, needles, cam cylinder, and needle operating cams of a lever or depressor located above and at one side of the needle operating cams, for automatically depressing or lowering the needles successively, substantially as described.

"(5) The combination, with the needle cylinder, needles, cam cylinder, and needle operating cams of the levers or droppers located on each side of the needle operating cams, for automatically engaging the heel of the elevated needles in succession and depressing them, substantially as described.

"(6) The combination, with the needle cylinder, needles, cam cylinder, and needle operating cams of the levers or droppers, o, and a retaining spring or catch therefor, substantially as described."

Several defenses have been set up, but the conclusion I have reached upon the question of infringement renders the discussion of any other unnecessary.

Branson was not a pioneer. His advance, if he made any, was upon a path which had been already opened. The object he had in view had before been accomplished, not only by hand, but also by machinery. His "lifters" and "droppers" were, at the utmost, but improvements, and in them, and his arrangement of them, if in anything, resided all that was new in the combination he devised. The language quoted in the plaintiff's brief, from the opinion of Judge Colt in the case of Machine Co. v. Thom (C. C.) 25 Fed. 499, is not applicable to this one. Upon reading the whole of that opinion, it clearly appears that the improvement which was there in question was of great value, and had, indeed, effected a "substantial advance in the art" to which it related; whereas it is doubtful whether those now under consideration actually and practically advanced the art of machine knitting at all, and that they did not substantially do so my examination of the evidence has fully convinced me. Therefore, while I do not question the soundness of the ruling in Machine Co. v. Thom, that "no mere changes in the details of construction should relieve a party from the charge of infringement," I cannot regard it

as pertinent to the very dissimilar case which the record before me presents. Moreover, the differences in this instance are far from being mere changes in details. They consist, not of formal alterations of, or of additions to, the mechanism or arrangement of the patent, but of the substitution therefor of an essentially different organism, which has given to the art—what Branson did not give—a satisfactory commercial machine. To accord to the complainants the domination of that machine would be to give them a monopoly, not only of all that Branson could possibly be said to have invented, but also of all that might thereafter be added to the art in the same line of advance, and the broad construction of his patent which is now invoked would operate rather to the discouragement, than to the promotion, of inventive talent. United States Glass Co. v. Atlas Glass Co. (C. C.) 90 Fed. 724; Deering v. Harvester Works, 155 U. S. 286–295, 15 Sup. Ct. 118, 39 L. Ed. 153. In view of the prior state of the art, and of the fact that the patented contrivance was, at best, of doubtful utility and never went into practical use, it is simply impossible to believe that it covered, or that the patent disclosed, the highly successful construction of the defendants.

I am of opinion that the charge of infringement has not been sustained, and therefore the bill will be dismissed, with costs.

## LEPPER et al. v. RANDALL.

(Circuit Court, E. D. Pennsylvania. January 31, 1901.)

1. PATENTS—HAM-BOILING WRAPPERS.
   Letters patent No. 624,839, for an improvement in ham-boiling wrappers, because of the prior state of the art, is limited to the specific device whereby, the corners of the wrapper being folded back, a lacing cord is tightly engaged with the hooks, so as to envelop the ham completely, and form a sack.
2. SAME—INFRINGEMENT.
   Letters patent No. 624,839, for an improvement in ham-boiling wrappers, is not infringed by a wrapper identical with the patented article, except that the fastenings are straps and buckles instead of a lacing cord, engaged with hooks, studs, or eyelets.

E. Hayward Fairbanks, for complainants.
William Morris, for respondent.

J. B. McPHERSON, District Judge. The complainants are the owners of letters patent No. 624,839, issued May 9, 1899, for an "improvement in ham-boiling wrappers." The specifications describe the invention as follows:

"Our invention consists of a wrapper for boiling a ham therein, more particularly a boneless ham, the same being formed of a piece of canvas or other suitable fabric adapted to envelop a ham, and means for tightly compressing the wrapper thereon and preventing opening thereof, whereby the ham is guarded against disintegration, and its juices are retained within the wrapper; thus producing superior results in the flavor, compactness, and appearance of the ham."

The drawings show a wrapper upon which are fastened four rows of hooks, arranged at right angles, so as to form a quadrilateral

figure within the ends of the wrapper. The arrangement of the hooks is thus described:

"It will be noticed that the rows of hooks are in parallel series or pairs, and the members of one pair extend at right angles to those of the other pair, and the several rows extend at an angle to the sides of the mat between the corners of the latter and the center thereof, said corners thus being free to be folded back along the lines of the hooks towards the center of the mat, overlapping each other, and adapted to be drawn closely together over a ham, as will be hereinafter more fully explained."

The corners being folded back, a lacing cord is tightly engaged with the hooks, so as to envelop the ham completely and form a sack, the joints of which are thus "comparatively hermetically sealed"; this phrase meaning no more than that the wrapper is tightly fastened around the ham. Instead of hooks, either studs or eyelets are also named by the patentees as an alternative device for engaging the cord. The claims of the patent are as follows:

"(1) A wrapper of the character named, consisting of a piece of fabric and devices within the ends thereof for engagement of a closing and tightening lacing cord, said devices being arranged in series at an angle to each other and each at an angle to the sides of the mat.

"(2) A wrapper of the character named, consisting of a mat of fabric, and means on the back thereof within the ends thereof for engagement of a lacing cord, the portions of the mat outside of said means being free to form laps; said means being in series at an angle to each other, and each at an angle to the sides of the mat.

"(3) A wrapper of the character named, formed of a mat and lacing devices on the back thereof between the corners and center thereof in series, at an angle to each other and to the sides of the mat.

"(4) A wrapper of the character named, formed of a mat, lacing devices on the back thereof between the free corners of the mat and the center thereof, and a cord with a loop adapted to be passed from one lacing device to the other over the folded-in corner."

This invention met with a good deal of success, between 10,000 and 15,000 wrappers being sold during one year. Not long after its introduction to the public, the defendant began to make and sell a wrapper which is in all respects identical with the patented article, except that the fastenings are straps and buckles, instead of a lacing cord engaged with hooks, studs, or eyelets. This bill was thereupon filed, and the only question for decision is this: In view of the prior art, is the patent to be restricted to the exact device shown and claimed, or is it so far a pioneer invention as to be entitled to invoke the doctrine of equivalents? I have no doubt that the defendant's straps and buckles are an equivalent of the complainants' cords and hooks, and I should enter a decree in the complainants' favor upon the third claim, if I did not feel constrained by the history of the patent to construe it narrowly, and restrict it to the exact device set forth.

When the application was first made, the claims were as follows:

"(1) A wrapper of the character named, consisting of a piece of fabric and devices within the ends thereof for engagement of a closing and tightening lacing cord.

"(2) A wrapper of the character named, consisting of a mat of fabric and means on the back thereof within the ends thereof for engagement of a lacing cord, the portions of the mat outside of said means being free to form laps."

The application was rejected, the examiner saying:

"Claim 1 is anticipated by Wohltman, 465,742, December 22, 1891, and is rejected thereon.

"Claim 2 covers the mat of fabric, with means on the back for tightening the wrapper about an inclosed ham, the portions outside of this means being free to form laps, shown in patent to Wohltman above cited, and the devices for the engagement of a closing and tightening lacing cord, shown in Maisel, 440,815, November 18, 1890. Claim 2 is accordingly rejected on references cited.

"Attention is invited to the following patents as of interest before amending:

"Galster, 269,588, December 26, 1882; Metzger, 367,425, August 2, 1887; and Detwiler, 225,467, March 16, 1880.

"All references in 'Preserving, Exclusion of Air.'

"The claims should be narrowly drawn to his specific device."

Thereupon the application was amended by inserting the second paragraph hereinbefore quoted, describing the arrangement of the hooks, and by substituting the claims that now appear. The patent was then issued; but, under these circumstances, I do not think it has any claim to be a pioneer invention. On the contrary, it seems to me that the authorities require me to decide that the claims must be narrowly construed, and the patent restricted to its specific device. As was said by the supreme court in Roemer v. Peddie, 132 U. S. 317, 10 Sup. Ct. 99, 33 L. Ed. 383: "This court has often held that when a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it." Or, to use the language of Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 429, 14 Sup. Ct. 629, 38 L. Ed. 502: "But the patentee having once presented his claim in that form, and the patent office having rejected it, and he having acquiesced in such rejection, he is, under the repeated decisions of this court, now estopped to claim the benefit of his rejected claim, or such a construction of his present claim as would be equivalent thereto." I think, therefore, that the complainants' patent must be so restricted that the fabric made by the defendant does not infringe. A strap and buckle is not a lacing cord, in any sense of the word, although, as I have said, it is no doubt an equivalent. It is intended to perform the same function in substantially the same way, but the defendant may use the device, because the complainants are not entitled to the benefit of the doctrine of equivalents.

The bill must be dismissed, with costs.

## CONSOLIDATED STORE-SERVICE CO. v. SEYBOLD et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 704.

PATENTS—INFRINGEMENT—CASH CARRIERS.

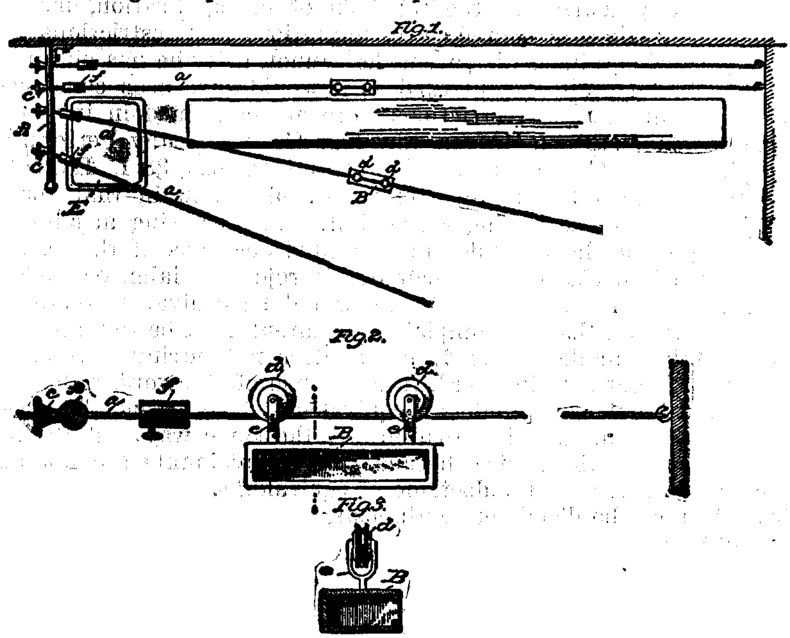
The Osgood patent, No. 357,851, for an improvement in store service apparatus, which describes in claim 1 a cash carrier consisting of a box having rigidly attached hangers by means of which it is suspended from grooved pulleys traveling one behind the other on a tautly-stretched horizontal wire, the purpose of such construction being to prevent oscillation of the car in the direction of the way so as to enable it to be impelled from one end of the way to the other by a single push or impulse, is limited to the precise means shown for preventing such oscillation, and is not infringed by a carrier which employs a different mechanism to accomplish the same purpose.

Appeal from the Circuit Court of the United States for the District of Indiana.

See 100 Fed. 299.

In the suit below the appellant alleged infringement of Letters Patent No. 357,851, granted to Edwin P. Osgood February 15, 1887, for a new and useful improvement in store service apparatus. The application for the above Letters Patent was filed June 7, 1883.

The drawing and specifications of the patent in suit are as follows:




"My invention is an improved cash-car apparatus or system for sales rooms and the like. Heretofore and prior to my invention a cash-carrier has been devised consisting of an elevated wireway with a car mounted on wheels adapted to run upon the way, and provided with an endless cord attached to the car and running over driving-wheels at each end of the way, with means for working the wheels and cord, and thus drawing the car back and forth.

Such a cash-carrier is shown in the United States patent to Brown, No. 165,-473, granted in 1875.

"Also prior to my invention I am aware that loads have been supported on hooks carried on trucks which ran on an elevated way, and were moved by pushing. In such cases, so far as I am aware, the load or the receptacle containing the load was, when moving on the way, attached loosely to the wheel or wheels, so that a push or single impulse would cause the load to swing or oscillate in line with its movement, and this swinging or oscillation, though not greatly objectionable with heavy loads, or when the load was pushed all the way by a continuous or prolonged pushing, is not practicable where a light load is required to be sent by a single impulse from one end of a line of considerable length to the other.

"I have found by practical use that a freely-moving car adapted to be thrown by the single impulse of a push from one end of a store to the other, or from the salesman's stand to the cashier's desk, usually a hundred feet and more, is practical, rapid, does not disfigure the store, and does not get out of repair in use. There are no pulleys to provide, put up, or keep in repair, or to disfigure the store; no cord to stretch or break or rattle of machinery; but to adapt the free movement of a car or carrier to this special service, where the car (which with its load is light) must go the entire length of the way on the momentum of its original single impulse or push, and where the sender cannot in practice follow it, all rocking or oscillating movement in the line of the impulse must be eliminated. To effect this I have provided for the car two wheels in line with each other and mounted in a suitable frame. This prevents any rocking of the frame longitudinally on the wire or in line with the impulse, and any slight lateral oscillation is not injurious. Further, the car (or that part on which the hand is placed in impelling the car), when impelled, must be rigid with the wheel-frame on which it is supported in the direction of the length of the car or line of movement. If it be attached by a hook, even if there be a two-wheel frame on the car, the load, when started by an impulse of the hand in line with the wire or track, will oscillate in that line, and interferes with the progress of the frame as seriously as if the frame oscillated on one heel. I therefore attach the car to the frame so that when impelled it will be rigid in the direction of its movement, and when pushed with its load will move as one solid body. As the car is required to go back and forth between the salesman and cashier it is manifest that the wire must be practicably horizontal.

"When placed in a store, a cash-car apparatus constructed according to the conditions hereinbefore explained, and substantially as hereinafter explained, may be put up by simply stretching the wire from one end of the store to the other as taut as practicable and without intermediate supports. When so stretched it is scarcely observable, and nothing more is required than to place the car thereon, the car being previously fitted for the purpose, and the store is not obstructed by workmen. The wire fitted to sustain the necessary tension will support the car indefinitely without appreciable wear or liability to disarrangement.

"Manifestly the wire and its car may be duplicated or multiplied according to the requirements of the store.

"Having thus given a general statement of the conditions and limitations of my invention, I proceed to describe it in detail and with reference to the accompanying drawings, in which—

"Figure 1 shows a plan view of the wires stretched from convenient points in the store and converging to the practical common point at the cashier's desk. Fig. 2 is a side elevation of the car. Fig. 3 shows a section of the car on line, x x, of Fig. 2.

"In the drawings, a represents the horizontal wires connected to a fixed support at each end. They are shown as converging from these fixed supports in different parts of the store to the cashier's desk (indicated at E), where they are attached to a common bar, A. The bar and other supports must be of sufficient strength to allow the wires to be put under tension, so that they may be held practically horizontal throughout, and so that a car impelled by a push applied by the hand of the operator may pass, by its own momentum, from one end to the other, in either direction. As shown, the ends of the wires are threaded and are strained by means of nuts, c. The wires shown

are all alike, and each has its appropriate car, so that a detailed description of one answers for all.

"The car shown consists of a box, B, which may be of any suitable shape or size under the limitations herein explained. It is suspended beneath the wire on wheels, d d, running on the wire one behind the other, by means of hangers, e e, which form a frame for the wheels. The two wheels, one behind the other, prevent any longitudinal oscillation on the axle, to which one wheel would render it liable, and the box or car, being fixed to the hangers, cannot be made to oscillate longitudinally thereon, and moves, with its load, as one rigid body. It is therefore adapted to be impelled from one end of the way to the other in either direction simply by an original impulse given at the start and the untrammeled momentum thereby acquired, and a single impulse being once given the car moves certainly to its destination without further attention from the operator.

"A buffer of india-rubber or some equivalent elastic material is placed axially upon the wire at or near the end, in order to arrest it without too severe a shock. I prefer to make this stop adjustable by means of a set screw or other suitable means, whereby it may be set in any desired position.

"The wires may be stretched out in an obvious manner, and throughout the store are free from intermediate supports."

The specifications and claims of appellant's original application for Letters Patent, June 7, 1883, were extremely broad, the claims being as follows:

"1. In a cash carrier system for sale rooms, wires stretched horizontally from suitable point or points in the store center or at any point forming suspended ways upon which cars are mounted by means of wheels.

"2. In a cash carrier system, a number of wires extending horizontally, from suitable supports to a supporting device at or near the cashier's desk, substantially as set forth.

"3. The cash carrier system consisting of the horizontal way for each car or carrier mounted upon the ways."

Subsequently, January 30, 1885, these claims were amended to read as follows:

"1. An elevated wire way extending from a point over the salesman's counter to the cashier's desk in combination with a freely moving car mounted upon wheels on the wire way and adapted to be impelled from one end to the other in either direction by an impulse which may be imparted to it by the hand of the cashier or salesman.

"2. A series of elevated wire ways extending from the various salesmen's counters and converging to the cashier's desk, combined with a freely moving car mounted upon wheels upon each of said ways, the said cars being adapted to be impelled from one end to the other of the ways in either direction by impulses of the hand imparted by the cashier or salesmen.

"3. An elevated wire way extending from a point over the salesman's counter to the cashier's desk, a freely moving car mounted upon wheels thereon and adapted to be impelled from one end to the other in either direction by an impulse of the hand imparted by the cashier or salesman, combined with buffers secured to the way at each end thereof, substantially as described."

Owing to interference proceedings, the claims, as amended January 30, 1885, were further amended and restricted, April 28, 1885, as follows:

"In the first claim insert after 'by' and before 'the cashier'—'of the hand of.'

"In the 2" claim after 'impulses'—'of the hand.'

"Amend the 3" claim by inserting 'of the hand' after 'impulses.'"

Letters Patent No. 312,752 issued to appellant, February 25, 1885, were canceled and withdrawn, January 4, 1887, when appellant submitted an amended specification, the claims reading as follows:

"1. In a cash car apparatus, a wire stretched horizontally between fixed supports at each end, and in the described relation to the cashier's desk, in combination with a freely moving car, having wheels fitted to run on a wire, one behind the other, said car being connected to a frame in which the wheels are journaled, and held rigidly against oscillation longitudinally of the way, when the car is moved, the whole moving structure being adapted to be impelled as a solid body from one end of the way to the other, in either direction, by the momentum imparted by a single impulse or push; substantially as described.

"2. In a cash car apparatus, a wire stretched horizontally between fixed supports at each end, and having an adjustable stop placed axially on said wire, in combination with a freely moving car, having wheels, one behind the other, said car being connected to a frame, the whole moving structure being adapted to be impelled from one end of the way to the other, by the momentum imparted by a single impulse or push; substantially as described."

January 11, 1887, in accordance with the Examiner's suggestions, further amendments and restrictions were made by appellant in the application of January 4, 1887, as follows:

"On page 4, lines 6 and 7, erase 'which with the box.'

"Claim 1, line 3, erase 'having wheels' through 'when the car is moved,' line 6, and insert:—'consisting of a receptacle below the wire connected with wheels fitted to run one behind the other on the wire, whereby the car is held rigidly against oscillation longitudinally of the way.'

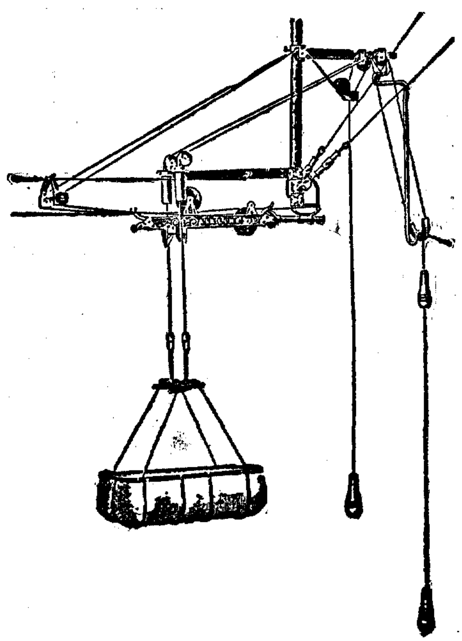
"Claim 2, line 3, erase 'having' and all of line 4 and insert:—'consisting of a receptacle below the wire connected with wheels fitted to run one behind the other on the wire, the.' "

January 13, 1887, the Examiner demanded a still further amendment, which was conceded by appellant, the following day. Letters Patent No. 357,851—those in suit—were then granted, February 15, 1887, in accordance with the last above amendment and restriction.

The first claim of the above patent is the only one alleged to be infringed, and is as follows:

1. "In a cash-car apparatus, a wire stretched horizontally between fixed supports at each end and in the described relation to the cashier's desk, in combination with a freely moving car held below the wire on wheel-hangers, to which it is rigidly connected, the wheels thereof being fitted to run one behind the other on the wire, whereby the car is held rigidly against oscillation longitudinally of the way, the whole moving structure being thus adapted to be impelled as a solid body from one end of the way to the other in either direction by the momentum imparted by a single impulse or push, substantially as described."

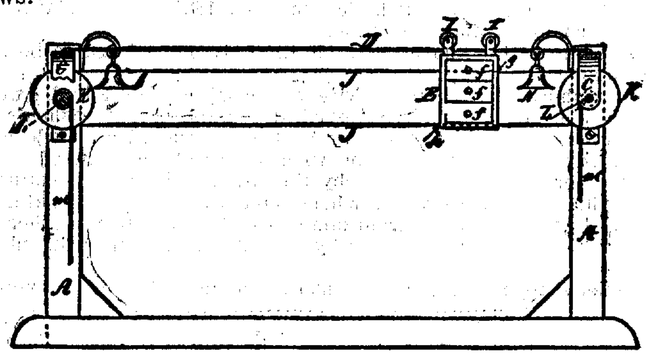
The appellee's apparatus is clearly shown in the following drawing:



The above apparatus consists of a track, or horizontally stretched wire, running from the cashier's desk to the sales counter, on which track a car is suspended upon a single wheel, near the middle of the car, and above the wire. The car-body is attached to a long frame suspended beneath, and parallel to the wire. This attachment is at a point some distance from the bearing of the wheel upon the wire, and at the opposite end is placed another wheel, which is journaled in the frame below the wire. The car-body, being attached to the short end of the frame, has a constant tendency, when weighted with merchandise, to overbalance the long end of the lever, and thus causes the wheel at the long end of the frame, and under the wire, to press against the wire, at its under side, which, in turn, is made to assume a slightly inclined position.

The appellees urged upon the court below many illustrations of the prior art, introducing nineteen patents in evidence. The court below, after stating succinctly and correctly the state of the art prior to the Osgood device, adopted the Brown patent, No. 165,473, as the one most nearly related to the claim of the patent in suit.

The specifications and drawing of the Brown patent, above referred to, are as follows:



"My invention consists in constructing and placing two standards, one at each place, between which transmission of goods, &c., is desired. At or near the top, and on one side of these standards, guards are placed, from the top of which a wire rail is suspended from one standard to the other. On this wire rail, D, I suspend a carriage which, by aid of wheels, allows it to be moved back and forth over the same. This movement is effected by an endless rope, which passes over grooved pulleys, placed within the fore-mentioned guards and passing through an aperture in the top of the carriage, and also placed in a groove in the bottom of the same, thus steadying the movements of the carriage.

"These pulleys are rotated by aid of ropes or cords passing over and around their axles. Thus when the carriage is moved in one direction one of the said ropes is wound up around one of the axles, the other being pulled down, and vice versa when the carriage is moved in the opposite direction. The carriage is provided with drawers or suitable compartments for the reception of the articles to be transmitted. To the top of the standards bells or similar annunciators are placed, which indicate the arrival of the carriage.

"In order to describe my invention more fully, I refer to the accompanying drawing, forming a part of this specification and representing a side view of my improved apparatus for transmission of goods, &c. A A, are the standards; C C, the guards, fastened to one of the upper sides of the standards. D is the wire fastened to the top of the guards, C C. E is the carriage, with drawers, f f, aperture, g, at the top, and groove, h, at the bottom. I I, are the wheels secured to the top of the carriage and supporting the same upon the wire rail, D. J is the endless rope, passing around the grooved pulleys, K K, which are supported on the axles, L L, around which the ropes, m m, are wound. N N, are the bells or enunciators, placed on the top of the stand-

ards, A A. Where a limited place does not admit of employing the ropes, m m, for rotating the pulleys, a crank may be employed and placed on the ends of the pulley-axles in order to accomplish the same result."

Although not convinced that the prior art contained an anticipation to Osgood's device, the court below was of the opinion that the Osgood patent made such a small advance over the prior art, that it ought to receive a strict and narrow construction—an interpretation no broader than its terms convey—and dismissed the bill for want of equity.

F. P. Fish, for appellant.

David H. Fletcher, for appellees.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

After stating the facts in the case as above, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

The object of the invention described in the patent in suit is to substitute for cash boys and girls formerly employed in retail stores a simple, efficient, and reliable apparatus, by which cash or small parcels can be conveyed from the sales station to the cashier's desk, and the change returned to the sales station.

It is not claimed that, in the promotion of the general purpose, the patent is, in any sense, a primary one. It is admitted that the general object in view had been previously realized, and that the patentee came into the art, not as a creator, but as an improver. The claim is that his system excels all its predecessors for cheapness, simplicity and efficiency. These constitute the scope of the appellant's improvement.

But these are results simply. It is somewhat difficult to point out, in the appellant's apparatus, the mechanical means leading to these results. They may, however, with sufficient accuracy, be summarized as follows: (a) The use of a slender wire, instead of a metal rail, or a wire rail; (b) the use of straining nuts, placed at each end of the wire, so that the wire may be tightened, from time to time, to keep it stretched perfectly taut; (c) the attachment of the car to the wire, so rigidly that oscillation, in the line with the car's movement, will be prevented, resulting in the car's being propelled from end to end by a single impulse.

It is plain to us that the employment of the two features first named, either singly or together, cannot be treated as importing novelty into the appellant's patent. The use of nuts to stretch the wire is not mentioned, either in the claims or the specifications; and the proceedings in the Patent Office, in connection with the formulation of the claims, exclude the inventor's selection of wire, as distinguished from some other form of rail, from being considered as a novel feature of the claims of the patent. The inventor first claimed broadly, "wires stretched horizontally from a suitable point or points in the store center, forming suspended ways upon which cars are mounted by means of wheels"; but this claim, as we have seen, went out before the patent was allowed. The only reference to wire in the claim allowed is in combination with a freely moving car. This, we think, eliminates the selection of a slender wire—as distinguished from a rail or wire rail—from a place, as an independent factor, in the grant to appellant. It may be that

wire, as a track, was not in use in that art formerly, and that its selection by the patentee was in the nature of a meritorious discovery; but courts will not, in the absence of an inclusive claim, go into the history of the art, to ascertain what was really discovered, and what might have been patented, had the patentee chosen. The patentee will be taken at his word, and protected only according to the terms in which he has himself demanded protection.

The real invention, then, if any, embodied in the patent under discussion is in the attachment of the car to a wire so rigidly, that oscillation is prevented. It is this conception—possibly new—in combination with the old parts of the apparatus, that gives to the claim its validity, if it have any.

It may be assumed that the patentee discovered that the hindrance to the easy propulsion of a car long distances on a wire, by a single impulse, was in the oscillatory movement of the car, where it hung loosely on the wire; but this discovery, however important, is not, as a discovery, included in the patent. The mechanical means of overcoming the hindrance is the subject-matter of the patent; and these means are described, in the specifications, as a car suspended beneath the wire on wheels, one behind the other, by means of hangers which form a frame for the wheels; and, in the claim, as a freely moving car held below the wire on wheel-hangers. The discovery actually embodied in the patent, therefore, is not that oscillation, in line with the wire, is a hindrance to the propulsion of a car, but that a car hung rigidly under the wire, on two wheels upon the wire, one behind the other, will overcome such oscillation. The scope of the patentee's grant embraces, not every means of overcoming this apprehended oscillation, but only such as are set forth in the patent.

However the merits of the patentee's contribution might incline us, we have no power to enlarge his patent. Restricted to the limits already indicated, it cannot, by judicial interpretation, be made to cover the appellee's device. That device obviates oscillation, and procures rigidity, through mechanical means, different from the patent in suit.

As already stated, appellant's apparatus consists of a car suspended beneath a wire or way from two wheels running upon the wire, and at opposite ends of the frame, one behind the other, and cooperating equally in sustaining the weight. The frame is rigidly attached to the wheels, for the primary purpose of preventing oscillation, in the line of the car's travel.

In the appellees' apparatus the car is suspended beneath the wire or way by one wheel only, upon the wire, and near the middle of the car, which wheel alone sustains the weight. Beneath the wire, and at one end of the car, however, is a second wheel, which serves the purpose of preventing oscillation, in the line of the car's travel.

In appellant's apparatus the weight conveyed is between the wheels, and, since the two wheels cooperate equally in sustaining the load, either may be treated as the fulcrum, the other being, in turn, the motive power, and the preventive against oscillation; while in appellees' apparatus the weight is on one end of the frame, the

fulcrum is in the center, and the motive power, and the preventive against oscillation, at the other.

Appellant must employ a frame of sufficient length—for the primary purpose of preventing oscillation—to preclude the forward end of the frame from an upward movement, in response to the initial impulse. This length of frame depends, of course, in each instance, upon the approximate weight of the parcel to be carried. Any undue attempt to shorten the length of frame, thus throwing the wheels close together, would eliminate the advantage against oscillation gained from an appropriate length of frame.

The mechanical construction, on the contrary, of appellees' apparatus admits of a placing of the wheels as close to each other as may be desired. The one wheel being under the wire and the other above, rigidity—non-oscillation—is preserved, not by length of frame proportionate to the weight and impulse, but by the fact that the position of the wheels is such, that one counteracts the other. In our opinion there is no infringement.

The decree of the Circuit Court will be affirmed.

CONSOLIDATED STORE-SERVICE CO. v. HERZOG et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1901.)

No. 703.

PATENTS—INFRINGEMENT—CASH CARRIER.

The Osgood patent, No. 357,851, for an improvement in store service apparatus, claims 1 and 2, construed, and *held* not infringed.

Appeal from the Circuit Court of the United States for the District of Indiana.

F. P. Fish, for appellant.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion of the court as follows:

The facts of this case, so far as the validity and scope of appellant's invention are concerned, are identical with those of Store-Service Co. v. Seybold (just decided), 105 Fed. 978. In this case, however, the appellant alleges infringement of both his claims of Letters Patent No. 357,851, granted him February 15, 1887, for a new and useful improvement in store service apparatus.

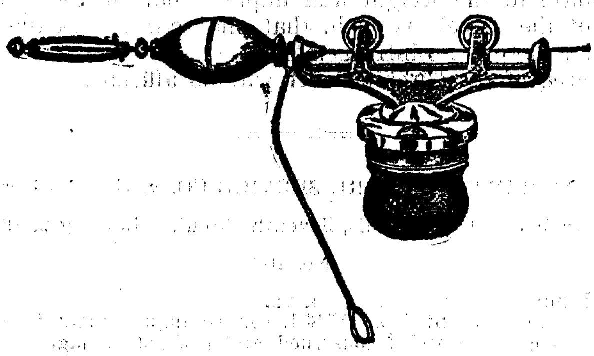
The two claims said to be infringed are as follows:

1. "In a cash-car apparatus, a wire stretched horizontally between fixed supports at each end and in the described relation to the cashier's desk, in combination with a freely-moving car held below the wire on wheel-hangers, to which it is rigidly connected, the wheels thereof being fitted to run one behind the other on the wire, whereby the car is held rigidly against oscillation longitudinally of the way, the whole moving structure being thus adapted to be impelled as a solid body from one end of the way to the other in either direction

by the momentum imparted by a single impulse or push, substantially as described.

2. "In a cash-car apparatus, a wire stretched horizontally between fixed supports at each end and in the described relation to the cashier's desk, and having adjustable stops placed axially on said wire, in combination with a freely-moving car held below the wire on wheel-hangers, to which it is rigidly connected, the wheels thereof being fitted to run one behind the other on the wire, whereby the car is held rigidly against oscillation longitudinally of the way, the whole moving structure being thus adapted to be impelled as a solid body from one end of the way to the other in either direction by the momentum imparted by a single impulse or push, substantially as described."

The appellees' apparatus is clearly shown in the following cut:



The above apparatus consists of a tautly stretched elevated track, or wire, running from the sales station to the cashier's desk, at a variable inclination of about eighteen inches, dependent upon the relative distance, in each instance, between the points of travel. A collapsible spring buffer, or rubber bulb, provided with a vent to admit of the escape of air when the car comes into contact with the chamber of the bulb, is attached or clamped to the wire or track at either end. A car having two wheels which run on the wire way, one behind the other, is suspended below the wire on wheel-hangers, being rigidly connected therewith. The cash cup or receptacle is firmly attached to the car body proper, the whole apparatus thus presenting a practically solid combination.

It is clear to us that the appellant is limited, by the very terms of his patent, to a horizontally stretched wire. It is equally evident to us that appellees employ an inclined wire—the inclination varying proportionately with the length of wire, or distance to be traveled.

We can not concur with the contention of appellant that the device of appellees comprises adjustable stops placed axially on the wire way. The adjustable stop of appellant's device may be moved to any position on the wire; while the bulb of appellees' apparatus is intended to be attached only at the opposite ends of the wire way.

The decree of the Circuit Court will be affirmed.

# THE EDWARD SMITH NO. 2.

## THE MASABA.

(District Court, N. D. Ohio, E. D. January 18, 1901.)

No. 2,257.

COLLISION—MEETING STEAMER AND TOW—CROWDING BY OVERTAKING STEAMER.

Evidence considered in a suit for collision between an ore-laden barge in tow passing down through the dredged channel in Lake St. Clair and the meeting steamer, Edward Smith No. 2, and *held* to establish that the collision was due to fault in the officers and crew of the Smith in failing to properly navigate their vessel, which was permitted to sheer after passing the tug, and swing across the course of the tow, breaking her cable, and also to the fault of the Masaba, an overtaking steamer, which was attempting to pass the Smith without having signaled her intention, and in violation of the rules governing navigation in the channel.

In Admiralty.

Harvey D. Goulder, for libelants.

John C. Shaw, for respondent the Smith.

H. W. Kelley and C. E. Kremer, for respondent the Masaba.

RICKS, District Judge. On a bright July day, in 1898, on the main waterway from Detroit northward, there might have been seen a fleet of steamers, some with tows and some without, some passing light up through the dredged channel in Lake St. Clair and others passing down loaded, all converging upon the dredged canal and passageway, which is provided by artificial aid for vessels engaged in commerce on the lakes. In this bright daylight a collision occurred by which a steamer was sunk, and the controversy we have before us is to determine who was responsible for the wrong and injury done.

The libel, filed on January 4, 1899, briefly recites the claim of the libelants as to who was responsible for the collision. This libel states that John Corrigan and William T. Carrington were the sole owners of the barge Aurania; that the said barge and the steamers Edward Smith No. 2 and Masaba were and are each maritime vessels of the United States, engaged in the business of commerce and navigation upon the public and navigable waters of the United States. The libel further alleges that on the 24th day of July, 1898, said barge Aurania, in tow of the steamer Aurora, upon a wire cable which had been shortened up to a length of 600 feet or thereabouts, was engaged in the prosecution of a voyage from Duluth to Ashtabula, laden with a cargo of iron ore, and that, proceeding down the St. Clair Flats Canal, said tow met and passed, under port signals, an up-bound tow near the lower end of the dikes, and so passed well to starboard out into the dredged channel which forms the approach to the channel between the dikes, and in which a descending tow can neither stop nor turn around; that, after so passing out into the dredged channel, they met and passed an up-bound steamer under port signals, when the said steamer Edward Smith No. 2 and the said steamer Masaba, approaching from below, and

bound up through the canal, exchanged with the Aurora signals of one blast; that the course of the Aurora and Aurania was so directed as to keep the tow well on the starboard side, in a proper place under the circumstances, and, as they were thus in all respects lawfully navigating the canal, leaving more than two-thirds of the channel on their port hand, the Smith came up on a course to pass the tow at a safe distance, when, a short distance only ahead, and on the port bow of the Aurora, in a proper position for passing the tow, the Masaba being then close on the starboard side of the Smith, and both steamers coming up rapidly, the Smith sheered slightly to port in consequence, as libelants are informed and believe and therefore allege, of the close proximity and the suction of the Masaba, moving in the same direction with her; that the Aurania, to make sure of allowing as full room as the steamer towing her, ported and headed slightly above her steamer. The Smith recovered, and passed the Aurora at a safe distance for vessels proceeding in opposite directions, and after she had gotten entirely past the Aurora, and was about to pass the Aurania at a safe distance, the Masaba still being close to the starboard side of the Smith, the stern of the Smith seemed drawn over towards the Masaba's stern, and the Smith suddenly and violently sheered, and swung to port across the bow of the Aurania. The Aurania's helm was hard ported, and the Aurora's engine was stopped, and the lever controlling the towing machine on the Aurora released so that the cable might reel out, there being no time or opportunity to let go the line on either vessel; but so extreme and rapid was the sheer of the Smith that she struck the towline at nearly a right angle, about 100 feet ahead of the Aurania, parted the wire cable, and then swung around the bow of the Aurania, which struck the Smith on the starboard quarter. The vessels came together with great force, driving the bow of the Aurania to port, and straightening the Smith up the channel, so damaged that she filled and sank after going a short distance, while the Aurania, with bows badly stove, forged and drifted diagonally down and across the channel, until she brought up on the bottom, aided in this by a stern anchor, which she had let go. The libelants further allege that they are ignorant of the definite positions of these vessels relative to each other before the passing signals were exchanged, but are informed, and therefore allege, that the Masaba, which was a large, powerful steamer, with one barge in tow, both without cargo, had been astern of the Smith, which was loaded, and had overhauled the Smith, and was attempting to pass her, in which she unlawfully persisted after the vessels had entered the improved channel of the approach below the dikes comprising part of the canal, by reason whereof the vessels entered in double line, and that afterwards, while attempting to pass, she negligently drew in so close to the Smith as to interfere with the steering of that vessel, and cause her to sheer. The libelants say, in respect to the Smith, that they are ignorant of what occurred on board of her, and whether all was done which might have been done to avoid or overcome the sheering caused by the Masaba, and have no positive knowledge that the Masaba was the overtaking and passing

vessel; and aver that the Smith, after having established an agreement with the Aurora to pass that steamer and her tow port to port, not only swung from her course, but ran through the towline and across the bow of the Aurania, and in so doing came into collision, inflicting great damage on her; and libelants charge that said vessels were in violation of the rules established by the secretary of war, under authority of an act of congress, for the use and navigation of the St. Clair Flats Ship Canal, which comprises the dikes, the water between the dikes, and the improved channels of approach, both above and below the dikes, wherein, by rule 5, it is provided that all persons in charge of, or employed upon, vessels or boats, are forbidden to enter the canal two or more abreast; to pass another vessel or boat while going in the same direction in the canal; to follow another vessel or boat at a distance of less than 500 feet, except when in tow; to pass the canal in more than one line going each way; or to pass the canal at a rate of speed exceeding eight miles per hour. And, aside from the violations of the rules, libelants charge that the Masaba was in fault:

"(1) In having in charge of her officers who were reckless and negligent: (2) in having no proper lookout; (3) in persisting in her effort to overhaul and pass the Smith in that place and under the circumstances; (4) in going so close to the Smith as to interfere with her steering and in causing her to sheer."

Libelants further charge that the Smith was in fault in the following particulars:

"(1) That her officers then and there in charge of her were negligent; (2) that she left her course, and ran across the bow of the Aurania, in violation of the agreement established by the one-blast signals exchanged; (3) that she ran across the bow of the Aurania and into collision with her."

The libelants further say that, by reason of the said collision, the said barge Aurania was greatly damaged.

The claim and answer of the owners of the steamer Edward Smith No. 2 states that the said steamer was bound on a voyage from the port of Buffalo to the port of Duluth, laden with a cargo; that, crossing Lake St. Clair in the afternoon of the 24th day of July, 1898, the said steamer Smith was being followed and overtaken by the large steamer Masaba, towing the barge Manda on a long line astern; that the Masaba did not signal any intention of passing the Smith, and the latter continued on, at her ordinary full running speed, while crossing the lake, and on the usual course for the St. Clair Flats Canal; that, upon approaching the head of the lake, the Masaba pulled out, and started to pass on the starboard hand of the Smith. Claimants further say that, as the Masaba came up abreast of the Smith, she came in closer to the latter, on a course somewhat converging with the Smith's course; that, when her bow was thus abreast of the Smith, it was apparent that, as the vessels were then going, the Smith must enter the canal abreast of the tow. Thereupon, it being apparent that the Smith could not get ahead of the Masaba, which continued going at an apparently full speed, the Smith's engine was checked, in an endeavor to drop behind the tow. Right after the Smith checked, the steamer Aurora,

with the barge Aurania in tow, which was then below the piers coming down, blew a signal of one whistle to the Masaba and Smith, and the latter vessels each responded with one blast. Thereafter the Masaba crowded over towards the Smith, and the latter was kept off to port, and checked a second time to as slow an engine speed as she could take and maintain steerageway; but the Masaba seemed to draw her along and pass very slowly, and, as the Aurora and Smith were about to meet and pass, the suction of the Masaba caused the Smith to sheer to port, and towards the Aurora, and she was rung up full speed under a hard a-port wheel to break such sheer, and avoid a collision with the Aurora. The Smith recovered from this sheer, and passed the Aurora safely to port, but with both vessels well on the westerly side of the channel, and with the Masaba close on the Smith's starboard hand, and about in the center of the channel. The Smith was again checked, as soon as she was steadied, but was rung up as she started on another sheer to port, and against a hard-over wheel; but her stern seemed to be drawn right around by the Masaba, so that she was thrown crosswise of the channel ahead of the Aurania, and the latter vessel, coming on, struck her stem on, on the starboard side, causing her to sink on the westerly side, and near the lower entrance, of the dredged channel leading up to the canal. Claimants deny all charges of fault made against the Edward Smith No. 2, and aver that they violated no rules governing the use and navigation of the St. Clair Flats Ship Canal, and aver that they had the right of way, and that the Masaba only is chargeable with fault for overtaking and approaching the canal abreast of the Smith. The claimants allege that the Masaba was at fault in the following particulars:

"(1) In not having a proper and sufficient lookout; (2) in that her officers were careless and inattentive to their duties; (3) in that she attempted to overhaul and pass the Smith without any agreement by signals; (4) in that, upon getting abreast of the Smith, she proceeded in her endeavor to pass, although she could not then possibly get her long tow ahead of the Smith, except by passing her in the narrow waters of the canal, contrary to the rules governing the same; (5) in that, upon the approach of the down-bound tow, she did not drop astern of the Smith until they should have passed the down-bound tow and gotten through the canal; (6) in that, having agreed by signals with the Aurania to pass port to port, she crowded upon the course of the Smith so that the latter could neither drop back of her long tow nor be steered safely between the two tows, where the wrongful actions of the Masaba had placed her, and where she was caused by suction to sheer over and into collision with the Aurania; (7) in that she undertook to enter the cut at an excessive and unlawful rate of speed."

The claimants of the steamer Edward Smith No. 2, on the 2d day of January, 1900, filed an intervening libel against the steamer Masaba, alleging negligence, and claiming damages against the Masaba.

The Minnesota Steamship Company, owner of the steamer Masaba, filed an answer on April 7, 1900, to the libel of John Corrigan and William T. Carrington, owners of the barge Aurania, in which they admit the collision above referred to, but deny that they were coming up rapidly, or were so close on the starboard side of the Smith, or that the Smith's stern was or could have been drawn towards

the stern of the Masaba, or that the Masaba in any manner interfered with the navigation of the Smith. They deny that the Masaba was, at the time of the occurrence mentioned, attempting to pass the Smith. On the contrary, they allege that the Masaba had overtaken and passed the Smith on Lake St. Clair, miles below the scene of the collision. They deny that they drew in so close to the Smith as to interfere with the steering of the vessel, causing her to sheer; and allege, on the contrary, that the Masaba was far over to the eastward and ahead of the Smith at the time the latter vessel went off to port. They deny that the Masaba caused, or contributed to, the movement of the Smith to port, or was guilty of any violation of the rules established by the secretary of war; and allege that the Smith was in fault, (1) in that she had no sufficient lookout; (2) in that her officers then and there in charge of her were negligent, and inattentive to their duties; (3) in that she left her course and ran across the bow of the Aurania, in violation of the rules of navigation; (4) in that she ran across the bow of the Aurania, and into collision with her; (5) in that she was negligently steered and managed at and before the time when she left her course; (6) in that she failed to stop and back her engines. They further allege that the Masaba was pursuing a course further to the eastward than usual, in order to give ample room to all vessels in the vicinity, and that she was wholly without fault or negligence in the matters referred to in the libel. The said Minnesota Steamship Company, owner of the said steamer Masaba, also filed, on May 8, 1900, a claim and answer to the intervening libel of the owners of the steamer Edward Smith No. 2, in which they make substantially the same allegations as those above recited.

After the testimony had all been presented, proctors for the Masaba and the Smith both consented that the record should show that each one conceded that the Aurora and Aurania were not in fault.

One of the most important facts to be determined in this case is at what point the Masaba passed the Smith before the collision occurred. I think the preponderance of evidence shows that the Masaba had not passed the Smith in the open lake, but that she came up to and attempted to pass the Smith about the time the downbound tow met them. The evidence shows that had the Smith been properly navigated, and kept her course, which took her safely by the Aurora, she and the Masaba would both have passed the downcoming tow in safety.

Another important question of fact, to be settled from the testimony of witnesses who saw the collision, is as to the distance between the Smith and the Masaba at the time the former took her sheer. It is important to ascertain this fact correctly, if possible, because the claim of the Smith is that the Masaba, in undertaking to pass her, came so near to her that the Smith felt the force of suction from the Masaba. It is further contended by the Smith that the Masaba was not only at the proper distance from the Smith to put into motion this mysterious power of suction, and to do it at such a point as would give that force the greatest power, but that she actually did this. If the Masaba was from 300 to 700 feet from

the Smith, the weight of the opinion of the experts and the experienced sailors is that the force of the suction would not reach the Smith with sufficient power to change her course or put her beyond the control of her wheel and engine. It is contended on behalf of the Smith that the weight of testimony shows that the Masaba was not too far away to bring this power of suction to bear.

Witnesses for the Smith testify that the Smith was only 40 or 50 feet from the Aurora, and from 50 to 60 feet from the Masaba. Other witnesses testify substantially as follows: Donaldson, captain of the Aurora, testifies that the Smith was 100 feet from the Aurora, and the Masaba 25 or 30 feet from the Smith. The engineer of the Aurora says that the Smith was 200 feet from the Aurora, and the Masaba closer. The mate of the Aurora says the Smith and Masaba were 100 feet apart. The wheelman of the Aurora says the Smith and Aurora were 100 feet, and the Masaba looked 15 or 20, but was probably more. The captain of the Aurania says the Masaba was only 50 feet from the Smith, and the Aurora and Smith 100 feet apart, but the Masaba was within 50 feet of the Smith. The mate of the Aurania says the Smith and Masaba were 50 to 100 feet apart, and the Smith and Aurora 75 or 100.

In contradiction, witnesses for the respondents say substantially as follows: The captain of the Masaba says that the Smith and Masaba were 600 to 700 feet apart. Thompson, fireman of the Masaba, says that the Aurora and Masaba were 300 feet apart. The captain of the Manda says the Smith was 300 or 400 feet off, and the mate also puts it the same.

I conclude that there must have been more space between the Smith and the Aurora and the Smith and the Masaba than 50 or 60 feet, because, as the proctor for the Masaba forcibly stated, the length of the Smith was 214 feet, and she could not have taken a sheer, and turned herself at an angle that shut her in between the Aurora and the Aurania in the space of 100 or 120 feet when her own length was double that amount. These opinions of the witnesses were quoted by counsel, and have been verified, and found to be correct.

It is but just that I should say, in this connection, that, appreciating the importance of determining correctly the distance between the Masaba and the Smith before the collision, Mr. Kelley, proctor for the Masaba, brought into court several photographs, taken to demonstrate the exact distance between these two vessels. It was contended by the proctor for the Smith that these photographs were not accurate, because there was no sufficient testimony to show that the lenses were all of the same power; because of this uncertainty, that accuracy as to distance as claimed could not be admitted.

Whether the proximity of these vessels was such as to cause suction sufficient to influence the course of the Smith or not, I am of the opinion that the Masaba was in fault, and contributed to some extent to the collision of the Smith and the Aurania, in this, to wit: That as she gradually lessened the distance between herself and the Smith, as she came up the lake on her usual course and at her usual speed, she must have observed, or should have observed, that

the Smith was not expecting her to attempt to pass her with her tow at that unfavorable place in the dredged channel leading to the canal, which was clearly against the rules of navigation. It must be remembered that the Masaba was the overtaking vessel. She was the faster vessel, and was sailing at her usual speed, which her master says was about 10 miles per hour in the open lake. Being in the rear, he could, without any difficulty, watch the progress the Smith was making, and, as they both approached the lower end of the dike where this collision occurred, he had better opportunities for observing the probability of their meeting between the dikes or somewhere in the channel. He knew that the tow would necessarily interfere with the free handling of the vessels, and make it more difficult for them to pass, either between the dikes or in the dredged channel. The rules required him to avoid meeting there if he could, and his own sound judgment ought to have warned him against such an unnecessary danger. If he saw that, proceeding under the rules and the agreement between the Smith and the Aurora, he was likely to meet the Smith in the dredged channel, or between the dikes at a point of unnecessary danger, he could have sounded an alarm to the Smith, and secured some agreement as to which of them should check and fall behind, so as to go through the channel and canal in single file instead of two abreast. The master of the Masaba admits that he did not sound the whistle, or give any signal that he was intending to overtake and pass the Smith, which was clearly in violation of the rule. The master of the Masaba says that he supposed the Smith was cognizant of what he was doing, both as to speed and course, as they were in sight of each other for several hours; and his proctor justifies him by saying that there was no duty resting on the Masaba to notify the Smith of her approach, when the latter had seen the Masaba in the Detroit river, and knew she was following. The preponderance of evidence shows that time enough had transpired to indicate clearly to the master of the Masaba that the Smith was not expecting him to pass her at that point, as heretofore stated. Now, whether there was a violation of the rules or not, the master of the Masaba is put in the position, in this case, by his own testimony and that of other witnesses, of having deliberately undertaken to pass the Smith, without giving her warning, in a channel which, under ordinary circumstances, might have been wide enough for all the vessels to pass, as they undertook to do. It looks very much to me as though the Masaba was undertaking to force her way through the channel and canal, without regard to the possibility, or, to put it stronger, probability, of doing some damage to the smaller vessel she was overtaking; and I cannot refrain from saying, at the close of this collision case, that I am again impressed with the great importance of care in the management of vessels on these lakes. The rivalry between boats for quick dispatch is so great that their masters are willing to take great risks in speeding their vessels to suit the demands of owners. There seems to be a mad rush for a cargo, and then a wild run for the goal. A few puffs of steam, and a little manual exercise at the wheel, intelligently used, would have avoided

this collision, and would have saved all the money lost, and all the trouble and expense of this litigation. Experimenting as to how close vessels can safely pass is instructive, but often dangerous and expensive. It is only by the rigorous enforcement of the rules of navigation that this dangerous rivalry shall be cured, and a conservative and wiser handling of vessels follow.

My conclusion, from all the testimony, is that the officers and crew of the Edward Smith No. 2 were in fault in not properly navigating their vessel, and not anticipating the sheer, which might have been avoided, or the force of which might have been greatly lessened, by a prompt handling of the wheel and proper signals to the engineer. The fault of the Masaba lay in undertaking to pass the Smith at that unfavorable place, which undoubtedly contributed to, if it did not wholly cause, the sheer of the Smith, as aforesaid. In the conclusions reached as to the facts, it is not necessary to discuss the legal propositions submitted and argued by proctors for both the Smith and the Masaba. I have so stated them that full advantage can be taken if any error has been made. A decree may therefore be drawn in favor of the libelants, awarding them costs and all court expenses, and finding both the Smith and the Masaba in fault, for the reasons heretofore stated, and dividing the damages between them. The case may be referred to H. F. Carleton, as commissioner, for the assessment of the damages.

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## THE ST. BERNARD.

## MORGAN v. VLASTO.

(District Court, S. D. New York. January 17, 1901.)

1. CHARTER PARTY—CONSTRUCTION—LAY DAYS.

A charter party provided that from 6 o'clock of the morning next after the vessel "is reported and all ready to discharge," of which notice is to be given by the captain in writing to the consignee, the lay days shall begin to run. The consignee received verbal notice of the arrival of the vessel in the harbor at 9 a. m. of September 8th, and gave notice to her agents, designating a certain pier for her berth within an hour or two afterwards, before written notice of readiness to discharge was received. About 11 a. m. of the same day such written notice was given, which, however, was false, as the vessel was still in the harbor. She did not proceed to her pier until 9 a. m. of September 9th. *Held*, that the lay days did not begin to run until 6 a. m. of the next working day; and where the vessel was discharged on the 21st, after deducting 10 hours of a working day on which it rained, and 1 Sunday, and 1 day's disability of the vessel, the discharge was completed within the lay-day period of 7 days and 17 hours given by the charter.

2. SAME.

A designation by a charterer of a berth for a vessel, on notice of its arrival in port, was given within a reasonable time when delivered within two or three hours from such notice of arrival.

In Admiralty. Demurrage. Lay days.

Martin A. Ryan, for libelant.

Convers & Kirlin and Charles R. Hickox, for the St. Bernard.

BROWN, District Judge. As respects the time when the lay days begin to run, the charter is so explicit that no variation from its terms can be allowed, i. e. "from 6 o'clock of the morning next after the vessel is reported and all ready to load or discharge. of which the captain is to give notice in writing to shippers or consignees."

In Aalholm v. A Cargo of Iron Ore (D. C.) 23 Fed. 620, the terms "all ready to discharge" were held to mean "a present readiness to commence the actual discharge."

The consignee in this case, having received verbal notice of the arrival of the vessel off Liberty Island at about 9 a. m. of September 8th, gave notice to her agents, designating Nineteenth street, East river, for her berth, within an hour or two afterwards, before any written notice of readiness to discharge was received. About 11 a. m. of the same day a written notice of such readiness was given him. This, however, was a false notice, as the vessel was still off Liberty Island. Addicks v. Three Hundred and Fifty-Four Tons Crude Kainit (D. C.) 23 Fed. 727. It was her duty to go to the berth designated, since it was a proper one, at her own expense, and until she arrived there she was not "all ready to discharge." She did not procure towage to go to her berth until the next day, and arrived there at 9 a. m. of September 9th, and then for the first time was she all ready to discharge. Under the charter, therefore, the lay days did not begin to run until 6 a. m. of the next working day, which was Monday the 11th. More than 10 hours out of the 24 of that day appear to have been rainy, which by the charter should therefore be deducted. As the vessel was discharged by 9 a. m. of the 21st, on deducting the above and 1 Sunday and 1 day's disability of the vessel, the discharge I find was completed within the lay-day period of 7 days 17 hours, to which the charterer was entitled.

There can be no question of the charterer's designation of a berth within a reasonable period, as this designation was within two to three hours after his first notice of the vessel's arrival. Under the charter the consignee was not thereafter required to be in readiness to begin discharge until 6 a. m. of the next day after receipt of a written notice that the vessel had arrived at her berth and was in fact "all ready to discharge." In Smith v. Lee, 13 C. C. A. 506, 66 Fed. 344, the notice required was only "notice of arrival at the port,"—a very different thing from being "all ready to discharge." Had the master chosen to incur some additional expense in towage, he could have had his vessel docked on the 8th, and by notice thereof have set the lay days running at 6 a. m. of the 9th. Libel dismissed with costs. In the libel for payments made for weighing out the cargo, the libelant is entitled to a decree with costs.

## HAGERMAN v. NORTON.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1901.)

No. 1,006.

1. SHIPPING—DEMURRAGE—LOADING CARGO—STOPPAGE OF LABOR.

Where a charter provided that a certain number of working days should be allowed for loading the vessel, detention caused by strikes or "estoppage of labor" not included, days on which those loading the vessel refused to work owing to storms, and days when the labor organizations withdrew their members to attend a funeral and for the celebration of Labor Day, should not be excepted from the days allowed for loading; all days save Sundays and legal holidays being working days, and there having been no forced stoppage, within the meaning of the charter party.

2. SAME—CUSTOM OF PORT.

Where a charter party provided that 14 working days should be allowed for loading the vessel in the port of Pensacola, and that the custom of each port was to be observed in all cases, and the vessel was delayed more than 14 working days owing to the members of labor organizations refusing to work on days generally recognized as working days, a contention that, the practice of such labor organizations being known to ship owners, the delay should be excused, under the clause relative to customs of ports, was without merit, since the custom of labor organizations in the port of Pensacola, and their manner of refusing to work, being known to the charterer of a ship, if he wished to protect himself from the results of their refusal to work on days generally regarded as working days he should so provide in his charter party.

3. SAME—DUTY OF CHARTERER.

Where a charter provided that a vessel should proceed to Pensacola and there load, the cargo to be delivered alongside, and that 14 working days should be allowed the charterers for loading the vessel, a contention that under the terms of the charter party the duty of the charterer was ended when the cargo was delivered alongside, and that all delays in loading and stowing the cargo were at the risk of the ship owner, was without merit.

Appeal from the District Court of the United States for the Northern District of Florida.

Libel by Charles W. Hagerman against Benjamin Norton to recover demurrage under a charter party. From a decree in favor of libelant, libelee appeals. Affirmed.

B. C. Tunison, S. M. Loftin, B. S. Liddon, and John Eagan, for appellant.

W. A. Blount and A. C. Blount, Jr., for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is a libel to recover demurrage under a charter party which contains provisions as follows:

"That the said vessel shall with all convenient speed sail and proceed to Pensacola, * * * there load (always afloat) from the said merchants, * * * as they may direct, a full and complete cargo, to consist of pitch-pine sawn timber. * * * Sufficient suitable timber and/or deals and/or boards, at merchants' option, to be supplied for beam fillings and stowage as required by master. * * * Loss, damage, or detention by the act of God, restraint of princes and rulers, public enemies or people, quarantine, epidemics, pirates or robbers, barratry of the master or crew, fire from any cause or wheresoever occurring, perils of the sea or other waters, riots,

strikes, or estoppage of labor, or lockouts of seamen or shore laborers, whether partial or otherwise, and any consequence thereof, * * * or any other extraordinary occurrence beyond the control of either party, always mutually excepted. * * * The cargo to be delivered alongside at merchants' risk and expense, secured by dogs and chains, and to be received by the master, and when so delivered to be then at ship's risk. The ship to discharge each lighter having lumber for cargo or broken stowage without unreasonable detention. Should the master order more timber or deals or boards alongside than the ship requires for loading, the expense of returning it to the booms to be paid by the ship. * * * Fourteen working days are to be allowed charterers or their agents for loading the vessel, which time is to commence on the day after the vessel is ready (in loading berth) to receive cargo, and written notice given of same to charterers or their agents, but days for discharging shall be according to the custom of the port of discharge. Should the cargo not be delivered to the vessel at port of loading, or received at port of discharge, within the specified time, by default of charterers or their agents, for each and every day over and above said lay days charterers or their agents are to pay the sum of sixpence sterling per net register ton demurrage; any detention through quarantine not to count in lay days. * * * Charterers or their agents to appoint and pay the stevedore to do the stowing of the cargo under the supervision of the master. * * * Cargo to be delivered to vessel at port of loading alongside, and to be taken from alongside at port of discharge, always within reach of ship's tackle, and at merchants' risk and expense, vessel always being afloat. * * * The custom of each port to be observed in all cases where not specially expressed. * * *"

There is no dispute that the ship was detained in loading 6 days beyond the 14 days, exclusive of Sundays and legal holidays, and demurrage for these 6 days was allowed in the court below. The first contention is that these extra 6 days should not be allowed, because thereon there was a stoppage of labor, as on three the baymen engaged in loading the vessel stopped and refused to work because of storms existing in the Bay of Pensacola; on another the said baymen so employed refused to work for the reason that on that day the funeral was to take place of a deceased bayman, and on this day the said labor organizations compelled and required all the baymen engaged in loading timber in the Bay of Pensacola to leave and quit their work, and there was by reason of the action of said labor organizations a general stoppage of labor in the Bay of Pensacola on said day; and on another the labor organizations withdrew all their members from work in stowing vessels for the purpose of celebrating the said day as Labor Day, so called by them; and all the laborers engaged there on the said day refused to labor thereon, and no labor was done by said baymen on said day, or on any vessel in said port, and the action of said labor organizations did on this day bring about a general stoppage of labor. It is further contended that the existence of labor organizations, and their customs and practices in regard to the manner in which they work in stowing vessels in the port of Pensacola, and their arbitrary manner of refusing to work, are well known to libelant and ship owners generally whose ships come to the port of Pensacola, wherefore it is contended that, under the provision of the charter party that "the customs of each port to be observed in all cases where not specifically expressed," excuses the respondent for the delay in question. It is well settled that the term "working days," as ordinarily used in charter parties, excludes Sundays and holidays, but not rainy nor stormy days. Pedersen v.

Eugster (D. C.) 14 Fed. 422; Wood v. Keyser (D. C.) 84 Fed. 692. In the last-cited case the charter party contained not only the provision that "the act of God, * * * floods, droughts, * * * riots, strikes, or stoppage of labor, * * * or any other extraordinary occurrence beyond the control of either party, were always mutually excepted," but the further provision that "in the computation of the days allowed for delivering and receiving the cargo shall be excluded any time lost by reason of fire, droughts, floods, storms, strikes, lockouts, combinations of workmen, or any extraordinary occurrence beyond the control of the charterers or the receivers of the cargo"; and yet the district court held, and the same was afterwards affirmed in this court, as follows:

"As to the other causes of delay, to wit, the funeral of the bayman, the day occupied in putting up the tackle for loading the vessel, and for cessation of work on Good Friday, it appears that these days do not fall within the exceptions of the charter party, as, properly speaking, they are 'working days,' which term includes all days except Sundays and legal holidays; and I am of the opinion that the custom of baymen to cease labor on these days, as set forth in the answer, is not such a stoppage of labor as was contemplated by the charter party."

We think that this ruling, in principle, covers the case of Labor Day, which was conceded not to be a legal holiday. The days on which the baymen refused to work because of storms which prevailed in the port of Pensacola are clearly not days excepted under any provision of the charter party, as the baymen certainly did not quit because of any strike or forced stoppage of labor. We are of opinion that with regard to the customs and habits of the labor organizations in the port of Pensacola the charterers of ships are as well informed as the owners, and if either wishes to protect himself from any of the peculiar results occasioned by organized labor, and thus derogate from the established rule as to working days, let him specifically provide for it in the contract.

The other contention of the appellant in this case is that under the terms of the charter party the duty of the charterers was ended when the cargo was delivered alongside, and that all delays in loading and stowing cargo aboard are at the risk of the ship owner. A recital of the various provisions of the charter party above quoted is a sufficient answer to this contention. A similar charter party was considered in the case of The Assyria, 39 C. C. A. 97, 98 Fed. 316, and it was held:

"Where a charter party provided that a cargo of lumber should be loaded by the charterer, and should be 'furnished' at the average rate of 50,000 superficial feet per running day, the lay days for loading are to be computed on the amount actually loaded, and not upon the amount delivered to the vessel for loading, a part of which was not actually loaded."

As we find no error in the record, the decree of the district court is affirmed.

# MEMORANDUM DECISIONS.

ADAMS EXP. CO. v. MORROW. (Circuit Court of Appeals, Sixth Circuit. January 14, 1901.) No. 926. In Error to the Circuit Court of the United States for the Southern District of Ohio. Maxwell & Ramsey, for plaintiff in error. R. S. Woodruff and Morey, Andrews & Morey, for defendant in error. Dismissed on motion of plaintiff in error.

ÆTNA PETROLEUM CO. v. CRIPPS et al. (Circuit Court of Appeals, Ninth Circuit. January 7, 1901.) No. 678. Appeal from the Circuit Court of the United States for the Southern District of California. Charles P. Eells, for appellant. Appeal dismissed upon motion of Charles P. Eells.

ÆTNA PETROLEUM CO. v. CRIPPS et al. (Circuit Court of Appeals, Ninth Circuit. January 7, 1901. No. 679. Appeal from the Circuit Court of the United States for the Southern District of California. Charles P. Eells, for appellant. Appeal dismissed upon motion of Charles P. Eells.

ALLEN B. WRISLEY CO. v. IOWA SOAP CO. et al. (Circuit Court of Appeals, Eighth Circuit. November 30, 1900.) No. 1,505. Appeal from the Circuit Court of the United States for the Southern District of Iowa. Taylor E. Brown and C. Clarence Poole, for appellant. Blake & Blake, for appellees. Appeal dismissed, with costs, per stipulation. See 104 Fed. 548.

BARBEE WIRE & IRON WORKS v. SMITH et al. (Circuit Court of Appeals, Sixth Circuit. November 17, 1900.) No. 851. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Poole & Brown, for appellant. James Whittemore, for appellees. No opinion. Affirmed.

BOARD OF COM'RS OF WICHITA COUNTY v. CROSBY et al. (Circuit Court of Appeals, Eighth Circuit. December 4, 1900.) No. 1,376. In Error to the Circuit Court of the United States for the District of Kansas. S. S. Ashbaugh, B. P. Waggener, Albert H. Horton, and J. S. Caldwell, for plaintiff in error. W. H. Rossington, Charles Blood Smith, and Clifford Histed, for defendants in error. No opinion. Affirmed, with costs.

BOARD OF EDUCATION OF CITY OF PIERRE v. YALE NAT. BANK OF NEW HAVEN. (Circuit Court of Appeals, Eighth Circuit. January 25, 1901.) No. 1,477. In Error to the Circuit Court of the United States for the District of South Dakota. Ivan W. Goodner and John A. Holmes, for plaintiff in error. H. R. Horner and R. W. Stewart, for defendant in error. No opinion. Affirmed, with costs.

BUTLER v. ILLINOIS CENT. R. CO. (Circuit Court of Appeals, Sixth Circuit. January 18, 1901.) No. 854. In Error to the Circuit Court of the United States for the District of Kentucky. Pryor & Sapinsky and Matt O'Doherty, for plaintiff in error. Pirtle & Trabue, for defendant in error. No opinion. Affirmed.

CENTRAL DISTRICT & PRINTING TEL. CO. v. CITY OF WELLSVILLE. (Circuit Court of Appeals, Sixth Circuit. December 6, 1900.) No. 844. Appeal from the Circuit Court of the United States for the Northern District of Ohio. Billingsly, Taylor & Clark, for appellant. Wells & MacDonald, for appellee. Dismissed per stipulation.

CENTRAL TRUST CO. OF NEW YORK et al. v. PEORIA, D. & E. RY. CO. et al. BALDWIN v. CENTRAL TRUST CO. OF NEW YORK et al. (Circuit Court of Appeals, Seventh Circuit. January 4, 1901.) No. 669. Appeal from the Circuit Court of the United States for the Southern District of Illinois. Charles A. Boston, William W. Baldwin, Frank L. Hatch, and Pascal E. Hatch, for appellants. Adrian H. Joline, David Willcox, Bluford Wilson, and P. B. Warren, for appellees. Ordered that same decree be entered as in No. 668 (same title) 43 C. C. A. 616, 104 Fed. 420.

CENTRAL TRUST CO. OF NEW YORK et al. v. PEORIA, D. & E. RY. CO. et al. CHAMBERLIN v. CENTRAL TRUST CO. OF NEW YORK et al. (Circuit Court of Appeals, Seventh Circuit. January 4, 1901.) No. 670. Appeal from the Circuit Court of the United States for the Southern District of Illinois. Charles A. Boston, William W. Baldwin, Frank L. Hatch, and Pascal E. Hatch, for appellants. Adrian H. Joline, David Willcox, Bluford Wilson, and P. B. Warren, for appellees. Ordered that same decree be entered as in cause No. 667 (same title) 43 C. C. A. 613, 104 Fed. 418.

CHICAGO G. W. RY. CO. v. HOLDEN. (Circuit Court of Appeals, Eighth Circuit. December 3, 1900.) No. 1,445. In Error to the Circuit Court of the United States for the District of Minnesota. Dan W. Lawler, for plaintiff in error. Humphrey Barton and Percy D. Godfrey, for defendant in error. Dismissed, without costs to either party in this court, pursuant to stipulation of the parties.

CITY OF ELLSWORTH CITY, ELLSWORTH COUNTY, KAN., v. MASSLICH. (Circuit Court of Appeals, Eighth Circuit. December 13, 1900.) No. 1,463. In Error to the Circuit Court of the United States for the District of Kansas. Ira E. Lloyd and Charles J. Evans, for plaintiff in error. O. H. Bentley, A. H. Horton, and Rodolph Hatfield, for defendant in error. No opinion. Affirmed, with costs.

CITY OF HOUSTON v. STORRIE. (Circuit Court of Appeals, Fifth Circuit. December 3, 1900.) No. 898. In Error to the Circuit Court of the United States for the Eastern District of Texas. John S. Stewart and Joe M. Sam, for plaintiff in error. Ewing & Ring, for defendant in error. Dismissed per stipulation.

CITY OF HURON v. ELWOOD. (Circuit Court of Appeals, Eighth Circuit. December 11, 1900.) No. 1,453. In Error to the Circuit Court of the United States for the District of South Dakota. John Wood, for plaintiff in error. C. O. Bailey, J. H. Voorhees, D. J. Carnes, and G. W. Dunton, for defendant in error. No opinion. Affirmed, with costs, on authority of City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38, 86 Fed. 272, 49 L. R. A. 534.

CITY OF HURON v. SHEPARD. (Circuit Court of Appeals, Eighth Circuit. January 25, 1901.) No. 1,478. In Error to the Circuit Court of the United States for the District of South Dakota. John Wood, for plaintiff in error. John L. Pyle and Alva E. Taylor, for defendant in error. No opinion. Affirmed, with costs.

CITY OF HURON v. WARREN. (Circuit Court of Appeals, Eighth Circuit. December 11, 1900.) No. 1,454. In Error to the Circuit Court of the United States for the District of South Dakota. John Wood, for plaintiff in error. William M. Jones, for defendant in error. No opinion. Affirmed, with costs, on authority of City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38, 86 Fed. 272, 49 L. R. A. 534.

CITY OF WOOSTER v. EASTERN TRUST & BANKING CO. (Circuit Court of Appeals, Sixth Circuit. November 15, 1900.) No. 847. In Error to the Circuit Court of the United States for the Northern District of Ohio. L. R. Critchfield, A. S. McClure, M. L. Smyser, and A. D. Metz, Jr., for plaintiff in error. Squire, Sanders & Dempsey, for defendant in error. No opinion. Affirmed, on authority of Village of Kent v. Dana, 40 C. C. A. 281, 100 Fed. 56, and of the opinion in this court.

CLEVELAND TERMINAL & VALLEY R. CO. v. METROPOLITAN TRUST CO. et al. (Circuit Court of Appeals, Sixth Circuit. December 4, 1900.) No. 910. Appeal from the Circuit Court of the United States for the Southern District of Ohio. Dismissed, on motion of counsel for Metropolitan Trust Company, (1) because the appeal was not perfected within six months from date of decree of the court below; (2) because no appeal bond was filed and no citation for appellees issued within six months from date of decree; (3) because no transcript has been filed in this court sufficient to show the errors complained of; (4) because no briefs have been filed for appellants in accordance with the rules of this court.

DETROIT BRIDGE & IRON WORKS v. FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. et al. ELLIOTT FROG & SWITCH CO. v. SAME. FROST-TRIGG LUMBER CO. v. SAME. T. J. MOSS TIE CO. v. SAME. JACKSONVILLE & ST. L. RY. CO. v. SAME. (Circuit Court of Appeals, Seventh Circuit. January 21, 1901.) Nos. 590, 592-595. Appeals from the Circuit Court of the United States for the Southern District of Illinois. On motion to dismiss appeals. W. L. Patton, for appellants. Samuel P. Wheeler and Bluford Wilson, for appellees.

PER CURIAM. The appeal in each of these cases is ordered dismissed, for lack of parties, on the authority of Kidder v. Deposit Co. (this day decided) 105 Fed. 821.

DUNN v. GEORGIA HOME INS. CO. (Circuit Court of Appeals, Fifth Circuit. January 8, 1901.) No. 990. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. E. A. O'Sullivan (Bernard McCloskey, on the brief), for plaintiff in error. W. W. Howe and Chas. P. Fenner (W. B. Spencer and C. P. Cocke, on the brief), for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the circuit court in this case is affirmed. The judges all concur in the affirmance; but, as they are not in accord as to the grounds of affirmance, no written opinion will be filed.

In re FAIRGRIEVE et al. (Circuit Court of Appeals, Eighth Circuit. November 26, 1900.) No. 20. Harvey D. Goulder, for petitioners. C. E. Kremer, for respondent. Petition for mandamus denied, and petition dismissed, at the costs of petitioners.

HAMPTON v. MAYS et al. (Circuit Court of Appeals, Eighth Circuit. November 30, 1900.) No. 1,405. Appeal from the United States Court of Appeals in the Indian Territory. R. T. Jones, J. T. Blanton, and Albert Rennie, for appellant. Dismissed, with costs, for want of prosecution.

HARMON et al. v. MATTHEWS. (Circuit Court of Appeals, Seventh Circuit. December 1, 1900.) No. 751. Appeal from the Circuit Court of the United States for the Southern District of Illinois. W. F. Bundy and Frank Noleman, for appellee. Docketed and dismissed under the provisions of subdivision 5, rule 14, and subdivision 1, rule 16.

In re HUNTER et al. (Circuit Court of Appeals, Second Circuit. December 21, 1900.) No. 24. Appeal from the District Court of the United States for the District of Connecticut. George F. Carroll, for appellant. A. M. Marsh and Edwin F. Hall, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Decision of district court affirmed.

IRWIN v. SOUTHERN RY. CO. (Circuit Court of Appeals, Sixth Circuit. January 19, 1901.) No. 925. In Error to the Circuit Court of the United States for the Eastern District of Tennessee. Templeton & Carlock, for plaintiff in error. Jourolmon, Welcker & Hudson, for defendant in error. Dismissed on plaintiff in error's motion.

KUMLER v. HALE. (Circuit Court of Appeals, Sixth Circuit. November 12, 1900.) No. 883. In Error to the Circuit Court of the United States for the Northern District of Ohio. Hurd, Brumback & Thatcher, for plaintiff in error. Smith & Baker, for defendant in error. No opinion. Affirmed.

LAZARUS v. McDONALD et al. (Circuit Court of Appeals, Eighth Circuit. January 7, 1901.) No. 1,348. Appeal from the Circuit Court of the United States for the Western District of Missouri. Ben J. Woodson, Frank Hagerman, O. M. Spencer, and Willard P. Hall, for appellant. Vinton Pike, Ste-

phen S. Brown, and John E. Dolman, for appellees. No opinion. Decree of circuit court (97 Fed. 121) reversed and annulled, at costs of appellees, and cause remanded, with directions to the circuit court to overrule all of the exceptions to the master's report, and to enter a decree in favor of Henry L. Lazarus, in conformity with the recommendations contained in the report which was filed in the circuit court on May 25, 1898.

MAXEY et al. v. WRIGHT, United States Indian Inspector, et al. (Circuit Court of Appeals, Eighth Circuit. November 22, 1900.) No. 1,402. Appeal from United States Court of Appeals in the Indian Territory. William T. Hutchings, for appellants. P. L. Soper, for appellees. No opinion. Affirmed, with costs.

MERCANTILE TRUST CO. v. PITTSBURG & W. RY. CO. Appeal of HOFFSTET. (Circuit Court of Appeals, Third Circuit. December 7, 1900.) No. 4. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. J. H. Beal, for appellant. Johns McCleave, for appellee. Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. Careful consideration of this record and of the arguments of counsel leaves us in no doubt as to the correctness of that part of the decree of the circuit court which is here complained of. We think the opinion of the learned judge of that court sufficiently sustains his conclusion that the Pittsburg & Western Railway Company was under no contractual obligation to construct the track which is the subject of controversy. Consequently we need not decide whether or not, if such obligation had existed, there should, under the circumstances of this case, have been a decree for its specific performance; but, if the determination of that question had been necessary, it would have been entitled to serious attention. 2 Story, Eq. §§ 742, 767; 3 Pars. Cont. p. 357; Du Bois v. Baum, 46 Pa. St. 537. The decree is affirmed.

MILLHISER et al. v. SMITH. (Circuit Court of Appeals, Fourth Circuit. November 5, 1900.) No. 370. Appeal from the District Court of the United States for the Eastern District of North Carolina. In bankruptcy. H. L. Stevens, for appellants. C. B. Aycock and F. A. Daniels, for appellee. Appeal dismissed by consent of counsel, under rule 20.

THE MOHEGAN. (Circuit Court of Appeals, Second Circuit. December 21, 1900.) No. 23. Appeal from the District Court of the United States for the Eastern District of New York. Samuel Park, for appellant. Le Roy S. Gove, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Decree of district court (91 Fed. 810) affirmed.

MUTUAL LIFE INS. CO. OF NEW YORK v. HILLMON. (Circuit Court of Appeals, Eighth Circuit. December 7, 1900.) No. 1,450. In Error to the Circuit Court of the United States for the District of Kansas. Edward Lyman Short, James A. Seddon, James L. Blair, and George J. Barker, for plaintiff in error. L. B. Wheat and C. F. Hutchings, for defendant in error. Dismissed, with costs, on motion of defendant in error.

THE M. VANDERCOOK. THE PLAINFIELD. (Circuit Court of Appeals, Second Circuit. December 21, 1900.) Nos. 36, 37. Appeal from the District Court of the United States for the Southern District of New York. Le Roy S. Gove, for appellant. James E. Carpenter, for the M. Vandercook. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Decrees of the district court (88 Fed. 559) affirmed.

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NATIONAL SURETY CO. v. UNITED STATES ex rel. ANNISTON PIPE & FOUNDRY CO. (Circuit Court of Appeals, Eighth Circuit. January 7, 1901.) No. 1,475. In Error to the Circuit Court of the United States for the Eastern District of Missouri. J. E. McKeighan, Shepard Barclay, and M. F. Watts, for plaintiff in error. T. A. Post, for defendant in error. No opinion. Affirmed, with costs, on authority of U. S. v. National Surety Co., 34 C. C. A. 526, 92 Fed. 549.

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PACIFIC COAST DREDGING & RECLAMATION CO. et al. v. BOWERS. (Circuit Court of Appeals, Ninth Circuit. January 7, 1901.) No. 545. Appeal from the Circuit Court of the United States for the Northern District of California. R. Percy Wright and D. M. Delmas, for appellants. John H. Miller, for appellee. Appeal dismissed, upon filing of stipulation of counsel for respective parties therefor, without costs to either party in either court. See 99 Fed. 745.

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PARDON v. McGEORGE. (Circuit Court of Appeals, Eighth Circuit. January 26, 1901.) No. 1,488. In Error to the Circuit Court of the United States for the District of South Dakota. Ralph W. Parliman and F. V. Brown, for plaintiff in error. Melvin Grigsby, S. H. Wright, and Sioux K. Grigsby, for defendant in error. No opinion. Affirmed, with costs.

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PINE RIVER LOGGING & IMPROVEMENT CO. et al. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 17, 1900.) No. 1,494. In Error to the Circuit Court of the United States for the District of Minnesota. John B. Atwater, Eugene G. Hay, and William H. Bennett, for plaintiffs in error. John E. Stryker, for the United States. No opinion. Affirmed, without costs to either party in this court.

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REDMAN v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. November 17, 1900.) No. 376. In Error to the District Court of the United States for the District of Maryland. Wm. Colton, for plaintiff in error. John C. Rose, U. S. Atty. Writ of error dismissed under rule 23; record not having been printed when case was called for argument.

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RYNAN et al. v. McCULLOM et al. (Circuit Court of Appeals, Sixth Circuit. January 19, 1901.) No. 845. Appeal from the District Court of the United States for the District of Kentucky. In admiralty. Campbell & Campbell and E. W. Bagby, for appellants. Bishop & Hendricks, for appellees. No opinion. Decree of district court modified.

SAN FRANCISCO BRIDGE CO. v. BOWERS. (Circuit Court of Appeals, Ninth Circuit. January 7, 1901.) No. 544. Appeal from the Circuit Court of the United States for the Northern District of California. R. Percy Wright and D. M. Delmas, for appellant. John H. Miller, for appellee. Appeal dismissed, upon filing of stipulation of counsel for respective parties therefor, without costs to either party in either court. See 91 Fed. 381.

SOUTHERN RY. CO. v. MOZELY. (Circuit Court of Appeals, Sixth Circuit. January 19, 1901.) No. 852. In Error to the Circuit Court of the United States for the Eastern District of Tennessee. Jourolmon, Welcker & Hudson, for plaintiff in error. Templeton & Carlock, for defendant in error. No opinion. Affirmed.

SWEENEY v. BARNEY & SMITH CAR CO. (Circuit Court of Appeals, Sixth Circuit. December 11, 1900.) No. 884. In Error to the Circuit Court of the United States for the Southern District of Ohio. Coffee & Mallon and Sprigg & Fitzgerald, for plaintiff in error. McMahon & McMahon and Paxton & Warring, for defendant in error. Dismissed per stipulation.

TEXAS & P. RY. CO. v. DE VITT et al. (Circuit Court of Appeals, Fifth Circuit. December 3, 1900.) No. 983. In Error to the Circuit Court of the United States for the Northern District of Texas. T. J. Freeman, for plaintiff in error. Maitlock, Cowan & Burney, for defendants in error. Dismissed per stipulation.

TRACY et al. v. EGGLESTON et al. (Circuit Court of Appeals, Fifth Circuit. January 15, 1901.) No. 909. In Error to the Circuit Court of the United States for the Western District of Texas. Charles J. Gillespie, for plaintiffs in error. R. H. Ward, for defendants in error. Dismissed for want of prosecution.

UNITED STATES v. BORGFELDT et al. (Circuit Court of Appeals, Second Circuit. December 12, 1900.) No. 33. Appeal from the Circuit Court of the United States for the Southern District of New York. Chas. D. Baker, for the United States. Everit Brown, for appellees. Before LACOMBE and SHIPMAN, Circuit Judges. No opinion. Affirmed in open court.

UNITED STATES v. DOWNING et al. (Circuit Court of Appeals, Second Circuit. December 21, 1900.) No. 45. Appeal from the Circuit Court of the United States for the Southern District of New York. W. Usher Parsons, for the United States. Albert Comstock, for appellees. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Decision of circuit court affirmed.

UNITED STATES v. SILBERSTEIN et al. (Circuit Court of Appeals, Second Circuit. December 11, 1900.) No. 30. Appeal from the Circuit Court of the United States for the Southern District of New York. W. Usher Parsons, for the United States. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Affirmed (99 Fed. 263) in open court.

A. B. DICK CO. v. HENRY. (Circuit Court, S. D. New York. November 16, 1900.) On Motion to Punish for Contempt for Disobedience of Injunction. For former opinions, see 75 Fed. 388, and 88 Fed. 80. S. O. Edmonds, for the motion. Sidney Henry, opposed.

LACOMBE, Circuit Judge. The defendant concedes that he has made the sales of infringing paper. He is a persistent infringer, who has heretofore been treated with great leniency. In June, 1897, he was found guilty of disobeying the injunction; but upon his claim that he "acted innocently, without an intention of disobeying the court," sentence was suspended. In July, 1898, he was again found guilty of the same offense; his only preferred excuse being that his circumstances were such that he found it difficult to make a living. The court inflicted a merely nominal penalty (2 days' imprisonment) and discharged him, with the admonition that he must not expect to make a living by appropriating other persons' property. He is at the bar again, convicted of a fresh act of willful disobedience, and his punishment must be sufficiently severe to insure from him for the future a greater measure of respect for the decrees of the court. He is committed for 60 days.

BLACKLEDGE v. WIER & CRAIG MFG. CO. (Circuit Court, N. D. Illinois, N. D. July 14, 1900.) No. 25,375. Poole & Brown and N. H. Lockwood, for plaintiff. Bond, Adams, Pickard & Jackson, for defendant.

KOHLSAAT, District Judge. This is a suit in assumpsit, brought by the guardian of a lunatic, who is the half owner of a patent, against the defendant, the owner of the other half of said patent, to recover one-half the profits derived by defendant from the use in its own business of the patent in question, and also one-half the profits derived by defendant from licenses granted by it to third persons to use said patent. There has been no authoritative decision in this country touching the right of one co-owner of a patent to participate in the profits made therefrom by another co-owner of such patent, in the absence of special agreement or other special circumstances. The decisions of the lower federal courts on the subject contain only dicta, and the matter has not been squarely before any of the courts of appeals or the supreme court. The English courts have held that no such right exists, and that joint ownership of a patent is in the nature of a tenancy in common, and is to be governed by rules analogous to those governing the rights of tenants in common of other property. The reasoning of plaintiff's attorney is plausible, but the authorities presented are such that I deem it best for all parties that the matter be passed upon by an upper court before the expense of a trial on the merits is incurred. In order, therefore, that the question may be taken up with as little delay and expense as possible, the demurrer will be sustained, and judgment entered thereon. The question is an important one, and should be settled permanently.

BOWERS et al. v. ATLANTIC, G. & P. CO. (Circuit Court, S. D. New York. October 6, 1900.) In Equity. Suit for infringement of patents. On motion for preliminary injunction. See 104 Fed. 887. John H. Miller, for the motion. Edwin H. Brown, opposed.

LACOMBE, Circuit Judge. The great mass of testimony, largely that of handwriting experts, bearing upon the honesty of the sketches and models, must be sifted by cross-examination before any reliance can be placed upon its assertions. The various questions presented should, therefore, be relegated to final hearing; and, following the numerous decisions upon the patent sued on, preliminary injunction may issue.

MUCHNICK v. PENNSYLVANIA GLOBE GASLIGHT CO. (Circuit Court, E. D. Pennsylvania. December 7, 1900.) No. 56. On Motions for Judgment Non Obstante Veredicto and for a New Trial. Henry W. Scarborough, for plaintiff. Thomas D. Finletter, for defendant.

DALLAS, Circuit Judge. This action was brought to recover for personal injuries suffered by the plaintiff in consequence, as alleged, of the defendant's negligence. Upon the trial the court reserved the point: "Whether there is any evidence to go to the jury in support of the plaintiff's claim." Subject to this reservation, a verdict was rendered for the plaintiff; and the defendant now moves for judgment in its favor notwithstanding that verdict, and also for a new trial. These motions have been considered together. They both present the same questions, viz.: Whether there was any, or sufficient, evidence of negligence on the part of the defendant to support the verdict; and whether, if there was, that negligence was adequately shown to have been the proximate cause of the plaintiff's injury. These questions are not to be answered with reference merely to the opinion of the trial judge respecting the weight of the evidence. They were submitted to the jury, with instructions concerning them which, it seems to be conceded, were as favorable to the defendant as they could properly be made, and I am unable to sustain the contention that they should not have been submitted at all. I cannot say that it was impossible for 12 reasonable men to find, upon the evidence adduced, the verdict which was rendered; and, this being so, the court would not be justified in setting it aside. Therefore, the defendant's motions for judgment non obstante veredicto and for a new trial must both be denied; and it is so ordered.

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STONESIFER v. GETTYSBURG WATER CO. MYERS v. SAME. (Circuit Court, E. D. Pennsylvania. December 14, 1900.) Nos. 115, 116. On Motions for New Trial. W. C. Sheely, McClean & McClean, and Beck, Robinson & Kane, for plaintiffs. John B. McPherson, J. J. De Kinder, and Rudolph M. Schick, for defendant.

J. B. McPHERSON, District Judge. It is, I think, beyond doubt that these verdicts are too large. The plaintiffs, who were of course bound to prove how much damage they had sustained, offered no evidence that would justify an award of $1,000 in each case. Obviously, as they had each put in a steam plant to assist in operating his mill, each plaintiff was entitled to recover no more than the cost of supplying by steam so much of the water power as the defendant had withdrawn from the creek. To this point the testimony was directed, but under no possible view of the evidence could such cost reach the amount fixed by the jury. Assuming, as I must, that the evidence thus far produced presented fully the plaintiffs' case, I should feel it my duty to set aside any verdict based upon that evidence, if it exceeded the sum of $300 in each case. Indeed, this is an extreme estimate of the amount that might be allowed to stand. It is therefore ordered that, if the plaintiff in each case, on or before January 15, 1901, remits so much of the verdict as exceeds $300, the motion for a new trial will be overruled, and judgment will be entered on the verdict. If no remittitur is entered, the clerk will make an entry in each case that a new trial is granted.

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WILLIS v. TERRY et al. (Circuit Court, E. D. Pennsylvania. December 26, 1900.) No. 70. In Equity. Hearing on pleading and proofs. See 98 Fed. 8. J. B. Uhle, for complainant. Dumler Beeber and Henry C. Terry, for respondents.

J. B. McPHERSON, District Judge. The testimony laid before the court upon the question of the defendants' liability to account has satisfied me that an account should be taken upon all matters not embraced in the release

of September 12, 1893. That instrument was proved to be genuine, there being no dispute upon this point, and no testimony was offered to impair or destroy its legal effect. But I do not think that the evidence concerning the transactions between the complainant and the defendants since September 12th would justify me in finding that these transactions constituted a binding final settlement of the trust. Payments on account, both of income and principal, have no doubt been made by the defendants; but I discover nothing that permits me to conclude that a full settlement has been made. Let a decree be drawn for an accounting from the day named.

END OF CASES IN VOL. 105.